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Navigating the Intersection of Scepticism, Gender Blindness, and Ethnocentricity in the Asylum Tribunal: the Urgent Case For Empathy Enhancement

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Footnotes

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Abstract

Adopting a critical legal studies position, informed by procedural justice theory, this article argues that the intersection of scepticism with ethnocentric and gender-blind expectations of behaviour from tribunal judges impacts the fairness of proceedings, to the particular detriment of women asylum-seekers in the UK. Procedural justice theorists argue that fair procedures help court users to accept adverse outcomes. Yet an attempt to apply these principles to the asylum tribunal where there is no common experience and where decision-making occurs within a culture of disbelief proves futile. This analysis is informed by the experiences of 14 women who appealed an adverse asylum decision before the tribunal. It is evident that whilst judicial discretion allows judges to make procedural enhancements, this leads to inconsistency (itself a marker of unfairness) and the opportunity for an appellant to rebut assumptions through meaningful participation is rarely available. It is argued that principles of procedural justice need to be tailored in the specific context of asylum. Empathy-informed reasoning is urgently required. This needs to be embedded, through training, guidelines, and greater accountability. Without such enhancement, the tribunal appears to lack impartiality and serves only to replicate the flaws of initial decision-making.

Keywords

[AQ10](#) Procedural justice, Empathy, Asylum tribunal, Ethnocentrism, Gender Blindness, Fairness 

1. INTRODUCTION

The social psychology theory of justice emphasises that perceptions of procedural fairness may be at least as important as outcomes in ensuring compliance and acceptance.¹ Procedural fairness has an intrinsic rather than purely instrumental value. It helps to secure compliance, but perhaps more importantly, when conceptualised as participation, it can significantly improve the participant's feeling of self-worth.² A special case can be made for examining the principles of justice through the prism of credibility from the perspective of women asylum appellants. As Singer observes, women are refused asylum primary because they are not believed.³ Expectations of credibility are both gendered and ethnoculturally constructed as judges seek to determine, in the absence of corroborative evidence, whether the appellant matches their conception of the “abject victim, powerless in the face of coercive powers of the state and non-state actors.”⁴ Whilst the victim's gender is not always relevant to the persecution, women experience particular types of gendered harm in patriarchal conservative societies including, forced marriage, forced sterilisation and abortion, and prostitution.⁵ They are also more likely to experience violence as a continuation rather than an isolated incident.⁶ This multi-dimensional nature of harm presents challenges for refugee law, which struggles to capture the complexities of women's experiences.⁷ It will be argued that it also presents a challenge for refugee determination.

Although fair proceedings are important to the dignity of the person,⁸ they also serve a broader democratic function as essential to traditional conceptions of the rule of law, which demand that legal systems give equal respect to all citizens as rational agents.⁹ An absence of fairness not only undermines equality but also damages respect for legal institutions and the authority of the state to enforce standards of conduct.¹⁰ In UK asylum proceedings this is recognised by the overriding objective to deal with cases “fairly and justly.”¹¹

Critics of procedural justice theory accuse the original social psychologists of over-reliance on simulated studies and ethnocentricity.¹² However, there are now few interdisciplinary approaches that have been applied in as many contexts, as MacCoun argues “the sheer heterogeneity of tasks, domains, populations, designs, and analytic methods provides remarkable convergence and triangulation.”¹³ In the legal realm, empirical studies originally centred on criminal process and there have been notable advances in both criminal and family law, which seek to protect and enhance the position of vulnerable court users, embedding principles of fairness. Its impact on diverse court users in tribunals was considered by Genn et al. in 2006 but the study omitted refugee status determination.¹⁴

There have certainly been enhancements in refugee determination with a chapter in the Equal

Treatment Bench Book focussed on the vulnerability of asylum-seekers before the court, but special measures to improve access, understanding and facilitate genuine participation, remain largely the province of individual judges. It is perhaps unsurprising that asylum proceedings are often described as a lottery where success depends on securing a “nice judge on a good day.”¹⁵ Credibility assessment sits at the centre of this lottery, and it is here that gendered and ethnocentric assumptions and expectations of behaviour easily take root.¹⁶

Although there is acknowledgement of the vital importance of procedural fairness in the work of scholars in their observations of asylum hearings, there is no research explicitly applying principles from the social psychology theory of justice to the asylum tribunal. Asylum tribunals warrant specific consideration because, unlike criminal and family hearings, there is a considerable experiential gulf between established legal actors and appellants. The absence of a shared cultural repertoire may, if unchecked, result in ethnocentric expectations of behaviour that are entirely inappropriate. Hunter identifies several factors that place asylum-seekers in a position of heightened vulnerability when attending hearings: the circumstances of their claim, the level of material deprivation,¹⁷ the inability to speak English, prior experiences of abuse and exploitation, and poor mental health.¹⁸ It should also be noted that unfamiliarity with the English legal system both contributes to, and results from, almost total marginalisation from the decision-making process. This puts asylum-seekers at a distinct disadvantage when considering the gold standard of meaningful participation, which requires that appellants can successfully navigate the system, understand the language of decision-making, and communicate with decision-makers and tribunal actors so they can understand where they are and what is required of them.¹⁹

Additionally, women asylum-seekers may face specific obstacles when their credibility is assessed. It is more likely that they will have experienced persecution in a private setting (such as the home) where documentary evidence is difficult to obtain. Highly patriarchal societies are less likely to publicly record harms against women, which impacts on the prevalence of harm and related evidence recorded in country of origin reports. Stigma, shame, and lower levels of literacy also impact on the collation and availability of corroborative evidence.²⁰ These factors are also relevant in the tribunal hearing as they undermine self-esteem and confidence, which influences levels of trust. Thus, credibility and procedural fairness necessitate examination from a specifically gendered perspective.

My intention here is threefold: to assess how principles of fairness advanced by social psychology theorists are realised in asylum appeals by women, second, to assess how the asylum process and the hostile environment in which decisions are promulgated impact on fairness, and finally to consider how the principles can be developed in the light of specific challenges facing women seeking protection. It will be argued that the context in which refugee status determination occurs, including ethnocentric assumptions which are fuelled by the absence of shared socio-cultural values, requires significant modification to the social psychology approach. Adaptations to procedural rules need to be accompanied

by empathy-enhanced reasoning requiring judges to reach beyond their personal experiences and ethnocentric, gendered expectations.²¹ Only then will tribunal proceedings be perceived as fair by appellants. This will inevitably require a shift in judicial mindset to ensure that individual judges recognise unconscious ethnocentric biases, but it also demands enhanced training and recruitment to address the collective “judicial identity blackout.”²² Although, there will be resistance in some quarters, as the history of tribunal gender guidelines indicate, it is worth emphasising that increased fairness not only benefits appellants but also helps to secure better outcome compliance which supports a more efficient and fair asylum system.²³

1.1. Situating adjudication within a hostile environment

The perceived independence of any tribunal as a fair and impartial arbiter helps foster trust but it must be recognised that tribunals are situated within a broader decision-making culture. Long delays before substantive interviews and initial decisions have already undermined confidence and trust.²⁴ Delays have increased significantly since the Home Office abandoned a European Union target to make straightforward asylum decisions within six months.²⁵ The impact of the Covid-19 pandemic has further reduced tribunal capacity. By the time decisions reach the first-tier tribunal, many asylum-seekers will have waited for more than 2 years.

