
Would I Lie to You?:
An assessment of credibility testing in the IPT

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*“Doctor, which of these buttons do I press? Doctor, which one?
Truth or Consequences?”
Doctor Who*

I Introduction

“Would I Lie to You?” is a BBC programme that pits two celebrity teams against each other, with each team attempting to decipher whether the opposite team’s embarrassing or unusual stories are true or false. The contestants do so by asking a series of follow-up questions, which are often comedic in nature. Despite its underlying comedy, the programme highlights how difficult it is to determine whether someone is telling the truth, or lying. In the programme, often the stranger the story is, the more likely it is to be true.

The New Zealand Refugee Status Branch (“RSB”) and Immigration Protection Tribunal (“IPT”) are faced with this difficulty on a daily basis. They constantly have to determine whether a refugee’s testimony is credible or not. Over 60% of the declined IPT cases in 2015 were decided on the basis of credibility.¹ As seen in the BBC programme, however, this job is far from simple. This paper seeks to evaluate whether the means by which the RSB and IPT determine credibility conforms with the international law principle of *non-refoulement*, and if not, how the test for credibility should be reformed both within New Zealand, and globally.

This paper argues that the principle of *non-refoulement*, to ensure ‘effective protection’, mandates a credibility system that is based on an objective inquiry. However, due to significant problems unique to refugee determination, a fully objective inquiry will never be possible. Therefore, credibility testing is required to be ‘sufficiently objective’ and this must be reflected in all the methods used by the IPT.²

In *Part II*, this paper begins by analysing the relationship between *non-refoulement* and credibility testing. This essay will argue that included in the principle of *non-refoulement* is the obligation to have proper credibility determination methods, which do not lead to a high chance of *refoulement* of individuals. This arises out of the positive obligation that a state *must* provide ‘effective protection’ against *refoulement*, therefore, mandating a more accountable credibility test.

¹ See Appendix 1.

² The RSB is not evaluated in this paper as their decisions are not publically accessible to be analysed.

Part III will then describe the problems that make credibility-testing a difficult process. The following five problems: lack of evidence, issues with memory, trauma, translation and trust of power; stand as insurmountable hurdles to the complete avoidance of *refoulement*. This section seeks to justify that, due to the nature of refugee determination, credibility testing is highly complicated. This must then necessitate an appropriate response from the decision-makers, in recognising these insurmountable hurdles.

Part IV examines the different responses by different guidelines to the problems faced in refugee determination. This will argue that, in light of the principle of *non-refoulement*, the most appropriate form of inquiry is objective and not subjective. However, in recognising that a perfect test of credibility is impossible, the question is then, whether a test is 'sufficiently objective.' In evaluating different forms of tests, the conclusion is made that the Michigan Guidelines on Well-Founded Fear ("Michigan Guidelines") provides the most 'sufficiently objective' test. The second half of *Part IV* evaluates specific methods employed by the IPT and whether these are 'sufficiently objective.' If the methods fail to meet this standard of objectivity, this paper will suggest modifications to guide the methods toward objectivity. This will take into account the Michigan Guidelines and the specific factors unique to each method of testing credibility.

Finally, *Part V* will look briefly ahead at the potential recourses through appeal and judicial review to the High Court. This will attempt to address the statutory barriers posed in reviewing and appealing IPT decisions.

II Credibility Testing and Non-Refoulement

A Principle of Non-Refoulement

The principle of *non-refoulement* is the international law prohibition against the forced direct or indirect removal of an individual, where the individual's return would run the risk of him/her being subjected to human rights violations.³ The principle is prospective in nature. It protects an individual from the risk of *future* harm.

This principle of *non-refoulement*, expressed in art 33(1) of the 1951 Convention Relating to the Status of Refugees, is fundamental to refugee law.⁴ The principle embodies the humanitarian essence of the Refugee Convention.⁵ The fundamental nature of the principle, within the scheme of the convention, has been repeatedly affirmed in the resolutions of the United Nations General Assembly.⁶ Furthermore, States cannot make reservations to art 33, as affirmed in art 42(1) of the Convention. This protection further demonstrates the importance of the right in the overall scheme of the Convention.

This principle is also generally considered fundamental to international law even outside the scheme of the Refugee Convention.⁷ It has gained the status of customary international law, and some scholars have also argued that the principle is of *jus cogens* status.⁸

An important question to consider is when exactly does *non-refoulement* apply within the refugee context? One argument is that the principle of *non-refoulement* only applies when a person has been formally recognised as a refugee.⁹ This argument takes the stance that a

³ Kees Wouters *International Legal Standard for the Protection from Refoulement* (Intersentia, Antwerp, 2009) at 25.

⁴ Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954), art 33(1).

⁵ Elihu Lauterpacht and Daniel Bethlehem "The scope and content of the principle of non-refoulement: Opinion" in Erika Feller, Volker Türk and Frances Nicholson (ed) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003) 87 at [50].

⁶ At 107; Executive Committee, *Conclusion No.79 (XLVII)* 1996, at [i]; General Assembly A/RES/51/75 (1997), at [3].

⁷ Alice Farmer. "Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection" (2008) 23 *Geo. Immigr.* 1, at 2.

⁸ Farmer, above n 7, at 2; Jean Allain. "The jus cogens Nature of non-refoulement" (2001) 13(4) *International Journal of Refugee Law* 533.

⁹ Lachterpacht and Bethlehem, above n 5, at [90].

person is a refugee if they have been *formally* recognised as one. As such, the recognition is constitutive, in that a refugee is not a refugee until *formally* recognized as one.¹⁰ The more accepted view is that recognition is simply declarative, and instead a person becomes a refugee when they meet the criteria in art 1A(2) of the Refugee Convention. Article 1A(2) defines a refugee as a person who has a “well-founded fear of being persecuted.”¹¹ As there is no mention of a need for formal recognition, this supports the view that such recognition is merely *declarative*, as opposed to *constitutive* of refugee status. This distinction is essential as it means that the obligation of *non-refoulement* first arises when a person satisfies the criteria defined in art 1A(2).

It is important to note that the principle of *non-refoulement* carries both negative and positive obligations.¹² One well-known negative obligation is the obligation to refrain from the removal of a person who meets the definition of a refugee.¹³ The principle also imports *positive* obligations onto the State.¹⁴ These obligations include the requirement to organise and provide access to refugee determination procedures.¹⁵

B The relationship between non-refoulement and credibility testing

The principle of *non-refoulement* also confers a positive obligation on the State to maintain an *effective* system of refugee determination. Combining the negative and positive obligations of the principle as outlined above, *non-refoulement* requires a State to provide refugee determination procedures that do not result in the removal of a person who meets the definition of a refugee in art 1A(2) of the Refugee Convention. This would be in keeping with the essence of the principle of *non-refoulement*, which is “to avoid certain consequences, whatever the nature of the actions.”¹⁶ By having ineffective procedures, a State fails in providing effective protection from the consequences of *refoulement*.

Credibility of testimony is a central part of the refugee determination system. Professor Macklin, reflecting on her time as a member of the Refugee Division of the Immigration and Refugee Board in Canada, stated that the vast majority of her time was spent on

¹⁰ At [89].

¹¹ At [90]. Convention relating to Status of Refugees, above n 4, at art 1A(2).

¹² Wouters, above n 3, at 29.

¹³ At 29.

¹⁴ At 29.

¹⁵ At 29.

¹⁶ James Hathaway *The rights of refugees under international law* (Cambridge University Press, Cambridge, 2004) at 318.

credibility determination.¹⁷ This is supported by statistics from the IPT. My analysis demonstrated that more than 60% of published decisions of the IPT in 2015, that resulted in a declined refugee status, were decided on the basis of credibility.¹⁸ Credibility testing is, therefore, of significant consequence in refugee determination.

Due to the centrality of credibility testing, a poor credibility testing system (for example, an ad hoc system, rather than a principled one), is more likely to result in a higher chance of *refoulement*. As discussed above, *non-refoulement* applies not only to those refugees who have been declared to be refugees by the State, but also to those who ‘de facto’ meet the definition in art 1A(2). As such, the proper testing of any claimant’s credibility (which will not lead to a high chance of *refoulement*) becomes synonymous with an effective system of determination.

III Problems with credibility testing

In reality, a perfect credibility testing system, akin to the perfect lie detector, can only be seen as an aspiration. There are insurmountable hurdles to the establishment of a fail-safe credibility test and thus, the complete avoidance of any chance of *refoulement*. This section will discuss five key hurdles which arise in credibility testing namely:

- 1) Lack of Evidence;
- 2) Memory;
- 3) Trauma and Mental Health;
- 4) Translation; and
- 5) Trust of power.

