

Credibility - Burden and Standard of Proof-Judgement rationale

Judicial professional development
meeting

Judge Sebastiaan de Groot

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Credibility – proof in asylum cases

- Well founded fear
- subjective – objective
- Objective: prove – obligation to cooperate to discover the truth – burden of proof

Credibility – proof in asylum cases

- A judge will not need to question claimants the same way the first instance does
- you re-evaluate the facts before you
- determine if the facts are accurate enough
- if they have been acquired in an objective way.

Court decisions

Credibility – proof in asylum cases

In determining asylum merits the judges must assess the **credibility**

- of the **claimant**,
- of **witnesses** and
- the **documentary** evidence.

Court decisions

Evaluating the facts / questions

In court

- Be aware of inhibitors to communication
- Be aware of impact of interpreters
- minimal encouragements
- maps and drawings

Court decisions : Credibility

The basic approach
of the first instance interviewer
will be reflected
in the file in front of you

Court decisions : Credibility

findings in the decision

- have to be explained
- must be supported by the evidence

Court decisions

- Identify the characteristics of a **weak first instance decision**.
- Argue in a correct, logical and understandable manner.
- Demonstrate awareness of the pitfalls in their arguments.
- Deal with special circumstances in asylum procedures (confidentiality, several family members, etc.).

proof in asylum applications
evidence

- **Country of Origin information**
- **identity documents**

proof in asylum applications

- obtaining documentary evidence to support a refugee claim will be based on the resources one has:
 - the situation he/she was in when leaving the country
 - his/her country of origin and
 - time at the his/her disposal.

Inter-Cultural Communication

Sources of Misunderstanding:

- Language and Speech Patterns
- Thought Processing
- Gender Roles
- Body Language
- Remember to take cultural differences into account when evaluating the nature of any inconsistencies or contradictions in the refugee claimant's testimony

Questioning Techniques in court and in the evaluating of the facts in the file

- Avoid leading questions
- Do not expect claimants to have perfect memory
- Do not ask judgemental questions
- Do not ask claimants to make legal conclusions
- Do not ask claimants to speculate
- Avoid breaking silences too quickly
- Do not press for too many details

the credibility and probative value of the evidence

- has to be evaluated in the light of what is generally known about conditions and the laws in the claimant's country of origin,
- as well as the experiences of similarly situated persons in that country.
- And in the case of exclusion clauses on the international standards

Rejection of some evidence

- on the basis of credibility does not necessarily lead to rejection of the claim
- A negative finding of credibility should be based on material aspects of the claim
- Make sure you are well-informed when evaluating credibility

(in)credibility factors

- Proof of identity, false documents, double identity.
- The person's full history was not revealed at the earliest possible opportunity (omission – contradiction).
- An earlier lie which is openly admitted.

(in)credibility indicators (1)

- Sufficiency of detail and specificity
- Internal consistency of the oral and/or written material facts asserted by the applicant
- Consistency of the applicant's statements with information provided by family members and/or witnesses

(in)credibility indicators (2)

- Consistency of the applicant's statements with available specific and general information
- Plausibility
- Demeanour

Standard of proof in asylum applications (1)

General situation:

burden of proof is on asylum seeker

- The **applicant** must comply with the applicable requirements
- to submit **information** or
- **documentation** in support of the applicant's application

Standard of proof in asylum applications (2)

EU Directive 2011/95/EU (recast)

aspects of the applicant's statements

are **NOT** supported

- by documentary or
- other evidence

those aspects **shall not need** confirmation,
when the following conditions are met:

Standard of proof in asylum applications

(3)

EU Directive 2011/95/EU

- (a) the applicant has made a genuine effort to substantiate his application;
- (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given; (a and b: duty to cooperate)

Standard of proof in asylum applications (4)

EU Directive 2011/95/EU

- (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
- internal (contradictions) and
 - external consistence (COI) of the statements

Standard of proof in asylum applications (5)

EU Directive 2011/95/EU

- (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
- (e) the general credibility of the applicant has been established.

Standard of proof in asylum applications (6)

Special cases

Apply lower burden of proof in cases of

- mentally disturbed persons,
- victims of torture,
- minors and
- gender cases.

proof in asylum applications

trauma victims

- **Istanbul Protocol, 1999**
- A medical – legal report from a recognized professional
 - Consider shortening the hearing and reducing the need for the claimant to recount the details of painful events at the hearing.
 - Torture victims may be particularly reluctant to recount aspects of their experiences in the presence of others who share their nationality.

proof in asylum applications

gender (1)

- Women: documentary evidence depends on
 - her social status
 - the wealth and influence of the husband or her family
- violent actions against women, men and children such as rape or abuse will rarely be documented
- homosexuality may lead to persecution

proof in asylum applications

gender (2)

- law:
 - ‘truth’ consists of the ‘story told by the human witness of the human act’, whereas
 - ‘facts’ are findings made by human beings in normative social contexts (such as by judges in courts).
- anthropologists :
 - the equivalent of ‘truth’ is the analysis of the human acts.
 - thin line between what is considered objective and subjective
 - There are no absolute objective elements nor are there absolute subjective elements

burden of proof in asylum applications

In criminal cases, the burden of proof is often on the prosecutor.

When applying the exclusion clause the burden of proof shifts to the state

Guidelines

The benefit of the doubt.
paragraph 203-204 UNHCR Handbook

Recognized in: ECtHR 9 March 2010 (*R.C vs Sweden*) and 20 July 2010 (*N. vs Sweden*)

Guidelines

- Consider the evidence in its entirety and with an objective and open mind.
- no requirement of external corroboration of an uncontradicted credible account.
- caution in rejecting uncontradicted testimony

Judgement

- Make clear findings on credibility and provide adequate reasons for such findings
- An adverse finding of credibility must have a proper foundation in the evidence
- Do not display excessive zeal in attempting to find contradictions
- Confront the claimant with your credibility concerns

Judgements :Credibility burden of proof

Consistency in the domestic
jurisprudence

- on findings of credibility and
- the burden of proof

in consistency with **international
jurisprudence**

The value of the judiciary

- Independence
- Impartiality

- Thank you for your attention!