Advocates have identified a culture of disbelief in the Home Office for many years, but the decision of the then Home Secretary Theresa May to announce the creation of a hostile environment for “illegal migrants” in 2012, has undoubtedly contributed to scepticism going far beyond its intended focus.²⁶ May’s announcement was accompanied by legislation restricting access to health care, rented accommodation, state benefits, driving licences and bank accounts for those unable to prove status.²⁷ The discriminatory effect of the right to rent scheme, which fines landlords £3,000 if they fail to undertake immigration checks, has since been recognised by the senior courts,²⁸ whilst the independent report into the Windrush affair highlighted the impact of the hostile environment on commonwealth migrants and their children who lacked proof of lawful residence.²⁹ The report found that those who had entered the UK lawfully to fill labour shortages after the Second World War, experienced ill-treatment including deportation, denial of life-saving medical treatment, and destitution, as a direct consequence of the hostile environment. The extension of immigration control responsibilities to ordinary members of the public, including landlords, employers, and medical personnel, along with the widespread use of inflammatory language linking migration to illegality in political and public discourse inevitably fuels scepticism.

The term ethnocentrism derives from the work of Sumner in 1906, who defined it as “the view of things in which one’s group is the centre of everything, and all others are scaled and rated with reference to it.”³⁰ More recent research suggests that there are many specific interrelated and mutually reinforcing components: preference for one’s own group (the ingroup); a belief in the superiority of

certain shared values of the ingroup; purity of the ingroup; exploitativeness, whereby little consideration is given to the feelings of the outgroup; group cohesion, and devotion to the interests and values on an ingroup.³¹ Whilst ingroup bias has been described as the “laboratory analogue of real word ethnocentrism,”³² the relationship with outgroups is important to clarify. Ethnocentrism does not necessitate hatred or fear of outsiders (unlike xenophobia), rather it suggests an indifference or less of a preference. That said, Duckitt argues that ethnocentrism easily predisposes people to become negative towards outgroups, especially when there is perceived competition.³³

There is no requirement for members of ingroups to be cognisant of their preferences and it has been suggested there is a certain inevitability to ethnocentrism. Whilst ingroups may also be formed from political or religious communities, the reference to ethnicity as the ingroup definer is relevant as it suggests certain shared cultural characteristics, culture being defined as a “relatively organised system of shared meanings.”³⁴

When reflecting on the six facets of ethnocentrism posited by Bizunic and Duckitt, it is relatively easy to imagine that a government policy and accompanying legislation, which legitimises hostility towards a certain group can fuel and even justify ethnocentrism. In this respect, Allport’s interpretation of Adorno’s scale of ethnocentrism as isolationism encompassing an “island of safety” outlook seems particularly apposite.³⁵ It would be surprising if a decade of pervasive signalling based on hostility had not influenced the asylum adjudication process.³⁶

2. METHODOLOGY

This analysis of procedural justice is grounded in critical legal studies and informed by 10 tribunal observations and semi-structured interviews with 14 women aged between 17 and 60 whose appeals were refused by the first-tier tribunal in England and Wales (Immigration and Asylum Chamber) between 2016 and 2019.³⁷ Participants were recruited through a mixture of professional referral and snowballing. An initial short conversation occurred to discuss details of the project and to explain the purpose of the research, in accordance with the ethical approval obtained from both Nottingham Trent University and Nottingham and Nottinghamshire Refugee Forum. The interviews took the form of semi-structured conversations, where the interviewer allowed participants to speak freely, reflecting on their experiences with minimal interruption using an approach grounded in interpretative phenomenological analysis (IPA).³⁸ Eleven interviews were conducted in English and three were conducted with the aid of an interpreter. IPA is a form of hermeneutic phenomenology that seeks to understand how a person experiences and processes challenging events.³⁹ It is well-suited to critical legal studies inquiries as it gives voice to the individual’s experience that has typically been subjugated or denied in a coercive and hostile legal system. Interviews informed by IPA require deeper experiential reflection from both parties as they aim to understand how the participant makes sense of their

experiences. They are transcribed in full, and a personal experiential analysis table is generated with a hierarchy of sub-themes accompanied by verbatim quotes. The IPA approach is idiographic rather than nomothetic and centred on individual meaning, nevertheless a comparison of experiences following transcription identifies patterns of convergence and divergence with transcribed interviews from subsequent participants.

Given the risk of re-traumatisation, extra care was taken to ensure that participants were only asked to focus on their experiences of the tribunal hearing, rather than being asked to recount personal details of their asylum claims. Nevertheless, several participants chose to elaborate on their asylum claim. Two participants contrasted their experience in the research interview with their hearing, noting how they had not previously felt able to fully explain their experiences and reactions.

Two limitations arose from the choice of methodology. Whilst IPA enabled a focus on meaning-making, this worked less well in the three cases where interpreters were used. Here answers tended to be much shorter with more focus on facts, and it was difficult to verify their accuracy. A further limitation arose from the conversation style of interviews as it was not always easy to remain centred on the tribunal hearing. On occasion, participants would express their frustration at an assumption of credibility that arose from the initial decision rather than the hearing. It was visibly difficult for some participants to distinguish the different stages of their asylum claim, particularly where they had experienced more than one hearing.

The interviews were supplemented by a small random sample of 10 hearing observations in spring 2020 at the Birmingham tribunal which is situated on the 4th floor of a large modern court building in the city centre. The observations support the findings of the much larger observational study undertaken in the UK by Gill et al. which identified a wide variance in practice and the influence of highly subjective factors on fairness in both proceedings and outcomes.⁴⁰ As first-tier decisions are unpublished, the data from the empirical research were triangulated and compared with 134 appeals publicly available on the Upper Tribunal database using the search terms “gender related violence” and “gender and credibility.” These cases are appeals from the first tier concerned with potential errors of law and, as such, they provide a valuable insight into the adjudication process.

Extracts from interviews provide a vital insight into the way that the asylum tribunal is experienced and understood by women appellants. They confirm the importance of the procedural fairness principles of voice, neutrality, respect, and trust, to the individual’s sense of self-worth, and ultimately their acceptance of the decision. Significantly, they also situate the tribunal within the wider context of decision-making, raising questions about judicial independence linked to cultures of disbelief and denial in which asylum decisions are understood to occur.⁴¹

3. FOUR PRINCIPLES OF PROCEDURAL FAIRNESS

Drawing on the work of social psychologists including Leventhal, Thibaut, Walker and Lind, Tom Tyler identifies four antecedent principles that determine whether a court procedure is perceived by the user to be fair.⁴² Crucially, fair proceedings appear most important when outcomes are less favourable as they provide a compensatory effect, helping parties to receive and accept difficult outcomes.⁴³ Lind et al. suggest that process control may actually be exclusively important to conceptions of fairness.⁴⁴

- Meaningful Voice
- Neutrality
- Respect
- Trust

Although the principles are derived from criminal justice, there are obvious similarities between criminal proceedings and refugee determinations in the UK. Both are vitally important to the individual; a negative asylum outcome may lead to the appellant being detained, refused support, and/or returned to their country of origin. The stakes could not be much higher, and this is when procedural justice matters most.⁴⁵ Additionally, asylum and criminal proceedings are adversarial, the state is a party to the proceedings, and the question of credibility is often decisive to the outcome. Although there are evident differences between asylum and criminal hearings, it is suggested that these similarities, and their use beyond the criminal justice sphere make the application of Tyler's principles valid and important.