A Lack of Material Evidence

Lack of material evidence obtainable by those who determine refugee status is a well-recognised problem in refugee law.¹⁹ The lack of such evidence poses two key problems to credibility testing. First, the testimony of the claimant lacks the ability to be tested

¹⁷ Audrey Macklin “*Truth and consequences: Credibility determination in the refugee context*” (paper presented to International Association of Refugee Law Judges, 1998) at 134.

¹⁸ See Appendix 1.

¹⁹ Michael Kagan "Is Truth in the Eye of the Beholder-Objective Credibility Assessment in Refugee Status Determination" (2002) 17 *Geo. Immigr. LJ* 367 at 371. UN High Commissioner for Refugees (UNHCR) “*Note on Burden and Standard of Proof in Refugee Claims*” (16 December 1998), Refworld <<http://www.refworld.org/docid/3ae6b3338.html>> at[10]; *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 (CA) at [31].

against material evidence. Second, and as a result, it places undue weight on the credibility test and causes it to play a central role in refugee determination.

In New Zealand, the Evidence Act 2006 allows for material evidence to be advanced to support the veracity of a testimony.²⁰ However, refugee claimants' often lack the material available to corroborate and support the truthfulness of their testimony. The Court of Appeal has recognised that due to claimants' precarious situations, there are significant difficulties in obtaining material that could support their accounts.²¹ Such difficulties are both inherent in refugee determination and unlikely to be the claimant's fault – and as such, any doubt surrounding the credibility of a claimant's testimony should be resolved in their claimant's favour.²²

The second issue is not directly an issue with credibility, but it leads to the caution needed to be taken in refugee determination. Given the lack of material evidence, it is near impossible to decide a refugee claim without aid from the testimony of the applicant.²³ This often makes credibility testing the central element in most refugee cases, as discussed above.²⁴ Where there continues to be over-reliance on credibility testing of refugee testimony, due to the lack of material evidence, then more consistent guidelines are required to ensure such testing is carried out effectively – bearing in mind the principle of *non-refoulement*.

B Memory

Another primary hurdle to credibility testing are issues of memory. Inconsistencies in testimony are regularly used to determine credibility. The prevailing assumption is that a consistent account is more likely to be true.²⁵ Due to this assumption, refugee determination procedures have often placed a large value on testimony consistency. However, research

²⁰ Richard Mahoney and others *The Evidence Act 2006: Act & Analysis*. (3rd ed, Thomson Reuters, Wellington, 2014) at 185.

²¹ *Jiao v Refugee Status Appeals Authority*, above n 19, at [31].

²² This concept will be discussed in further detail later in this essay.

²³ James Hathaway and Michelle Foster *The law of refugee status* (Cambridge University Press, Cambridge, 2014) at 136.

²⁴ See Appendix 1.

²⁵ Juliet Cohen "Errors of recall and credibility: Can omissions and discrepancies in successive statements reasonably be said to undermine credibility of testimony?." (2001) 69(1) *Medico-Legal Journal* 25 at 25.

has suggested that there are significant issues given the errors in recall and fallibility of memory.²⁶

The assumption that our memory is like a ‘video recording’ has been highly criticised by psychologists.²⁷ Psychological studies have shown that true memories have a high potential for variability and are, in fact, unreliable.²⁸ Cameron identifies two key explanations as to the variability of true memory.²⁹ First, is that all memories are reconstructions. When we try recall and recite the duration and frequency of an event, we estimate.³⁰ If asked again later, we estimate again. This may result in discrepancies. Second, is that a person’s memory may change over time.³¹ This loss and gain of information is said to be “typical of how memory works.”³²

As such, what psychologists have called the ‘consistency heuristic’, has been largely debunked by psychological studies.³³ This refers to the idea that consistency equates to the truth, and inconsistency implies deception. The studies surrounding memory are far more complex than can be summarised here, however, it is clear from the studies that our memories are not as clear cut as is often suggested. This compounds the problems the RSB and the IPT face in making a decision as to the credibility of a claimant.

C Trauma and Mental Health

To further complicate this already problematic memory is the fact key details surrounding a claim often require the reconstruction of *traumatic* events. Herlihy and Turner suggest that the recollection of traumatic memories is “qualitatively different” from that of normal

²⁶ Cohen, above n 25, at 25.

²⁷ At 25; Hilary Cameron "Refugee Status Determinations and the Limits of Memory" (2010) 22 *International Journal of Refugee Law* 469 at 469-470

²⁸ Cohen above n 25, at 32.

²⁹ Cameron, above n 27, at 490.

³⁰ At 491; LA Strömwall, PA Granhag and AC Jonsson, 'Deception among pairs: "Let's say we had lunch and hope they swallow it!" (2003) 9 *Psychology, Crime & Law* 109; N Brewer and A Burke, 'Effects of testimonial inconsistencies and eyewitness confidence on mock-juror judgments' (2002) 46 *Law & Human Behavior* 353; N Brewer and RM Hupfeld, 'Effects of testimonial inconsistencies and witness group identity on mock-juror judgments', (2004) 34 *Journal of Applied Social Psychology* 493.

³¹ At 491.

³² JW Turtle and JC Yuille, 'Lost but not forgotten details: Repeated eyewitness recall leads to reminiscence but not hypermnesia' (1994) 79 *Journal of Applied Psychology* 260 at 269.

³³ Cameron, above n 27, at 490.

autobiographical memories.³⁴ Instead of a fluid account, a traumatic memory is often a distorted picture of the events.³⁵ Memory fragmentation can occur as a protective mechanism, meant to dampen the pain of the trauma. This can significantly impact a claimant's ability to formulate a consistent and accurate narrative of the events.³⁶ It is further noted that the problem of recalling traumatic memories is further exacerbated when a claimant is placed into a stressful situation - such as an asylum interview or a IPT hearing.³⁷ As stated in the Canadian Immigration and Refugee Board's *Training Manual on Victims of Torture* (2004):³⁸

“Our assumptions and beliefs about memory can be a key element in assessing the credibility of alleged victims of torture... there is also a risk that genuine victims of torture may be rejected when decision-makers draw wrong conclusions about their memory difficulties.”

Mental health issues are also a possible side-effect of experiencing such trauma. This can take the form of Post-Traumatic Stress Disorder (“PTSD”) and/or depression.³⁹ Both of these have been shown to result in ‘over-general’ memory, where individuals will struggle to recall specific details.⁴⁰ This further complicates the ability for a claimant to provide a consistent account.

D Translation and Cultural Differences

Inherent in the interpretive process between an interpreter, asylum-seeker, and refugee official, is the potential for meanings to be ‘lost in translation.’ Languages seldom, if ever, translate directly. Words and phrases cannot be simply interchanged between languages, as they are often culturally and linguistically multidimensional and also incorporate

³⁴ Jane Herlihy and Stuart Turner, "Asylum claims and memory of trauma: sharing our knowledge." *The British Journal of Psychiatry* 191(1)1 (2007) 3 at 3.

³⁵ Sameer Sarkar, "Truth without consequence: reality and recall in refugees fleeing persecution" (2009) 37(1) *Journal of the American Academy of Psychiatry and the Law Online* 6 at 8.

³⁶ At 8.

³⁷ At 8.

³⁸ Refugee Protection Division Professional Development Branch “Training Manual on Victims of Torture” (2004) Immigration and Refugee Board Canada <<http://www.irb-cisr.gc.ca/Eng/RefClaDem/Pages/GuideTorture.aspx>> at 32.

³⁹ Sarkar, above n 35, At 8.

⁴⁰ Herlihy and Turner, above n 34, at 3.

different worldviews.⁴¹ There are four key obstacles to a perfect understanding between asylum-seeker and official:⁴²

- a) The manner in which the applicant expresses themselves;
- b) The interpreter;
- c) The cultural relativity of notions and concepts;
- d) Different perceptions of time; and

This essay will briefly discuss each of the obstacles. ‘The manner of expression’ refers to the different speech styles, such as a ‘polite’ speaker as opposed to a more ‘forceful speaker.’ The way speech styles impact refugee determination will be discussed later under the sub-heading ‘demeanour,’ however, it is essential to note that language and the way a claimant expresses themselves can lead the decision-maker to a particular decision.