Notwithstanding similarities, there are marked differences between criminal justice and asylum proceedings. The standard of proof in asylum hearings, articulated as "a reasonable degree of likelihood," is lower than the civil balance of probabilities standard, although it has been noted that decision-makers are not consistently applying the lower standard.⁴⁶ The burden of proof lies with the appellant but is subject to the principle whereby an applicant whose story broadly appears credible should be afforded the benefit of the doubt.⁴⁷ It has been noted that women claimants face additional hurdles in this respect, particularly when persecution has occurred in a private setting.⁴⁸ There may be little corroborative physical evidence and systemic gender inequality means gender-related harm is less likely to be officially documented. Minor inconsistencies can therefore have a disproportionate impact on women's credibility.⁴⁹

More generally, restrictions to the affordability and accessibility of legal aid have resulted in more appellants struggling to find good quality legal advice and representation, or attending asylum hearings without representation.⁵⁰ The right to a fair trial guaranteed by Article 6 of the *European Convention on Human Rights* (ECHR) and Article 14 of the *International Covenant on Civil and Political Rights* has consistently been construed as inapplicable to immigration proceedings due to their administrative nature.⁵¹ This approach is regrettable, given that tribunals were intended to replace the court system

and largely follow similar procedural patterns.⁵²

To some extent, this deficiency is addressed in England and Wales through the overriding objective in Tribunal rules and common law principles, where fair hearing is viewed as a manifestation of natural justice.⁵³ In *SH (Afghanistan)*,⁵⁴ the Court of Appeal noted that when deciding to grant an adjournment, the sole test was fairness as a requirement of procedural propriety. In *Miah*, the Upper Tribunal construed the principle of fairness to include a duty of tribunals have a broad power to conduct proceedings in a manner considered appropriate, which should include enabling an appellant to comment on any adverse material in the evidence.⁵⁵ Although English asylum hearings are adversarial, the court has a “reasonable inquisitorial function to make its own inquiries in the context of full disclosure and discussion of all relevant issues at the hearing.”⁵⁶ This enhanced judicial role receives heightened importance when the appellant lacks representation.⁵⁷

3.1. Voice

Tyler understands voice as both substantively and instrumentally valuable in the pursuit of procedural fairness: “People want to have the opportunity to tell their side of the story in their own words before decisions are made about how to handle the dispute or problem.”⁵⁸ There is an inherent tension between the opportunity for voice and the management of hearings, including the need for interpreters. Tribunal procedures attempt to navigate this tension through the requirement on the appellant, in most cases, to provide witness statements, an indexed bundle of evidence, a skeleton argument, and chronology of events.⁵⁹ The witness statement stands as evidence in chief, but in the interests of fairness appellants should have an opportunity to amend their statement in the hearing.⁶⁰

The necessity of using interpreters in many asylum cases compromises the appellant's voice, so it is preferable to consider voice as one manifestation of meaningful participation. My observations found considerable reliance on the interview record with little opportunity for the appellant to verify or dispute its content. Vianelli cautions against reliance on these statements, arguing that multiple layers of translation, transcription, and dilution during the asylum process make them unreliable sources.⁶¹ Research with victims of gender-related harm in criminal and immigration proceedings also cautions against treating early interview statements as accurate records.⁶² Meaningful participation should present the judge with an opportunity to better understand the appellant and their experiences through a dialogue (either directly or via an interpreter) which has the potential to clarify or challenge inconsistencies.

Exposure to first-hand accounts from outsiders can enable judges to broaden their cultural repertoire, thereby enhancing understanding and reasoning. For appellants, voice has an important therapeutic value in demonstrating that their experiences are respected, restoring dignity and agency which are typically lost in the asylum process. As an educated woman with good command of English and a medical career in her home country, Ella was frustrated that her experiences were not heard: “listening

is a different thing than listening with a purpose to do stuff, you know, with a fixed end in mind. Then it makes no difference, you might as well have not listened.”

Studies indicate that therapeutic benefits can be conferred through empowering court users even in situations where there are low levels of outcome control.⁶³ This is especially apparent when the individual has experienced severe human rights violations which have left them feeling disempowered.⁶⁴ The opportunity to be heard can play a significant part in the healing process;⁶⁵ conversely, its denial has the opposite effect. Julie explained how she was orphaned and homeless when she was trafficked from her home country and exposed to sexual violence. Understandably, these experiences have left Julie with considerable mental ill-health challenges. There is no evidence to substantiate her testimony, and her fear of interacting with authority resulted in an adverse credibility assessment by the decision-maker, which she sought to challenge at her hearing. Yet, Julie was not offered an opportunity to speak. Julie was exhausted and visibly distressed when she reflected on the refusal: “I’m so tired ... I cannot go forward or back. There is just no future.”

Several participants recalled being denied an opportunity to explain crucial aspects of their case relevant to credibility. To leave such important explanations unsaid is not conducive to fair determination. If refugee status determination was adapted to enable greater appellant empowerment there could be a significant therapeutic benefit, which, far from undermining the role of the tribunal as a neutral arbiter, would improve confidence, trust, and overall fairness in outcomes. Yet, the features commonly associated with therapeutic justice, including a supportive interaction between judge and appellant and a non-adversarial, interventionist approach are not commonly present in asylum tribunals. Although judges can discretionarily provide an enhanced role for appellants moving towards an inquisitorial approach, there is no common practice and increasing workload pressures can, as Kirby notes, militate against meaningful participation.⁶⁶

3.1.1. Managing meaningful participation and secondary trauma

Most of the participants in this study wanted to tell their stories, their frustration and disappointment came from being denied this opportunity. Esther knew that the witness statement did not reflect the totality of her experience, but she was not afforded the opportunity to fully explain:

it's really hard for me to mention because I was raped when I was kidnapped. But it does not reflect the first statement that I gave. But they never said anything about that[...].I never got to explain

At the same time, appellants who are already traumatised may find it particularly difficult to voice their experiences and participation needs to be carefully managed. The tribunal hearing has been described as

a “a gruelling experience at the best of times”⁶⁷ and the experience of teenagers Sarah and her sister illustrate the need for cautious sensitivity. The sisters had a very different experience from the other participants, having been questioned at length by the judge. Sarah described feeling re-traumatised as they were required to repeat distressing events concerning the sudden disappearance of their parents and brother. The Home Office had concluded that the girls were lying, and the judge focussed his questioning on their knowledge of their parents’ whereabouts:

*Because we were so terrified, we did not know what was going on, and we started crying, we couldn't get a sentence out. They were like 'you need to speak clearly and get your sentences out'. Then they asked her 'have you spoke to your parents' and the home office lady asked 'when was the last time you spoke to your parents?' and 'when did your parents leave this? Why can't you go to XXX?'. Then they ask why you can't go, tell me where your parents are, tell me why you haven't located them, what steps have you taken to locate them?'. And I'm like, what steps can I take? we came here when we were thirteen years old.*⁶⁸

Expert evidence on the impact of allowing personal testimony should be provided and the judge must consider this carefully.⁶⁹ The *Istanbul Protocol*⁷⁰ provides guidance in this respect and requires that a legal representative should obtain expert evidence if there is any doubt about whether the client can comfortably manage cross-examination.⁷¹ Where this is not possible, there may be a need to consider special procedural measures such as those applied in criminal and family proceedings, in the interests of the overriding objectives.⁷²

3.1.2. Legal representation and participation

Tyler argues that legal representation is not a prerequisite for meaningful voice. In this study it often appeared as an impediment to meaningful participation, contributing to an increasingly legalistic process where the appellant’s passivity is confirmed.⁷³ Problems with legal representation for refused asylum-seekers have long been recognised in academic and judicial studies.⁷⁴

The pervasive sense of passivity was apparent in most of the hearing observations, in the waiting area, and in all but one interview. Reflecting on her first hearing, Karen noted “I didn’t get any attention, they were just talking by themselves.” Observations typically consisted of dialogues between barrister, presenting officer, and judge. During one hearing the appellant became increasingly distressed which culminated in her grabbing and searching through the bundle for a screenshot to dispute the presenting

officer's suggestion that she was not known to the authorities. Her barrister was not impressed, instructing her to sit down and remain quiet. The judge then explained that her barrister was there to represent her and would speak on her behalf.

Ella expressed gratitude that her legal team talked through the process which had given her confidence to express herself. Her experience was very much at odds with those of other participants and may be attributable to her advanced education and articulation.⁷⁵ In other interviews, participants recalled the stress caused when unfamiliar barristers arrived a few minutes before hearings were due to commence. This was obvious from the tribunal observations where barristers arrived appearing flustered and searched for their clients with a few minutes to spare. Several participants noted that their barristers appeared entirely unfamiliar with their cases. Given the pressures and comparatively low remuneration for legal aid barristers in England and Wales this is not surprising. The availability of high-quality legally aided advice has been significantly reduced over the last decade and clients, particularly those who are trying to make a fresh claim, may struggle to find a solicitor.⁷⁶ Reductions in the fees available to barristers who then represent clients at hearings are a further barrier. Wilding's study of the legal aid market in immigration law found that barristers were receiving levels of pay only slightly above the minimum wage⁷⁷ Consequently, they were not able to spend extra time reassuring clients or familiarising themselves with case bundles.

Esme recalled that her barrister did not advocate in her hearing, leaving her feeling that she would have been better without representation. Fatima had never met her barrister, who appeared rushed and flustered when he arrived:

He didn't do anything ... I don't think he discussed it with the [original] lawyer. That was the first time I met him. When he came, we went to a room and he was like going through my file.

Maureen recalled how she felt when the barrister with whom she had built a relationship of trust, sent a replacement to her hearing:

In my heart I was crying, I said 'if only I could let the judge know, if only I could report my lawyer to the judge that morning', but nobody asked me. I slept in my lawyer's office, helping her do my bundle, but in the morning somebody else came.

Maureen's experience serves to remind us that empathy is not something that should be the exclusive province of judges. Whilst the legal profession is gradually becoming more representative of society,

barristers typically come from the same socio-cultural background as judges.⁷⁸ Crucially, they are also operating within the same ‘hostile environment’ culture of disbelief and suspicion and it is recognised that repeated exposure to accounts of violence contributes to vicarious trauma, resulting in desensitisation and case-hardening.⁷⁹ A good legal representative should be a source of comfort for an appellant but all but one of the participants complained about the quality of representation they received.

3.2. Neutrality

Neutrality is associated with the absence of bias and an expectation that decisions are grounded in clear legal rules. Accusations of judicial bias in immigration tribunals appear comparatively rare, although in one recent asylum case, Judge Martin criticised the “sarcastic and aggressive” tone of first-tier judge Geraint Jones, noting that “the decision and reasons itself gives the impression that this particular judge considers all asylum seekers to be liars.”⁸⁰

Although the judicial process is independent of Home-Office decision-making, participants in this study did not recognize any distinction, viewing the tribunal as integral to the administration of political interests, including the hostile environment. None of the interviewees regarded the court as a neutral, impartial arbiter (this can be presented as: *State/Home-Office/Judge v Appellant*). Ella raised the question of impartiality and noted that her credibility was disputed yet the credibility of the Home Office remained unimpeachable:

There were a lot of things they said that were wrong [...] So, from the beginning, when we started, the judge clearly heard a lot of those things to try and reduce my credibility, but they didn't do anything to remove the credibility of the Home Office.

This perspective is echoed by a recent evaluation of expert evidence in the UK. Campbell found that judges would ignore errors in the presenting officer’s arguments whilst exposing experts and appellants to higher standards.⁸¹ This can be seen in *MST and Others* where the Home-Office had “manufactured” evidence of safety.⁸² Campbell argues that the additional scrutiny applied to expert evidence makes it clear that “the principal rationale of the court is to enforce official immigration policy rather than arrive at a decision based on a fair assessment of all the evidence.”⁸³

Social psychologists express a preference for adversarialism due to its visible manifestation of neutrality. Whilst no tribunal in the UK adopts an entirely inquisitorial approach, immigration proceedings are unusual as they are adversarial, inevitably leading to comparisons with criminal process.⁸⁴ As Esme recalled: “Yes, that is what it feels like, like it’s a crime to be seeking asylum.” Mina wanted to explain why she had not applied for asylum on arrival as a commonwealth worker having understood this to be

essential for restoring her credibility. The opportunity was never presented to her: “They didn’t even ask me to say my story. What I heard was ‘you will hear from us in 5-7 working days. I just sat like a criminal.” [AQ3](#)

The relationship between adversarialism and the perception of neutrality is far from straightforward, in part because there have been considerable efforts to increase informality in the interests of the overriding objectives. Tribunal procedural rules require that cases should be dealt with fairly and justly “avoiding unnecessary formalities and seeking flexibility in the proceedings” and ensuring that parties can participate.⁸⁵ The newly updated Judicial College Equal Treatment Bench Book advises special measures and seeks to increase awareness of factors including ethnicity, socio-economic factors, discrimination, and culture on court users. Chapter 8 applies to refugees and asylum-seekers, recognising that both groups are among the most vulnerable within society with higher rates of mental ill-health when compared to that usually found within the general population:

As well as pre-migration trauma, asylum-seekers suffer as a result of the loss of the support of family and friends, social isolation, loss of status, culture shock, uncertainty, racism, hostility (eg. from the local population and press), housing difficulties, poverty and loss of choice and control. The process of seeking asylum adds further stress. New migrants may well have different experiences and understandings of the role of courts. Refugees and asylum-seekers may have had traumatic experiences of the administration (or otherwise) of the rule of law in their own countries.⁸⁶

This is an important statement on the specific challenges facing asylum appellants, but refusal to engage with the guidelines does not by itself constitute an error of law and the limited opportunity for judicial training inevitably results in inconsistent application.⁸⁷

The informal “enabling” adaptations are not easy to align with the requirement of neutrality. Informality can appear incongruous when the stakes are so high. Several participants remarked on the collegiality of established court actors yet noted that this friendliness was rarely extended to them. For appellants, the perception that judges, representatives, and clerks share an understanding from which they are excluded, undermines their confidence in procedural impartiality and confirms their passivity. This is particularly evident when contrasted with the physical space of the hearing room and waiting area. All participants referred to the tribunal as a court and one described their experience as a trial. Hearing rooms in Birmingham are laid out as a typical court with the judge sitting high and entering via a separate door. It would thus appear that the adversarial process is not actually tempered by this form of what might be termed “establishment informality”:

I think my challenge is that there is an inherent prejudice, sometimes it feels as if, you know, that the system works together against the individual. It feels like the judge is actually on their side (Ella).