Secondly, the interpreter plays an essential role in making communication possible in the first place. It has often been argued that the interpreter should also play the role of a ‘bi-cultural worker’, to bridge the gap between cultures, which is so closely tied to language.⁴³ Very few interpreters meet this standard, and even they are prone to making mistakes when working in a lengthy hearing.⁴⁴ When this happens, the communication becomes distorted, thus weakening the communicative bridge.

Cultural relativity of notions and concepts are a further barrier that is posed by translation.⁴⁵ While words can have the same ‘label’ across two different languages, they can nevertheless embody different meanings due to their cultural background.⁴⁶ This difference in meaning can pertain to both abstract notions and commonly used words.⁴⁷ Due to the potential confusion that can arise when attempting to translate words that embody different meanings in different cultures, misinterpretation often occurs.

⁴¹ MM Mudarikiri “Working with interpreters in adult mental health” in R. Tribe and H. Raval *Working with interpreters in mental health* (Routledge, London) 182 at 182.

⁴² Walter Kalin “Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing” (1986) 20(2) *The International Migration Review* 230.

⁴³ R. Tribe “Bridging the gap or damming the flow? Some observations on using interpreters/bicultural workers when working with refugee clients, many of whom have been tortured.” (1999) 72(4) *British Journal of Medical Psychology* 567 at 567.

⁴⁴ At 567.

⁴⁵ It is noted that this also may arise where the applicant speaks English as a second language and conducts the interview in English.

⁴⁶ Kalin, above n 42, at 233.

⁴⁷ For example, for many Africans the words ‘brother’ and ‘cousin’ cover everyone in their tribe, as opposed to those directly related through blood, Kalin above n 42, at 234.

Kalin argues that even concepts of time are perceived differently through different cultures.⁴⁸ Time is not, in fact, universally perceived. There are many different calendars (i.e. Muslim v Gregorian Calendar) which may cause issues when converting dates. Furthermore, the very conception of time is coloured by our cultural background.⁴⁹ While the Western sense of time is very linear, other cultures may have a very different understanding. For example, the famous anthropologist, Evans-Prichard, found that in his study of the African tribe of Nuer that they thought of time in “terms of activities and of successions of activities” as opposed to pure units of time.⁵⁰ Thus, even the concept of time that is relied so heavily upon, must be questioned in light of cultural differences.

E Trust of Power

Many of the claimants simply do not trust people in positions of power, such as refugee protection officers and IPT members. This may be a result of societal circumstances (such as growing up where public officials are corrupt and can be easily bribed) or experiences (such as if they were tortured by police officers). Due to the inherent fear of persecution, many refugees have a relationship of fear and hatred with their home government, instead of trust and loyalty.⁵¹ For these refugees, the primary lens through which they view *any* government body is mistrust.⁵² Therefore, the forthrightness of the claimant, when being interviewed, will often be coloured by sense of suspicion.

As such, a claimant may be either apprehensive when answering questions, fail to reveal all answers, or may entirely change their story throughout the course of an interview. This poses a huge barrier to ascertainment of the truth, as the mistrust of officials will play directly into a refugee interview or tribunal hearing. As will be seen later in this essay, the hesitance and lack of forthrightness will often be unfavorable to a refugee claim.

⁴⁸ Kalin, above n 42, at 236.

⁴⁹ At 236.

⁵⁰ Edward Evans-Pritchard, *The Nuer* (Oxford University Press, Oxford, 1940) at 95.

⁵¹ Atle Grahl-Madsen. *The status of refugees in international law*. (2nd ed, AW Sijthoff, Leyden, 1972) at 78; EV Daniel *Mistrusting refugees*. (Univ of California Press, California, 1995) at 27.

⁵² Tricia Hynes “The issue of ‘trust’ or ‘mistrust’ in research with refugees: choices, caveats and considerations for researchers” (UN High Commissioner for Refugees, 2003) Working Paper No. 98 at 3..

IV Credibility Testing in NZ

A Defining a credibility standard

Due to the insurmountable hurdles to the ‘perfect’ determination of credibility, effective procedures for testing credibility must be used to avoid a major chance of *refoulement*. This section will argue that ‘effective protection’ necessitates the use of an objective inquiry, with reference to the Michigan Guidelines.⁵³

1 Objective Inquiry

In light of *non-refoulement*, credibility assessments should not be arbitrary or subjective but founded on an objective basis. An objective standard would be one that applies a “standard criteria and require[s] adjudicators to conduct a more structured inquiry.”⁵⁴ This is in contrast to a subjective inquiry, which is based on mere impressions and speculation.

A subjective inquiry would also be in breach of *non-refoulement* as it results in a greater risk of mistaken refusals. Firstly, where a refugee adjudicator uses a subjective inquiry they are more prone to use personal judgment or ‘gut-feelings’ as opposed to articulated logic.⁵⁵ Secondly, subjective tests are also affected by the personal biases of the decision-maker.⁵⁶ This results in a failure to pay adequate attention to “the problems of assessment, identification of material facts, weight of the evidence and standard of proof,” all procedures put in place to protect against undue *refoulement*.⁵⁷

It must be noted, however, that refugee determination is not an exact science but in the end, a human process which has inherent weaknesses.⁵⁸ Therefore, every test will have an element of subjectivity that can never be fully surmounted. This, however, does not discredit the effort that should be implemented to produce a test that is ‘sufficiently objective’ or ‘closest to objectivity.’

⁵³ James Hathaway, "Third Colloquium on Challenges in International Refugee Law: The Michigan Guidelines on Well-Founded Fear." (2005) 26 *Mich J. Int'l L.* 491.

⁵⁴ Kagan, above n 19, at 374.

⁵⁵ Kagan, above n 19, at 367; Guy Goodwin-Gill and Jane McAdam *The refugee in international law*. (3rd ed, Oxford University Press, Oxford, 2007) at 350.

⁵⁶ Kagan, above n 19, at 375.

⁵⁷ Goodwin-Gill, above n 55, at 350.

⁵⁸ Kagan, above n 19, at 375.

2 *Testing approaches*

Over time, various approaches to credibility testing have arisen. Therefore, we should look towards different standards as advanced by different sources. This section looks in particular at three different approaches: the UNHCR ‘believability’ test, a Refugee Status Appeals Authority approach and the Michigan Guidelines. The determinant for the best approach being: which approach, with regard to the need for practical implementation, is ‘closest to objectivity’?

The 1998 UNHCR Note on Burden and Standard of Proof in Refugee Claims states that:⁵⁹

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.

The ‘believability’ test is useful, as it attempts to set an objective standard. The ‘believability’ test means that decision-makers have to find a concrete basis for credibility assessments to demonstrate that no reasonable person could believe the testimony, therefore, resolving any doubt in favour of the claimant.⁶⁰ This provides a clear standard that can be more objectively ascertained.⁶¹

The value of the UNHCR test is demonstrated when contrasted with the standard set out by the New Zealand Refugee Status Appeal Authority (“RSAA”). The standard provided by the RSAA is that the decision-maker must be “sure that the applicant’s account is untrue.”⁶² Requiring a decision-maker to be ‘sure’ of themselves results in a highly subjective inquiry.

While useful, the UNHCR test is incomplete. Requiring a person’s testimony to be “coherent and plausible, [and to] not [contradict] generally known facts” is not a sufficiently objective test that is also easy to apply.⁶³ What is ‘coherent’ and ‘plausible’ is left to subjective determination, even with the objective standard of ‘believability.’ This leaves open a large and significant part of the approach to subjective determination.

⁵⁹ UNHCR, above 19, At [11].

⁶⁰ Kagan, above n 19, at 381.

⁶¹ At 381.

⁶² At 382.

⁶³ UNHCR, above 19, At [11].

The UNHCR's test is rectified by the Michigan Guidelines which clearly and concisely state that:⁶⁴

11. An applicant's testimony may only be deemed not credible on the basis of a specific, cogent concern about its veracity on a significant and substantively relevant point.

The Michigan Guidelines are a set of guidelines drafted by the Third Colloquium of on Challenges in International Refugee Law convened in the University of Michigan, School of Law. In Refugee Appeal 75692, Rodger Haines QC stated, in relation to the Guidelines, that "the collective wisdom of an otherwise distinguished body of persons cannot be lightly put aside."⁶⁵ This essay argues that the Michigan Guidelines' credibility standard meets the challenges for evaluating credibility of a refugee's testimony and is closest to a purely objective test that can still be practically implemented.

The Michigan Guidelines provides an objective test as to the factors which can override the presumption of credibility. This is the key separator between the UNHCR and the Michigan Guideline test. The Michigan Guidelines detail four factors essential in determining whether an inconsistency or implausibility should be held to result in the testimony deemed as not credible:⁶⁶

- a) Specific;
- b) Cogent;
- c) About its veracity; and
- d) Significant and substantively relevant point.