3.2.2. Correctability as a requirement of neutrality

Tyler links neutrality to the concept of correctability, whereby poor decisions can be quickly remedied, and best practise is shared among decision makers. Poor quality decision-making and delays by the Home Office have been a problem for decades, with three-quarters of appellants waiting more than 6 months for an initial decision and an average wait of 40 weeks for an appeal to be determined.⁸⁸ This is the backdrop of refugee determination in England and Wales. Although the rate of successful asylum appeals is relatively high at around one-third of appeals,⁸⁹ a significant number of appellants are unsuccessful on first appeal (including all the participants in this study). A decision that all rights of appeal are exhausted will likely be accompanied by a complete withdrawal of state support. It is worth noting that following subsequent appeals or private and family life applications, more than two-thirds of the participants in this study have now received leave to remain (the outcome of the other applications are unknown).

First-tier tribunal judgments are unpublished, so poor-quality decisions and/or unfair practices that do not reach the point of legal error are largely beyond scrutiny.⁹⁰ Whilst a judge has the power to correct administrative, procedural, or clerical errors in the interests of justice,⁹¹ less formal remedial structures such as peer observation and appraisals do not exist in the tribunal machinery, preventing a valuable opportunity to enhance adjudication. Failure to consult the ETB or other guidance cannot by itself form an arguable ground for appeal, and immigration judges did not make use of gender guidelines introduced to the tribunal in 2000.⁹² **AQ4** Although not mandatory, the guidelines were pioneering in their recognition that women claimants were not always treated equitably.⁹³ Yet, they were met with a mixture of resistance and indifference from caseworkers and judges.⁹⁴ In the 50 cases surveyed by Wallace and Holliday no representative referred to or applied the guidelines as a matter of course.⁹⁵ In 2006 they were summarily withdrawn following tribunal restructuring.

Thus, the opportunity for correctability is limited in the absence of a legal error. Individually, there is little time and incentive for judges to engage in critical reflection, whilst collectively the tribunal bench remains impervious to peer review, mandatory periodic training, and wider scrutiny.

3.3. Respect

Legitimate legal processes depend on showing respect for the person, whatever their status.⁹⁶ Tyler

stresses that state authorities, including court clerks and judges, “communicate important messages to people about their status in society. Respect for people and their rights affirms to people that they are viewed as important and valuable.”⁹⁷ How respect is evidenced will depend on context, but it is reasonable to expect courtesy as well as timeliness and consistency in both process and outcome.⁹⁸ Leventhal prefers the term ethicality, requiring that parties are treated with “courtesy and politeness.”⁹⁹

Asylum appellants are unlikely to know what to expect before entering a tribunal. Process fatigue characterised by delays, lack of information, and disorganisation undoubtedly impacts on their confidence so the role of ancillary staff, such as security guards and ushers, will be crucial in setting the tone.¹⁰⁰ All the participants in this study reported feelings of anxiety, fear, and stress on the day of their hearing. Those sitting in the waiting area of the Birmingham tribunal exhibited similar signs. Although always busy, the waiting area was strangely quiet between intermittent bursts of activity when a barrister would rush up to the desk trying to identify a client. Several appellants were accompanied by family or friends, but most sat alone with their thoughts. The appellant had already navigated the metal detector, security guards and lifts with instructions entirely in English. There were no refreshments on offer and the nearest working vending machine was several floors away.

Intrinsic aspects of court processes can also exacerbate vulnerability and impede meaningful participation.¹⁰¹ In the 10 hearings I observed court staff did not provide reassurance and barristers typically arrived minutes before hearings commenced. Sarah and her teenage sister’s barrister arrived 15 minutes before the hearing. Sarah reported feeling highly emotional as they were both struggling to cope with grief and abandonment following the disappearance of their parents. They had no idea what to expect and were anxious about how to best tell their story:

So we went there. We were all by ourselves, and our barrister was supposed to meet us.

... it was the first time we met her. The first thing she said to us was like ‘I don’t think that the judge will believe you. There is nothing to prove your story or what you are saying’ and she was very like disbelieving of what we were saying.

In five observations, judges provided a brief outline of the tribunal process for the appellant, but in others this was omitted. Two judges were particularly welcoming and endeavoured to put the appellant at ease, addressing them directly and with patience. This is a small sample, but it echoes the findings of a much larger observational study by Gill et al.¹⁰² In three observations judges did not directly

communicate with the appellant at all, addressing the court in formal legal language that could be interpreted as unhelpful and disrespectful. In one of these hearings, the judge berated the presenting officer and postponed the hearing without addressing the appellant at any time.

Respect is further undermined when court personnel use complex, legalistic language and where appellants experience intimidating formality, lengthy delays, postponements, and constraints on storytelling.¹⁰³ Julie reported feeling very nervous when she entered the waiting room, the following delay made confused and anxious. When asked if anyone had explained the delay she responded: “no, no-one. I felt bad. Very bad.” Esme remembered feeling humiliated during her hearing: “I could see it on their face at the start, they weren’t believing in any way.” It is difficult to imagine how an appellant can trust in the fairness of the process from this starting position.

In hearings where appellants had an opportunity to speak freely or respond to questions, they reported being regularly interrupted and diverted. Gumperz suggests that this curtailment of testimony when there is no common cultural context will place asylum seeker and judge on “parallel tracks that don’t meet.”¹⁰⁴ Esme also recalled her frustration at being interrupted by the judge without an opportunity to fully explain why she had not applied for asylum immediately: “If they had listened to me, until I had finished everything I wanted to say. Then they would have judged me differently.” As a result, it was not unusual for participants to feel as though they were not being listened to. One of the final interview questions asked respondents to consider how the process might have been improved. Mina suggested “if they would just sit back and give you a chance to explain yourself, without interrupting you now and then ... so you’ve forgotten the sentence that you were saying, and you say it in a different way, then you are told you are lying.” Sarah suggested that the judge should allow more time and “Be not so much nice, but fair. Making sure everybody in a way has their time to speak.”

3.4. Trust

Respect is strongly linked to trust and Tyler’s fourth principle is arguably the most important when aiming to secure outcome compliance.¹⁰⁵ It has already been noted that appellants view the asylum tribunal process as part of the state machinery. Prior experiences of refusal, disbelief, and delay will therefore make it extremely difficult to cultivate an atmosphere of trust. As Ella explained:

This person is traumatised, this person is scared, much more than the person is telling you, they really need in that environment to be believed. She is feeling so horrible. Most times when she comes there, she sits in fear, because she does not think that those people are there to help. They are there just trying to throw you out.

Tyler concedes that there is limited literature on the antecedents of trust, but he is clear that certain factors contribute to its presence. These include when court personnel listen to and consider the appellants views (respect); are honest and open about the basis for their actions; are trying to do what is right for everyone involved; and are acting in the interests of the parties, not out of personal prejudices.¹

⁰⁶ It is probably best explained as the extent to which a decision-maker tries to be fair by exhibiting good-faith behaviour.

Bella recalled the myriad difficulties she had encountered throughout the asylum process. Her interview illustrates how an understanding of cultural context is necessary when considering whether someone's accounts are plausible; she repeatedly contrasted the cultural expectations in her home country with the UK. Bella wanted to explain that if her family returned to a different region they would quickly be identified by their persecutors through informal "reporting networks" based on gossip and rumour, but the judge appeared dismissive:

They [judge] really have no clue about us, my life [...]do they want to really know? My country, everyone knows everything about you [...] you cannot hide away, they know. People talk, they see, they report you. Not like here when you can be secret, private. It's different. They just don't understand. How can they? they don't ask us, why? I cannot trust. I am tired.

In tribunal observations in Northern Island, McKeever notes how tribunal users appear more withdrawn and passive when trust is low. In such circumstances, participants visibly disengaged from the process and were more likely to regard the outcome as pre-determined.¹⁰⁷ This was notable in Fatima and Esme's interviews in which they considered the demeanour of the bench to indicate disbelief. From that point on they understood that refusal was inevitable and disengaged from their appeal. Fatima thought the judge had made her decision before she entered the room, and this was compounded by the brevity of the hearing (reportedly 20 minutes). Though understandable, disengagement could easily be attributed as indifference by a judge, which is unlikely to have had a positive impact on Fatima's credibility.

Trust will be influenced by subjective factors and personal interactions with authority, but there are some relatively easy actions that decision-makers can take to provide some reassurance. Good-faith actions could include putting the appellant at ease, providing accessible explanations, and showing calmness and patience.¹⁰⁸ The appearance of sincerity and a positive disposition have been cited in research exploring managerial relationships where trust is identified as a key component of legitimacy.¹⁰⁹ However, these relatively simple adjustments are unlikely to prove sufficient by themselves.

Asylum tribunals have two features that demand an adaptation of Tyler's principles of fairness. First, Tyler notes that shared social bonds and understanding of the motivations of the decision-maker are antecedents of trust.¹¹⁰ Secondly, it has already been noted that determinations occur in a hostile environment characterised by disbelief, denial, and suspicion.¹¹¹ Studies suggest that perceptions of fairness are strongly influenced by a person's treatment across their legal experience, and by all the legal authorities they encounter.¹¹² The asylum process can be characterised as a "low trust, low respect" environment, and appellants report feeling removed from the legal process before reaching the tribunal. Given the demands of efficient case management, it will be difficult for any judge to enhance the trust of appellants.

4. FIRST STEPS TO FAIRNESS: EMBEDDING PROCEDURAL JUSTICE

One way to ensure that the principles of fairness are embedded is to enable meaningful participation in the form of oral testimony, whether it be in the courtroom or via special measures. Of course this needs to be handled sensitively and the *Joint Presidential Guidance Note on Child, Vulnerable Adult and Sensitive Witnesses (No. 2 of 2010)* reminds judges that some disabilities can cause or result in impaired memory, and that trauma may affect the order and manner in which evidence is given and impair comprehension.¹¹³ When so much turns on credibility, the opportunity to present one's case can help to restore confidence, showing respect for the appellant, and fostering trust. Providing an opportunity for voice also has an intrinsic value as the act of telling the story *enables* empathy, expanding the judge's cultural repertoire and reducing the likelihood that credibility will be measured against gendered ethnocentric expectations.

McKeever adapts the ladder of participation devised by Arnstein to measure the degree of participation and its effect on tribunal users in Northern Ireland.¹¹⁴ The ladder has seven rungs, moving from non-participation, through tokenism to full participation (the gold standard).¹¹⁵ The experiences of participants in this study are situated at the lowest rungs of non-participation, characterised as isolation and segregation. Isolation, conceived in an intellectual, practical, and emotional sense, occurs when decision-making appears cursory rather than robust and independent, and outcomes appear pre-determined. This is illustrated by Fatima's experience:

I felt like she'd already made her decision before she saw me. So they didn't ask me anything, like, anything really basic questions. Just basic, what's your name? how old are you? [...] she was just asking me simple questions. Yes or No. I thought she'd already made up her mind before she saw me.

Several participants were confused when they received the outcome, expressing frustration alongside disappointment that their honesty was again disputed, particularly when inconsistencies in their statements had not been put to them. This contributed to the impression that their presence was purely performative as their answers did not, and could not, have changed the outcome. As Sarah recalled:

he put down the issues as to why he refused us, and then he said that he didn't believe us, he didn't believe anything that we said. And we were confused, because we thought he did, he never asked it in the question, he never had any doubts.

The perception that the outcome was pre-ordained undermines principles of neutrality, respect, and trust. McKeever's research confirms the experiences of participants in this study, namely that the absence of meaningful participation, both in terms of an opportunity to speak and to be heard, leaves court users disengaged, withdrawn and frustrated. Esther wanted to explain her reasons for delaying her asylum application:

when he (judge) was asking me how did you come into this country? I was telling him how I came in and why I came ... I came for protection. But why didn't you claim asylum immediately? When I was trying to explain to him that I didn't know or trust anyone to ask for legal advice, and I didn't know about the asylum process. Because you can't just go around telling people what happened to you, but he wasn't ready to listen to all of that.

In contrast, for meaningful participation that is not simply tokenistic, judges should take care to listen and avoid interruption, applying flexibility and allowing for answers that may not always conform to the expected structure of legal process. The presence of a legal representative should not provide an excuse to ignore the appellant. A good judge will be prepared to move beyond ethnocentric expectations, listening and reflecting on the reasonableness of the appellant's explanations with reference to their socio-cultural context.

Gill et al. have produced a series of recommendations to increase access to justice in the tribunal, which include relatively simple adjustments that could significantly enhance the experience for all parties, reduce the anxiety of appellants and move towards meaningful participation.¹¹⁶ Their suggestions include good listening and behavioural practices, as well as pre-hearing support, including access to

culturally appropriate food, community support and clearer information about waiting times and what to expect in hearings. These are important first steps but there remain significant challenges to fairness that cannot be addressed by simply transposing Tyler's principles into the asylum hearing. A move towards rebalancing tribunal proceedings so that fairness is more than superficial, requires a modified approach, built on empathy in both process and reasoning.

5. SECOND STEP TO FAIRNESS: EMPATHY INFORMED REASONING

Empathy does not require us to experience the same emotion as the subject, merely to be aware of their feelings and experiences to best understand their perspective. It demands a degree of mental flexibility and regulatory mechanisms that operate to suppress one's own perspective and is described as "first person access to another."¹¹⁷

The suppression of perspectives and prejudices grounded in ethnocentric and gendered expectations of behaviour is essential to ensure that asylum appellants are treated respectfully and fairly. Kalin identifies five factors that prevent an undistorted interaction between asylum-seekers and officials: the manner of expression, the use of interpreters, cultural relativity of words and concepts, different perceptions of time, and the cultural relativity of lies and truths. Unless these obstacles are acknowledged "misunderstandings in cross-cultural communication" are likely.¹¹⁸ As Ella explained:

I felt that they didn't get it. Most of them were seeing things from a Western angle, but it is not the same, that cultural context was lost. And if you lose it, you lose it, so there was no sense of the case. Because you know, as educated as I am, I cannot challenge things, because of the cultural understanding that is missing [...] it is frustrating to be told somebody like you should have done this or that. You cannot understand that.