The Michigan Guidelines starts with the presumption of truth. It states that claimant's testimony may only be "deemed not credible" where the above negative credibility factors overrule this presumption.⁶⁷ This, in essence, reflects a general principle that any doubt as to the claimant's testimony should be resolved in their favour, similar to that established by the 'believability' test.⁶⁸ Due to the need to actively protect against a chance of *refoulement*, these factors must reach a very high standard in order to rebut the presumption. The Michigan Guidelines are useful in creating an objective framework for

⁶⁴ Hathaway, above n 53, at [11].

⁶⁵ *Refugee Appeal No. 75692* [2007] NZAR 307 at [84]

⁶⁶ Hathaway, above n 53, at [11].

⁶⁷ At [11].

⁶⁸ Kagan, above n 19, at 382.

what constitutes a factor that can impugn credibility, which does not appear in the UNHCR standard. This makes the Michigan Guideline a more reliable framework in analysing the assessment of credibility.

B Factors impugning credibility

In recognising the need for an objective test, and the Michigan Guidelines as a helpful, albeit not complete, framework to achieving this, this essay will analyse four of the key ways credibility is tested in the IPT: demeanour, plausibility, inconsistency and knowledge testing. In reviewing these four methods of analysis, this essay will answer three questions:

- 1) How is this method used by the IPT?
- 2) Is the current usage ‘sufficiently objective’?
- 3) If no, can it be improved with guidance from the Michigan Guidelines?

1 Demeanour

One of the forms employed by the IPT in making credibility decisions is to examine the demeanour of the applicant whilst giving testimony. Credibility testing through demeanor is based on the assumption that certain demeanours, such as hesitance or evasiveness, are indicative of non-credibility, while certain other demeanours, such as confidence and fluidness, are indicative of credibility.⁶⁹ This paper will argue that this assumption is highly subjective and lacks cogency, therefore, this mode of credibility testing should not be used in a refugee context.

The use of demeanor as a truth-telling mechanism is still applied in IPT decisions. The UNHCR defines demeanor as outward expressions which include; “acting, expression or reply (for example, hesitant, reticent, evasive, confident, spontaneous, direct etc.), tone of voice, modulation or pace of speech, facial expression, eye contact, emotion, physical posture, and other non-verbal communication.”⁷⁰ Demeanour has been split into two

⁶⁹ Hathaway, above n 23, at 142.

⁷⁰ UN High Commissioner for Refugees (UNHCR) “Beyond Proof, Credibility Assessment in EU Asylum Systems : Full Report” (May 2013) UNHCR. <<http://www.unhcr.org/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html>>.

categories distinguishing between ‘subjective’ impressions based on physical appearance and ‘objective’ such as hesitation and evasiveness in providing oral narrative.⁷¹

Whilst my review of 2015 and 2016 IPT cases did not demonstrate any ‘subjective’ demeanor indicators, (i.e. eye contact, body language and facial expression) there still appears to be a reliance on the ‘objective’ factors which will be the primary focus of this section. It is key to note that decision-makers may still be impacted by ‘subjective’ and ‘objective’ demeanor factors, both consciously and sub-consciously, even if they do not disclose it in their judgments.⁷²

One example of evasiveness in reply has been perceived to by IPT members to indicate a lack of credibility. In *AY (South Africa)*, the sexual orientation of the appellant, as being bisexual, was brought into doubt due to “her vague and evasive responses” surrounding her description of the first meeting with her supposed partner.⁷³

The current use of demeanor in the IPT is not ‘sufficiently objective’ but highly subjective, premised on the decision-maker’s own impressions and speculation.⁷⁴ For example, in *AB (The Gambia)* the tribunal member stated that:⁷⁵

The appellant’s sudden hesitation and long pauses in giving the evidence about where he spent his money gave a strong impression that he was trying to create a coherent but fabricated account.

An ‘impression’, defined as “an idea, feeling, or opinion about something or someone, especially one formed without conscious thought or on the basis of little evidence,” would be a poor means of deciding refugee status especially with consideration of the consequences associated with *refoulement*.⁷⁶

There are several key barriers in use of demeanor for determination of credibility, especially in cases of refugee determination, which make it completely untenable as a

⁷¹Jenni Millbank “‘The ring of truth’: A case study of credibility assessment in particular social group refugee determinations” (2009) 21(1) *International Journal of Refugee Law* 1 at 7.

⁷²Millbank, above n 71, at 7.

⁷³*AY (South Africa)* [2015] NZIPT 800763 at [61].

⁷⁴UN High Commissioner for Refugees, above n 70, at 36.

⁷⁵*AB (The Gambia)* [2015] NZIPT 800707 at [65].

⁷⁶“Impression” Oxford Dictionaries <<https://en.oxforddictionaries.com/definition/impression>>

means for determination. These factors make it impossible, even if adopting the Michigan Guidelines, use demeanour objectively. Barriers to the use of demeanour include:

- (a) Inability to detect;
- (b) ‘Othello error’;
- (c) Cultural differences and language;
- (d) Sensitive issues; and
- (e) Mental Health and Trauma

As noted earlier, there remains an assumption that by studying a person’s demeanour, a decision-maker can identify whether they are lying or not. ‘Subjective’ demeanour (e.g. averting gaze, fidgeting), has been readily debunked by scientists as correlating with lying.⁷⁷ On the other hand, while some scientists argue that the coherency and lack of hesitance with which a testimony is delivered may be more reliable as an indicator, they state that these factors are extremely difficult to detect.⁷⁸ Firstly, the naked eye or ear is unlikely to detect the incoherency or hesitance without use of equipment or specialised training.⁷⁹ Secondly, the ability to do so would still require knowledge of a person’s usual behavior, as not all people display the same signs when lying.⁸⁰ Even the trained professional would struggle to determine from the demeanour, both ‘objective’ and ‘subjective’, of a stranger whether they are telling the truth or a lie.

A second barrier to a test incorporating demeanour being objective is the ‘Othello error’, which arises from nervousness in the claimant.⁸¹ It is understandable that a refugee claimant would be nervous in giving testimony to the RSB/IPT.⁸² They are in an unfamiliar environment and, as stated above, may have distrust in authorities due to their life experiences. The ‘Othello error,’ coined after Desdemona’s reaction in the Shakespearean play, is the phenomenon where a person who is not being believed starts to act in a way

⁷⁷ Anthony Bingham “Assessing Contentious Eyewitness Evidence: A Judicial View” in Anthony Heaton-Armstrong (eds) *Witness Testimony: Psychological, Investigative and Evidential Perspectives* (Oxford University Press, Oxford, 2006) at 333.

⁷⁸ Donald Nicolson “Truth and Demeanour: Lifting the Veil” (2014) 18 Edin LR 254 at 257; A Vrij, “The assessment and detection of deceit” in R Bull and D Carson (eds) *Handbook of Psychology in Legal Contexts*, (2nd ed, Wiley, United Kingdom, 2003).

⁷⁹ Nicolson, above n 78, at 257.

⁸⁰ Kagan, above n 19, at 379.

⁸¹ Paul Ekman *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (Norton, 1985).

⁸² *CB (India)* [2016] NZIPT 800860 at [32].

commonly associated with lying.⁸³ Ekman's studies show that where a person is disbelieved they show signs of nervousness and anxiousness, which can appear deceptive.⁸⁴ This phenomenon, coupled with the nervousness already felt by claimants, could explain tribunal members' findings of deceptiveness in cases such as *AY (South Africa)* and *AB (The Gambia)*.⁸⁵ When the tribunal member poses a question concerning the credibility of a statement made by a claimant, they may inadvertently cause a truthful claimant to also exhibit 'deceptive demeanour.' Therefore, the 'deceptive demeanour' may arise from factors not associated with deception, making it an unreliable indicator of a lack of credibility.

Even if we accept that in a general context, a decision-maker is able to identify deceptive demeanours, a further barrier to the use of it arises from cross-cultural differences and language barriers. The problem with demeanour is inherent when looking at cross-cultural differences. The definition of testing thorough demeanour requires a "benchmark of normalcy" which in the IPT context is inherently Eurocentric.⁸⁶ A further problem arises where the language barrier is clear. For example, in *AY (South Africa)*, when asked to comment on her evasive responses the claimant stated that "she was having difficulty, as English was not her first language."⁸⁷ The tribunal member's response dismissed this stating that "she had not expressed this difficulty at any other point in the two-day hearing."⁸⁸ The nature of speaking in a second language will pose problems in hesitancy. It may be that in the case, the questioning had arisen to the point that the language and issues were too complicated for her understanding. The Tribunal's dismissal of any such problem is worrying and problematic.