A formalist view of judging that fails to acknowledge personal preferences and prejudices or the wider culture in which asylum decision-making occurs, suggests unfairness, and may cause injustice. As Corso argues "judges who make no attempt to exercise empathy are not even-handed they are mind blind. They are likely to assume that their own perspective is universal, rather than to make the imaginative effort to understand what motivates others."¹¹⁹ Mina described how the difficult decision to flee her violent husband led her to be accused of witchcraft and threatened with community justice by her family and village elders. Her family now refused any contact, which had contributed to a recent diagnosis of severe depression and two attempted suicides. The judge did not believe Mina's family

would react in that way:

Do they know. What is a witch? A magic person on tv? No, no, a witch is evil, shameful. Everyone knows in [home country]. I know. How can I go back to that, I would die – they would kill me, my family. But no, it can't be true. This is my life. It is over.

Mina's example shows a significant gap in understanding. There have been several prosecutions for witchcraft in her home country in recent years and legislation aims to tackle the problem. Without an understanding of this cultural context, it is almost inevitable that "visceral beliefs and emotional impulses"¹²⁰ will influence credibility assessments unless they are actively recognised and exposed to reflective scrutiny. Fairness thus requires an approach grounded in empathy to support the procedural adjustments discussed.¹²¹

5.1. Empathy informed reasoning in women's cases

An approach grounded in empathy will benefit all tribunal users, but, as women are statistically less likely to be believed, there is greatest need in these cases.¹²² Late disclosure of evidence can be detrimental to credibility, yet most women seeking asylum come from patriarchal societies where they lack a strong public voice and where gendered harms may be normalised. Culture and shame impact on the ability of women to articulate their experiences at the earliest opportunity.¹²³ Kalin describes a culture shock that impacts on the manner of expression, which impairs the applicant's ability to make a forceful statement that conforms to the expectations of the decision-maker.¹²⁴

It is well-established that complete accuracy cannot reasonably be expected from those who have experienced torture, sexual violence, and trauma.¹²⁵ However, this is not sufficiently recognised in the asylum process. Caseworkers have been accused of applying standards of proof close to the criminal standard when considering evidence of torture, even in the presence of independent medical reports.¹²⁶ The ability of judges to identify trauma in appellant demeanour will be variable. More obvious symptoms of post-traumatic stress disorder may be easily identified by an experienced judge, but symptoms such as numbing and avoidance, may be easily missed.¹²⁷ Psychiatrists Herlihy and Turner note that conflicting accounts may indicate post-traumatic stress disorder:

one of the key factors when presenting a case for asylum is the ability of the asylum seeker to remember past experiences, usually traumatic, and give a coherent account of these to officials. A common assumption is that an experience of severe violence or

*torture will be so important that it will be remembered very clearly over the long term. If applicants for asylum change their account of their experiences (give discrepant accounts), this is therefore taken to suggest fabrication. This is an understandable view but one which is challenged by scientific evidence.*¹²⁸

The torture survivors interviewed by Herlihy experienced dissociation during asylum interviews, with those who had experienced sexual violence experiencing particular difficulty in disclosure.¹²⁹ Yet, when faced with behaviour and reactions deemed unusual, such as inconsistent or incoherent responses, non-verbal clues can assume heightened significance with anything deemed “odd” eliciting suspicion.¹³⁰ Transcripts from interviews are therefore unlikely to be accurate and reliable records, necessitating greater scrutiny of credibility from an empathetic position.

What is both surprising and disappointing is that these challenges are not new. They have been well-documented in academic research and led the UNHCR to produce gender guidelines some 20 years ago.¹³¹ Yet, as these interviews suggest, judges continue to rely on interview transcripts and initial credibility assessments whilst resorting to ethnocentrically constructed intuition or “common-sense” to fill any knowledge gaps.¹³²

5.2. “Common-sense” in asylum adjudication

To articulate the need for empathy informed reasoning we need to better understand why resort to intuition or “common-sense” is inappropriate. An examination of appeals to the Upper Tribunal found that first tier judges regularly plugged gaps in knowledge with implicit or explicit reference to common-sense, suggesting a shared understanding based on Western norms that was mutually accepted by all participants. In the case of an unrepresented vulnerable appellant from Sri Lanka, Judge Murray accepted evidence of rape but made the following assumption: “the appellant is an educated individual and I do not accept that if she were in fear of returning to Sri Lanka that she would not have voiced this fear to her solicitor.” Her failure to tell her husband was also considered to damage credibility. The judgment then contained assumptions regarding how the applicant could avoid the perpetrator once she was returned, culminating in the following:

Whilst I accept ... that effective state protection is unlikely to be available to the majority of women fearing sexual and gender-based violence, the appellant would be returning to Sri Lanka with her husband and would be unlikely to put herself in a situation where she was alone with [the alleged rapist].

Resort to common-sense is a clear example of ethnocentrism as it is based on a cultural system resting on the conviction of those who possess it that has an essential value and validity.¹³³ An approach grounded in empathy looks very different. In the case of a trafficked Albanian woman, the first-tier judge agreed with the Home-Office that the appellant was not credible in part because of her late disclosure of rape.¹³⁴ Judge Bruce applied an empathetic approach hearing the appellant's testimony and expert evidence, leading her to describe the first-tier decision as "utter nonsense":

survivors of sexual violence very often have difficulty in disclosing their experiences, particularly to strangers. I heard the Appellant speak with passion and great bitterness ... it needs only the most basic degree of empathy to understand that she might find it difficult to admit that he raped and abused her, and that she had been extremely foolish in trusting his promises.

Even when evidence of rape is accepted, there can be difficulties in demonstrating its impact on the appellant. A Sri Lankan appellant who had been raped several times (once at gunpoint) in front of her father had her appeal refused as the judge reasoned that "rogue soldiers" were responsible and therefore she could access state protection. The Court of Appeal unanimously overturned the decision, ruling that she was entitled to humanitarian protection because of the serious harm she had experienced, and the real risk of recurrence if returned.¹³⁵

It is difficult to understand the decision of the first tribunal in this case and such examples illustrate how gendered and ethnocentric expectations may result in a heightened standard of proof, which does not sit comfortably with the benefit of the doubt principle or the "reasonable degree of likelihood" test.¹³⁶ This is further illustrated by the experiences of the participants who perceived their hearing outcome to be pre-determined.

Resort to common-sense may be attributed to laziness, indifference, case fatigue, or even a natural response to workload, which can lead to reliance on informational cues to simplify complex information.¹³⁷ "Maladaptive emotional responses" such as case-hardening, detachment, and distancing are tools applied (consciously or otherwise) to avoid vicarious trauma and distress.¹³⁸ Yet, as Vianelli argues, simplification is already inherent in the process through which testimony reaches the courtroom so what is left (and what is to be judged) may have little resemblance to the appellant's lived experience.¹³⁹ Fatima explained that she had been engaged to be married for several years as her father demanded that she first completed school. As her testimony did not accord with the judge's expectations of marriages and education in African countries, she was considered deceitful:

So they didn't believe that because, they said ... in XX [African country] an engagement doesn't take that long. Why would the man still be interested in me, after so many years? But that was the time. So what could I say?