Fourthly, the use of demeanour is found especially when the topics in question are of a sensitive nature to the claimant. In *AY (South Africa)*, the key question at hand was the sexuality of the claimant.⁸⁹ She claimed to be bisexual and that she would be persecuted in South Africa because of her sexual orientation. The tribunal member decided that based on

⁸³ Ekman, above n 81, at 170.

⁸⁴ At 170.

⁸⁵ *AY (South Africa)*, above n 73; *AB (The Gambia)*, above n 75.

⁸⁶ *Arulampalam v. Attorney General* 353 F 3d 679 (9th Cir 2003) at 687.

⁸⁷ *AY (South Africa)*, above n 73, at [61].

⁸⁸ At [61].

⁸⁹ At [2].

the hesitancy and evasiveness of her answer, that the meeting with her female ‘lover’ did not in fact take place.⁹⁰

The Tribunal is not convinced that the appellant’s inability to respond was due to feelings of shame, but instead because the meeting did not take place.

This is highly problematic as it suggests that the decision-maker is able to clearly distinguish between the emotional states of shame and deceit. The hesitancy by the claimant could easily have arisen from shame in her sexual orientation, especially in the context that she is claiming persecution due to that very fact in her home country. As Millbank suggests, claimants who face persecution due to sexual orientation will often feel shame or internalised homophobia.⁹¹ The statement by the tribunal member – confidently concluding that the claimant’s response was deceitful and not shameful employs a highly subjective basis of credibility determination. Where there are factors of shame and sensitivity, it becomes difficult for a tribunal member to objectively ascertain whether the demeanours exhibited are of deceit or shame.

A further complication arises due to trauma and mental health issues, which are also likely to cause hesitancy when recounting testimony.⁹² In *AY (South Africa)*, the claimant was said to be “suffering mental health issues including depression and suicidal thoughts” and also diagnosed to be suffering PTSD.⁹³ However, her hesitancy and evasiveness was consistently relied upon.⁹⁴ Where there is particular trauma or the person is diagnosed to be suffering from mental illness, the tribunal member must take into account these factors. This further complicates assessment through demeanour.

Testing credibility through the use of demeanour is extremely problematic. Psychological reports and tests have shown that it is extremely difficult to be able to detect lies through ‘objective’ demeanours. The use of demeanour is faced with too many barriers to be ‘sufficiently objective.’ As such demeanour, in any form, should not be used at all in the determination of credibility.

⁹⁰ At [65].

⁹¹ Millbank, above n 71, at 8.

⁹² US Department of Justice, Guidelines for Children’s Asylum Claims (10 December 1998) <<https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/Ancient%20History/ChildrensGuidelines121098.pdf>> at 14.

⁹³ *AY (South Africa)*, above n 73, at [23].

⁹⁴ At 65.

2 Plausibility

Plausibility of the testimony is another key indicator of credibility that is used by the IPT. This tests whether a testimony is believable in light of our understanding of how the world works. As Macklin describes, plausibility is “the relationship between what the claimant describes and what we think we ‘know’ about the external world.”⁹⁵ The test of ‘plausibility’ has often been used as a vague, catch-all term which includes the concepts of “‘likelihood’, ‘reasonableness’, ‘probability’, and ‘common sense’.”⁹⁶ The use of plausibility by the IPT through this vague definition risks bringing in subjective elements of assumptions, conjecture and speculation. This essay argues that there is a need for plausibility to be used carefully, with regard to the Michigan Guidelines, in order to be ‘sufficiently objective.’

One example of how the IPT has used plausibility is in the decision of *BI (India)* where the tribunal member stated that “it is implausible that AA would not have had a mobile telephone, in light of his work as a ‘gangster.’”⁹⁷ While recognising that this was not the only negative credibility finding in this case, it does point to the possibility of strange conclusions when using implausibility as a façade for ‘common sense’ determination. It simply does not logically follow that a ‘gangster’ must have a mobile phone. While it may be useful to carry a mobile phone as a gangster, it does not necessarily mean that AA *must* then have to carry a mobile phone.

The UNHCR guidelines cautions against extensive reliance on plausibility as a credibility indicator.⁹⁸ The UNHCR bases its criticism on the existence of “different cultures, and practices and procedures.”⁹⁹ A decision-maker may not fully understand the different cultures and practices from which the claimants are based, which stymies their ability to determine what is plausible or implausible. The US courts have also cautioned that “[s]peculation and conjecture cannot form the basis of a credibility finding, which must instead be based on substantial evidence.”¹⁰⁰ Where there is a lack of understanding of a different context, speculation and conjecture are substituted for logical reasoning.

⁹⁵ Macklin, above n 17, at 138.

⁹⁶ UN High Commissioner for Refugees, above n 70, at 35.

⁹⁷ *BI (India)* [2015] NZIPT 800768 at [26]

⁹⁸ UN High Commissioner for Refugees, above n 70, at 35.

⁹⁹ At 35.

¹⁰⁰ *Shah v Immigration and Naturalization Service* 220 F 3d 1062 (9th Cir 2000) at 1071; Hathaway above n 23 at 140.

In determining credibility through plausibility, a test must be designed in order to meet the test of ‘sufficiently objective.’ The Michigan Guidelines require before a testimony is deemed to be not credible that any implausibility is specific, cogent and about the veracity of the testimony on a significant and substantively relevant point.¹⁰¹ A further requirement specific to plausibility is that a negative credibility determination can only be found where the claimant’s evidence is built “entirely upon a series of coincidences and a chance too implausible on a cumulative basis to believe”.¹⁰² These assessments of implausibility must be also “tethered to the record...[avoiding] hyperbole,”¹⁰³ to ensure that the reasoning of the decision-maker is recorded and any failures in logical reasoning can be reviewed. These further requirements exist to satisfy the need to resolve any doubt in favour of the claimant, especially where the context of the claim is alien to the decision-maker.

In applying this test to the decision in *BI (India)*, quoted above, we can see that the decision fails the test as it fails to be cogent, lacking a logical chain of reasoning. Furthermore, it does not reach the level of being too implausible to believe and as it is not fully explained cannot be said to be ‘tethered to the record.’

In applying a plausibility test, a decision-maker should not speculate on “how the applicant or a third party ought to have behave.”¹⁰⁴ An example of this can be seen in *CO (Sri Lanka)* where the tribunal member stated that she found it implausible that the appellants did not seek protection from a security firm, especially for the children, after they were threatened.¹⁰⁵ This is a highly subjective determination as it speculates as to what the applicant should have done in the circumstances and does not in fact reach the standard of ‘too implausible to believe.’ Even if desirable, it is not necessary that a person seek protection from a security firm after being threatened.

This form of speculation is also found in *CF (Sri Lanka)*, where it was stated that it was “inherently implausible” that a nine-year-old child would be sent to a boarding establishment, not a boarding school, where five or six other students lived independently.¹⁰⁶ While this may seem unlikely or highly irresponsible, this does not logically follow that it was too implausible to believe. Here, the tribunal member speculates that because the child ‘ought’ not to be sent to such a boarding establishment, it therefore

¹⁰¹ Hathaway, above n 53, at [11].

¹⁰² *Ankrah v Canada (Minister of Employment and Immigration)* [1993] FCJ 258 (FCTD) at [5].

¹⁰³ *Berishaj* 378 F 3d 314 (3rd Cir 2004) at 324.

¹⁰⁴ UN High Commissioner for Refugees, above n 70, at 35.

¹⁰⁵ *CO (Sri Lanka)* [2015] NZIPT 800683-7 at [73]

¹⁰⁶ *CF (Sri Lanka)* [2015] NZIPT 800523 at [39]

did not happen. This chain of reasoning is highly suspect. A second issue with this decision is that it ignores the cultural differences (in this case surrounding child care and schooling) that are present when dealing with claims from other countries. In applying plausibility, the decision-maker must ensure that their own particular worldview of what is plausible or implausible is not applied to a context which may be entirely different.

Due to the challenges inherent in applying a plausibility test, a decision-maker must be careful not use the terms ‘implausibility’ lightly for a negative credibility finding. The decisions cannot be speculative and must take into account a different worldview. A decision of non-credibility arising from implausibility must only arise where the facts are either based on a series of coincidences or the chances are so low that it cannot reasonably be believed to have possibly happened.

3 *Inconsistency*

A commonly used factor in the IPT for impugning credibility is the finding of inconsistency.¹⁰⁷ Tests for inconsistency are often split into three forms; internal consistency, consistency with information provided by witnesses and consistency with general and specific information.¹⁰⁸ The primary focus of the analysis here is on the use of internal consistency.

The use of inconsistency as a test operates on the assumption that an inconsistent testimony is indicative of a false testimony as it is difficult to remember and sustain a fabricated story.¹⁰⁹ This poses many concerns. As seen above, even a true memory can be fallible and result in an inconsistent statement, particularly where trauma and mental illness is concerned. Further to this, inconsistent statements may be a result of cultural differences or a failure in translation rather than a false statement.

Cohen describes this as a fallacy of converting the proposition or false conversion.¹¹⁰ The first observation is that liars make up their story and, therefore, it is harder to remember. When questioned, they cover it up with inconsistent statements. This observation is already suspect, as it has been suggested that, in fact, the most “rigidly reproduced accounts” are

¹⁰⁷ See *AI (Somalia)* [2016] NZIPT 800857; *AO (Zimbabwe)* [2015] NZIPT 800619; *AG (Ghana)* [2016] NZIPT 800851.

¹⁰⁸ UN High Commissioner for Refugees, above n 70, at 31.

¹⁰⁹ At 31.

¹¹⁰ Cohen, above n 25, at 32.

ones that are scripted.¹¹¹ Even if we assume the observation is true, the hypothesis that follows appears to be: ‘all inconsistencies and changes indicate falsehood.’ This is guilty of the fallacy of converting the proposition; if A entails B, that does not mean B entails A. For example, while monkeys eat bananas not all creatures that eat bananas are monkeys. Just because a liar may have an inconsistent statement does not mean all inconsistent statements are made by liars.

More generally, it is noted in Federal Court of Australia that “credibility assessment should not be a search for contradictions, with any inconsistency immediately leading to negative decision.”¹¹² This warns that self-contradictory statements, while important, do not necessarily lead to the conclusion that the witness is being untruthful in those aspects of the testimony, or that the whole testimony should be rejected because of it.¹¹³

It is essential to put constraints on when and how an inconsistency can overturn the presumption of credibility to ensure that it becomes an objective inquiry. This paper proposes a five-step analysis that should be adopted by the IPT in determining whether inconsistencies support a negative finding:

- (1) Does the discrepancy actually exist?
- (2) Is the inconsistency a “specific, cogent concern about its veracity”?¹¹⁴
- (3) Is the discrepancy both “immediately relevant” and go to the “heart of the case”?¹¹⁵
- (4) Is the discrepancy a “minor inconsistency”?¹¹⁶
- (5) Has the respondent failed to provide a ‘believable’ explanation for the discrepancies and omission?

(a) Step 1: Does the discrepancy exist?

The first step may appear obvious, however, a decision-maker may claim to see an inconsistency where no inconsistency exists. An example can be found in *AI (Somalia)*

¹¹¹ At 33.

¹¹² *Guo v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 151 at 194.

¹¹³ At 194.

¹¹⁴ Hathaway, above n 53, at [11].

¹¹⁵ Hathaway, above n 23, at 147-148; *Yi Quan Chen* 266 F 3d 1164 (2nd Cir 2005) at 1098; *Sabaratnam v Canada (Minister of Employment and Immigration)* [1992] FCJ 901 (FCA) at [1].

¹¹⁶ *Mak v Canada (Minister of Employment and Immigration)* [1989] FCJ 838 (FCA) at [1].

where the tribunal member rejected credibility on reliance on inconsistencies in the number of phone calls.¹¹⁷ The member wrote:¹¹⁸

Asked whether any *Al-Shabaab* member had called him during this five-day period, the appellant told the Tribunal that on the fourth day he had received a telephone call and it was as a consequence of this one telephone call, that he had gone to hide in a friend's home.

Later, he stated that he had received three phone calls during that period. When approached with the apparent inconsistency he stated that the call he referred to was the third call, where they threatened to kill him.¹¹⁹ The first two calls were calls asking whether he would work for them.¹²⁰ The tribunal member rejected this explanation.¹²¹ However, this paper argues that there is, in fact, no inconsistency here. Even in the decision, the claimant at no point stated that he only received one call. He only described the significant call during that period, the call where his life was threatened. As Hathaway describes it is easy to see contradictions where it may just be a “difference of emphasis or phrasing.”¹²² Therefore, a tribunal member must be sure not to search for contradictions where there may be none.

(b) Step 2: Is the inconsistency a “specific, cogent concern about its veracity”?

The second step is a direct application of the Michigan Guidelines. The two elements; specificity and cogency will be discussed in turn.

Specificity requires the identification of a singular concern about veracity which heavily contrasts the IPT's use of cumulative reasoning. In many (if not most) IPT cases the inconsistencies are considered to ‘cumulatively’ amount to a factor impugning credibility. This stands in stark contrast with the requirement to be specific. For example, in *DH (Sri Lanka)* the “cumulative impact” of the findings led the Tribunal to reject the core of the claim as not credible.¹²³ The Tribunal was clear, stating that:¹²⁴

¹¹⁷ *AI (Somalia)* [2016] NZIPT 800857 at [74].

¹¹⁸ At [54].

¹¹⁹ *AI Somalia*, above n 117, at [54].

¹²⁰ At [54].

¹²¹ At [55].

¹²² Hathaway, above n 23, at 144.

¹²³ *DH (Sri Lanka)* [2016] NZIPT 800861 at [38]

¹²⁴ At [38].

Had any one of the above matters occurred in isolation, the Tribunal may have been in a position of doubt to which the appellant would have been entitled to the benefit.

This shows that when factors are considered cumulatively, the Tribunal member is unable to point to a specific inconsistency which deems the testimony not credible. As stated above inconsistency should not be a “search for contradictions,” neither should it be a ‘point-based system’ where the more mistakes you make, the less credible you are.¹²⁵ Only where there is a specific inconsistency that cannot be reconciled, can a negative credibility decision be made on that basis. Especially given the problems in stating an inconsistent testimony is more likely to be a lie, a cumulative inconsistency based system is extremely problematic and is likely to lead to a high chance of *refoulement*.

The second part of this test is to check whether the concern is cogent. The Merriam-Webster dictionary defines ‘cogent’ as “having power to compel or constrain” and “appealing forcibly to the mind or reason.”¹²⁶ Therefore, the reasoning behind the finding of inconsistency must be logical. A compelling and cogent argument must account for all factors to have the ability to appeal to reason. As such, it is essential in considering inconsistencies to account for issues such as memory loss, PTSD, trauma and translation problems as described in above sections. IPT decisions have conformed to this standard – at least in writing. In *AO (Zimbabwe)*, the Tribunal stated:¹²⁷

The Tribunal is cognisant of the appellant’s mental health issues and the effect these may have had on her ability to recall events, especially earlier in the refugee procedure process.

This is a largely positive step in appealing to a cogent concern by taking into account the mental health of the claimant. However, this case then becomes problematic by yet again utilising cumulative reasoning. It later states that “[w]hile bad memory caused by trauma may contribute to some forgetfulness, considered cumulatively, the number of inconsistencies and the mobility in the appellant’s evidence”¹²⁸ leads to a negative credibility decision. The use of ‘number of inconsistencies’ and ‘mobility,’ in spite of recognising the trauma and PTSD, is highly problematic. Especially where mental health concerns are involved, the use of cumulative factors is highly suspect. This is because claimants suffering from mental health issues are more likely to have fragmented memory

¹²⁵ *Mak v Canada*, above n 116, at [1].

¹²⁶ “Cogent” Merriam-Webster Dictionary <<http://www.merriam-webster.com/dictionary/cogent?>>

¹²⁷ *AO (Zimbabwe)* [2015] NZIPT 800619 at [55].

¹²⁸ At [55]

throughout their testimony, not just in isolated parts.¹²⁹ The decisions by the IPT members cannot simply play lip-service to the idea of recognising mental health, but must fully take this into account.

(c) Step 3: Is the discrepancy both ‘immediately relevant’ and go to the ‘heart of the case’?

This is encapsulated in the Michigan Guidelines which requires the inconsistency to concern a “significant and substantively relevant point.”¹³⁰ As Hathaway states, an inconsistency can only be relevant to credibility when it is a matter of “real substantive import.”¹³¹ The inconsistencies must “call into question an important component of the applicant’s evidence” required to establish a “well-founded fear.”¹³² This problem is compounded when cumulative reasoning is taken into account. A claimant may have a number of inconsistencies in the periphery but may be entirely consistent with the core of their account. In this case, credibility should not be impugned.

AG (Ghana) is an example of the use of multiple peripheral inconsistencies leading to a finding of non-credibility.¹³³ Here the claimant claimed refugee status on the basis that he was “the epicentre of a protracted chieftaincy dispute.”¹³⁴ However, two inconsistencies were relied upon. First, the Tribunal Member pointed out that in his form he stated that he had not travelled outside Ghana, while in testimony he stated he had travelled seven countries in the previous five years.¹³⁵ In the second contradiction, he stated in his application that he had owned a business and been employed as an engineer, whereas he stated in the RSB and Tribunal that he had worked as a technician.¹³⁶ Both these inconsistencies are not directly, or indirectly, relevant to the ‘chieftaincy dispute’ which is the issue in question. They simply are not essential to his claim and therefore should not impugn his testimony.

(d) Step 4: Is the discrepancy a “minor inconsistency”?¹³⁷

¹²⁹ Sarkar, above n 35, at 8.

¹³⁰ Hathaway, above n 53, at [11].

¹³¹ Hathaway, above n 23, at 147.

¹³² At 148.

¹³³ *AG (Ghana)* [2016] NZIPT 800851.

¹³⁴ At [2].

¹³⁵ At [36].

¹³⁶ At [36].

¹³⁷ *Mak v Canada*, above n 116, at [1].

While an inconsistency is of a matter of substantive importance, ‘minor inconsistencies’ are not to impugn the credibility of the testimony.¹³⁸ Minor inconsistencies have been incorrectly used to impugn the credibility of a testimony in the IPT. For example, in *CH (Sri Lanka)*, they relied on several inconsistencies which were minor. One of the factors was whether he had his shirt off or was completely naked while being interrogated.¹³⁹ While the inconsistency was on a relevant subject, his interrogation, the inconsistency of whether he had a shirt on or was completely naked is minor. Another factor was whether he was punched and slapped during the interrogation or just slapped.¹⁴⁰ Minor inconsistencies used in this manner would allude to a ‘search for inconsistencies’ as opposed to a genuine attempt at discerning credibility. Again, minor inconsistencies may be more indicative of the fallibility of our memories as opposed to a false testimony. A reliance on minor inconsistencies would place undue weight on the ‘consistency heuristic.’

Furthermore, minor inconsistencies are particularly problematic in relation to traumatic events. As argued above, trauma causes an over general memory, where individuals will struggle to recall specific details.¹⁴¹ It would thus mean that minor inconsistencies such as this are more likely to occur in the event where trauma is involved. Tribunal members are required to be alive to factors such as this, which impact heavily on the ability for a claimant to give a consistent account.

- (e) Step 5: Is the respondent failed to provide a ‘believable’ explanation for the discrepancies and omission?

Scholars have described the view towards refugee as one that possess a “culture of disbelief.”¹⁴² In my evaluation of IPT cases, this rings particularly true in the context of explanations for inconsistencies. As stated when setting out the credibility standard, any doubt should be resolved in favour of the applicant. This is also applicable to the explanations given by claimants which only need to be ‘believable’ rather than believed.

¹³⁸ At [1].

¹³⁹ *CH (Sri Lanka)* [2015] NZIPT 800704 at [37] – [38].

¹⁴⁰ At [39].

¹⁴¹ Herlihy and Turner, above n 34, at 3

¹⁴² Jessica Anderson “The culture of disbelief An ethnographic approach to understanding an under-theorised concept in the UK asylum system” (July 2014) Refugee Studies Centre <<https://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp102-culture-of-disbelief-2014.pdf>> at 4.

For example, in *AI (Somalia)*, the ‘inconsistent’ phone calls were explained with the claimant stating that “that was the last call when they threatened to kill him and he had received earlier calls asking whether he was coming to work for them.”¹⁴³ To this the Tribunal simply rejected the explanation, finding that it was simply an “unpersuasive” attempt to align his evidence with previous inconsistent evidence.¹⁴⁴ There are two primary problems with this. First, it gives no reasons other than the Tribunal members own belief that it is “unpersuasive.”¹⁴⁵ If an explanation is rejected, reasons must be given as to why the explanation is not believable. Further to this, the explanation that he was referring to the final call is entirely believable. It is believable that a person may misconstrue the question to discussing the ‘most’ important event than discussing all the events when asked an open end question such as “whether any Al-Shabaab member had called him during this five-day period.”¹⁴⁶

4 Knowledge testing

Another form of credibility testing can be found in knowledge testing. From my research, this has not gained much use in the IPT and, therefore, will only be discussed briefly. Knowledge testing is particularly useful in specific cases where a person claims to have converted to certain religion and the IPT is forced to determine this to establish whether the *sur place* claim was in bad faith.¹⁴⁷ Here, knowledge testing can be of some use. However, strong caution should be taken on relying on this as the only factor. The Full Federal Court of Australia provides helpful guidance, stating that this decision can only be made there it is satisfied that the doctrines asked are one which an adherent of the religion in the position of the claimant might reasonably be expected to know.¹⁴⁸ Even then, a ‘false’ convert may be able to search online the doctrines of a religion and easily learn the doctrines and, vice versa, a ‘true’ convert may simply not be educated enough as to the doctrines of the religion they follow.

An even more unhelpful approach would be to use knowledge testing for claims based on sexual orientation. Millibank references extreme examples of this, such as the use of a “gay

¹⁴³ *AI (Somalia)*, above n 117, at [54]

¹⁴⁴ At [55]

¹⁴⁵ At [55].

¹⁴⁶ At [54].

¹⁴⁷ See Richard Pidgeon and Danyon Chong “Testing Damascene Change in refugee law” [2016] NZLJ 89.

¹⁴⁸ *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362 at 375.

icon” test to determine whether a person is a homosexual.¹⁴⁹ The problems inherent in this approach are obvious. Different people engage with their sexuality, political identity or religion in vastly different ways and to test one’s knowledge on it assumes a certain homogeneity which does not exist.

The IPT have been careful in their use of knowledge testing for good reason. It is extremely difficult to construct questions which would be able to determine a claimant’s credibility based on their knowledge of the group they adhere to.¹⁵⁰ Knowledge testing may appear to be under the false pretenses of objectivity. However, attached to the tests is the presumption that a person of a certain quality must then know a certain thing. This presumption is subjective and may not apply in all circumstances. Therefore, the IPT should be wary not to fall into the traps of overreliance on knowledge testing.

V Moving Forward

It is clear that Tribunal Members and Refugee Protection Officers are placed in difficult situations. The ability to tell the truth is one that is difficult in any setting. Placed in a refugee determination and the task becomes complicated ten-fold. However, the decision-maker must take into account these difficulties and the need for a protection against a chance of *refoulement*. The suggestions made in this paper are some of the ways the decision-makers have failed to appropriately test credibility and thus opening up a high chance of *refoulement*.

Ideally, the IPT decision-making process would naturally adopt a more objective approach. However, it is likely that change may have to be mandated from the courts. Recourse through Judicial Review and Appeals have been limited by s247 and s245 of the Immigration Act 2009.¹⁵¹ The primary barrier to both these is the need for a “general or public importance” to be brought forward.¹⁵² This paper argues that the issues are of general and public importance because of the need to protect against a high chance of *refoulement*. A review or appeal would assess best practice methodology in determining both how refugee and/or protected person status is determined. It would also describe what is material and what inconsistencies should be taken into account when making a decision

¹⁴⁹ *WAAG v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FMCA 191 at 12; Millbank, above n 71, at 18.

¹⁵⁰ Hathaway, above n 23, at 141.

¹⁵¹ Immigration Act 2009, s 245; s 247.

¹⁵² Section 249(6)(b).

as to whether a person is a refugee or protected person. Overall, it would promote a process which delivers consistency within and between decisions and decision-makers (reducing subjective elements).

The New Zealand Court of Appeal has stated that, “it cannot possibly be said the Tribunal erred in law by following a different analytical path” in response to a framework advanced by Michael Kagan, an article I have referred to extensively in this paper.¹⁵³ This paper’s response is that while this may be the case, the Tribunal errs in law when its processes create a high chance of *refoulement*. The framework posited here is not exclusively correct, there may be other frameworks that are ‘sufficiently objective’. However, those frameworks must be entirely compliant with the need to protect against *refoulement*.

As Macklin put it, credibility determination needs to become less about ‘discovering’ truth.¹⁵⁴ Rather it is a choice as to what to accept and what to reject “in the face of empirical uncertainty.”¹⁵⁵ This shifts the focus of credibility. Perhaps, in light of *non-refoulement*, a modified version of Blackstone’s formulation is apt to be kept in mind by IPT tribunal members. It would go like this: ‘It is better ten false refugees escape than to let one innocent suffer at the hands of their persecutor.’

¹⁵³ *BV v Immigration and Protection Tribunal* [2014] NZCA 594, [2015] NZAR 139 at [14].

¹⁵⁴ Macklin, above n 17, at 140.

¹⁵⁵ At 140.

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CO (Sri Lanka) [2015] NZIPT 800683-7
CU (Sri Lanka) [2015] NZIPT 800799.
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DO (Iran) [2015] NZIPT 80072.
DQ (Iran) [2015] NZIPT 800868.
DZ (Fiji) [2015] NZIPT 800559, 800561.
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Appendix 1: Declined IPT Cases 2015

Citation	Date of Decision	Declined on Basis of Credibility
<i>AP (Bangladesh)</i> [2015] NZIPT 800578.	6 January 2015	Y at [3]
<i>AQ (Bangladesh)</i> [2015] NZIPT 800547.	7 January 2015	Y at [4]
<i>DZ (Fiji)</i> [2015] NZIPT 800559, 800561.	14 January 2015	N
<i>AB (North & South Korea)</i> [2015] NZIPT 800642-645.	15 January 2015	Withheld from publication
<i>BM (Pakistan)</i> [2015] NZIPT 800660.	20 January 2015	Y at [2], [71]
<i>AK (Nepal)</i> [2015] NZIPT 800669.	18 February 2015	Y at [2], [16], [26]
<i>AO (Zimbabwe)</i> [2015] NZIPT 800619.	20 February 2015	Y at [3]
<i>DI (Iran)</i> [2015] NZIPT 800571 .	24 February 2015	Y at [2]
<i>BO (Pakistan)</i> [2015] NZIPT 800677.	27 February 2015	Withheld from publication
<i>BD (India)</i> [2015] NZIPT 800692 .	5 March 2015	Y at [2], [3]
<i>AB (Australia)</i> [2015] NZIPT 800451.	19 March 2015	N
<i>AM (Nepal)</i> [2015] NZIPT 800670.	24 March 2015	Y at [2], [38]
<i>AQ (Zimbabwe)</i> [2015] NZIPT 800678.	26 March 2015	Y at [2], [58]
<i>AR (Bangladesh)</i> [2015] NZIPT 800739.	26 March 2015	Y at [3], [38]
<i>CB (Sri Lanka)</i> [2015] NZIPT 800527.	27 March 2015	Y at [2]
<i>AN (Nepal)</i> [2015] NZIPT 800705.	20 April 2015	Y at [2], [21]
<i>AH (Turkey)</i> [2015] NZIPT 800665–666.	28 April 2015	N
<i>EH (Fiji)</i> [2015] NZIPT 800628-629, 630.	29 April 2015	Withheld from publication
<i>CH (Sri Lanka)</i> [2015] NZIPT 800704.	1 May 2015	Y at [3], [46]
<i>AD (Cameroon)</i> [2015] NZIPT 800711.	5 May 2015	Y at [74] ¹⁵⁶
<i>EI (Fiji)</i> [2015] NZIPT 800657.	11 May 2015	N
<i>EJ (Fiji)</i> [2015] NZIPT 800769.	15 May 2015	Y at [2], [27]
<i>AE (United States)</i> [2015] NZIPT 800850.	19 May 2015	N
<i>BP (China)</i> [2015] NZIPT 800801-803.	22 May 2015	N
<i>BQ (China)</i> [2015] NZIPT 800826.	25 May 2015	N
<i>AH (Somalia)</i> [2015] NZIPT 800754.	26 May 2015	Y at [3]
<i>CK (Sri Lanka)</i> [2015] NZIPT 800609.	28 May 2015	Y at [3], [57]
<i>CM (Sri Lanka)</i> [2015] NZIPT 800730.	9 June 2015	Y at [2], [49]
<i>AF (Brazil)</i> [2015] NZIPT 800713-715.	11 June 2015	N
<i>BH (India)</i> [2015] NZIPT 800765-67.	11 June 2015	Y at [2]

¹⁵⁶ Decision relied upon credibility finding of previous appeal.

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<i>CO (Sri Lanka)</i> [2015] NZIPT 800683-7.	23 June 2015	Y at [4]
<i>AB (The Gambia)</i> [2015] NZIPT 800707.	24 June 2015	Y at [3]
<i>BI (India)</i> [2015] NZIPT 800768.	24 June 2015	Y at [2]
<i>AE (Georgia)</i> [2015] NZIPT 800697-98.	26 June 2015	Y at [4], [47]
<i>AF (Myanmar)</i> [2015] NZIPT 800708.	29 June 2015	Y at [43], [45]
<i>AM (The Philippines)</i> [2015] NZIPT 800673.	30 June 2015	Y at [3], [56]
<i>AF (Cameroon)</i> [2015] NZIPT 800674.	30 June 2015	Y at [3]
<i>AL (Malaysia)</i> [2015] NZIPT 800756-757.	30 June 2015	Withheld from publication
<i>BK (India)</i> [2015] NZIPT 800786.	23 July 2015	N
<i>AG (Colombia)</i> [2015] NZIPT 800760.	30 July 2015	N
<i>BL (India)</i> [2015] NZIPT 800795.	4 August 2015	N
<i>CU (Sri Lanka)</i> [2015] NZIPT 800799.	13 August 2015	Y at [2], [27]
<i>BM (India)</i> [2015] NZIPT 800777.	14 August 2015	Y at [2]
<i>EN (Fiji)</i> [2015] NZIPT 800874.	17 August 2015	N
<i>BT (Pakistan)</i> [2015] NZIPT 800774.	25 August 2015	Y at [2], [32]
<i>AK (Turkey)</i> [2015] NZIPT 800806.	27 August 2015	Withheld from publication
<i>BW (Pakistan)</i> [2015] NZIPT 800679.	31 August 2015	Y at [4], [32]
<i>BV (Pakistan)</i> [2015] NZIPT 800820-21.	31 August 2015	N
<i>AH (Indonesia)</i> [2015] NZIPT 800817-818.	9 September 2015	Y at [4], [55]
<i>AC (Israel)</i> [2015] NZIPT 800886.	14 September 2015	N at [34]
<i>AH (Vietnam)</i> [2015] NZIPT 800827.	22 September 2015	N
<i>DQ (Iran)</i> [2015] NZIPT 800868.	22 September 2015	N
<i>CX (Sri Lanka)</i> [2015] NZIPT 800543.	12 October 2015	Y at [67]
<i>AF (Tuvalu)</i> [2015] NZIPT 800859.	20 October 2015	N
<i>AP (Philippines)</i> [2015] NZIPT 800703.	22 October 2015	Y at [3]
<i>ES (Fiji)</i> [2015] NZIPT 800804.	23 October 2015	N
<i>BO (India)</i> [2015] NZIPT 800807-808.	28 October 2015	Y at [4], [80]
<i>BP (India)</i> [2015] NZIPT 800812-813.	28 October 2015	Y at [2]
<i>AY (South Africa)</i> [2015] NZIPT 800763.	30 October 2015	Y at [3]
<i>BQ (India)</i> [2015] NZIPT 800800.	30 October 2015	N
<i>BR (India)</i> [2015] NZIPT 800823.	30 October 2015	N
<i>DA (Sri Lanka)</i> [2015] NZIPT 800816.	18 November 2015	Y at [2], [3]
<i>AT (Bangladesh)</i> [2015] NZIPT 800785.	19 November 2015	Y at [2]
<i>AE (Mexico)</i> [2015] NZIPT 800778.	24 November 2015	Withheld from publication

<i>BY (India)</i> [2015] NZIPT 800819.	25 November 2015	Y at [3], [57]
<i>AO (Nepal)</i> [2015] NZIPT 800829.	9 December 2015	N
<i>BU (India)</i> [2015] NZIPT 800884-85.	15 December 2015	Y at [3], [49]
<i>AP (Nepal)</i> [2015] NZIPT 800824.	22 December 2015	Y at [2]
<i>AI (Brazil)</i> [2015] NZIPT 800896.	22 December 2015	Withheld from publication
<i>AF (United States)</i> [2015] NZIPT 800890.	24 December 2015	N