In contrast the application of empathy requires training, reflection, and above all, a willingness to accept the limitations of legal formalism. It is articulated by Justice Sedley as “not so much knowing others but knowing oneself – perhaps the hardest form of knowledge for anyone to acquire.”¹⁴⁰

So far there has been little willingness to embed principles of empathy in the training of immigration judges and the orthodox position where personal identity characteristics are removed from adjudication remains largely impervious to the empathy challenge.¹⁴¹ The brief history of the tribunal's gender guidelines suggests that embedding empathy will require a cultural shift.¹⁴² This is not to say that judges do not recognise their position of privilege in the hierarchy of narrative, but rather that they believe they can and do detach this position from their judging, retaining a positive and normative defence of the judicial identity blackout.¹⁴³

5.3. A strategy for embedding empathy

The starting point for a shift towards empathy enhanced reasoning should be a recognition that adjudication in the absence of empathy undermines principles procedural fairness, particularly trust and neutrality. There is also a direct link between empathy, meaningful participation and credibility findings, as explained by Lee:

*Judges, relying on their own assumptions and experiences, may too easily favor the more familiar story without aiming to better understand the situation of the less familiar party, and in this way exhibit partiality toward one side. As a result, judges may not seek to fully learn about and fully comprehend the situation of each of the litigants in the dispute and all that is at stake.*¹⁴⁴

The “inelasticity in the cultural repertoire” of judges would almost certainly benefit from enhanced training and expert navigation.¹⁴⁵ In *R (Es-Eldin) v Immigration Appeal Tribunal*, Brooke LJ recognised that external expertise could help to address cultural dissonance supporting good decision-making.¹⁴⁶ Indeed, some judges have considerable country knowledge and may already adopt an enhanced approach making use of personal as well as external expertise. However, it is comparatively rare for expert evidence to be admitted and given significant weight by the judge, whilst country of

origin reports vary significantly in quality, depth, and independence.¹⁴⁷ Even the use of medical evidence illustrating the vulnerability of the appellant can be treated as irrelevant to credibility. In *Mibanga and SA*, the Court of Appeal criticised decisions where medical evidence was only considered after an opinion on credibility had been formulated:

*where there is medical evidence corroborative of an appellant's account of torture or mistreatment, it should be considered as part of the whole package of evidence going to the question of credibility and not simply treated as an 'add-on' or separate exercise for subsequent assessment only after a decision on credibility has been reached.*¹⁴⁸

In a recent trafficking appeal, the judge deemed the appellant not credible in part based on an earlier medical report which he had not seen, whilst rejecting more recent expert reports on medical evidence concerning the risk of suicide and plausibility without providing reasons.¹⁴⁹ A further example is provided by *SE-A v Secretary of State for the Home Dept.*¹⁵⁰ where the Upper Tribunal determined that the appellant was at risk of persecution as a lesbian and from likely exposure to female genital mutilation. They found that the first-tier judge had failed to have “proper regard” to the expert report and had determined, without reason, that notwithstanding the absence of state protection, the claimant’s mother would protect her. Campbell argues that such failures are attributable to the overriding rationale driving decision-making, namely the “desire to uphold immigration enforcement to prevent ‘migrants’—including the majority of those seeking asylum—from entering the country rather than arriving at a fair decision.”¹⁵¹

The rejection of expertise and gender guidelines evidences a judicial culture which regards reasoning as a detached, rational process to be distinguished from emotion, sympathy, and personal morality. The personal characteristics of judges are hidden behind a “judicial identity blackout”¹⁵² supporting the hierarchical construction of decision-making whereby decision-makers are not corrupted by culture and are always able to act objectively and rationally. The appellant, on the other hand, deviates from the supposedly neutral culture of the decision-maker as the possessor of difference and deviance.¹⁵³ This was Maureen’s experience:

So much hostility and disbelief. The system, they all say I am lying. Why? look at me. Yes, I answer their questions, again and again, 'yes' or 'no'. I want them to hear me, I try to explain but I know they don't want to ... it sounds bad. But it is my life. I live it.

6. CONCLUSION

The principles of fairness advanced by the social psychology theory of justice are not sufficiently embedded in asylum hearings, making it impossible for appellants to have confidence in the legal process and to accept difficult outcomes. It is suggested that judging cannot be detached from the hostile environment in which asylum decision-making takes place. There is no common starting point from which to make reasoned assessments of credibility, and this is particularly apparent in cases involving women whose intimate, complex life stories are beyond the reach and comprehension of most tribunal judges. Therefore, it is asserted that Tyler's principles of fairness must be adapted, taking account of the particular challenges facing women before the asylum tribunal.

The concern emerging from interviews and observations is that asylum-seekers are routinely denied voice and become passive bystanders in a decision which could not be more important. The asylum system denies an opportunity for truth when appellants are not able to tell their story, it is the act of telling that *enables* empathy.¹⁵⁴ As Sarah explained:

if the judge didn't believe us, why didn't he ask us more? he just smiled and nodded whilst we cried and they [the Home Office] fired questions which we could not answer. We didn't know where our parents are, what happened to them ... we missed them, and our baby brother [crying] ... it's ... you can't imagine.

Solutions cannot be found in the application of discretionary procedural adjustments which depend on the willingness of individual judges and have the potential through inconsistent application, to further undermine perceptions of trust and neutrality. Greater discretion merely reinforces the criticism that asylum decisions are a lottery, with outcomes depending on the benevolence of the individual judge.¹⁵⁵ Rather, the answer can only be found in empathy informed processes and reasoning.

The "empathy craze" which has started to inhabit various academic and popular discourses has received comparatively little attention in human rights law.¹⁵⁶ Although empathic reasoning stands at odds with a tradition of legal formalism which has little regard to extraneous considerations, such as public policy, culture, or morality,¹⁵⁷ asylum adjudication cannot be easily detached from these considerations. Fairness requires judges to recognise their inherent biases and preferences, so as to better understand the appellant's perspective. There is no necessary conflict between the concept of legality and the empathic eye.¹⁵⁸ Many of the criticisms levelled at empathy regard it as a moral position, equated with compassion or sympathy and it is argued these traits have no place in legal reasoning as they lead to



unpredictable behaviour and emotive responses, undermining consistency, and the rule of law. Formalists will argue that judicial self-restraint is key to ensuring correct outcomes, yet self-restraint is not itself morally neutral or objective.¹⁵⁹ In explaining wide inconsistencies in outcomes in the American asylum court, Keith observes how the political outlook of judges impacts significantly on the way they think about public policy considerations such as national security and public policy.¹⁶⁰ As Justice Sotomayor relayed in her inaugural speech to the US Supreme Court “Whether born from experience or inherent psychological or cultural differences, our gender and national origins may and will make a difference in our judging.”¹⁶¹ The empathic approach rejects both legal formalism and judicial minimalism in the interests of justice as both replicate the myth of the impersonal, detached judge.¹⁶²



Empathy informed reasoning may increase the number of successful appeals but will not inevitably produce outcomes favouring appellants.¹⁶³ Rather, it will mean that the appellant’s testimony and experience is afforded respect, a crucial requirement of the social psychology theory of justice, and, unless there is evidence to the contrary, their account will be considered prime facie plausible, restoring agency and dignity to the appellant.¹⁶⁴ It should also address the widespread perception that outcomes are pre-determined which undermines neutrality.



The participants in this study reflected on their day in court with a mixture of tired acceptance and frustration. Outcome acceptance can be very difficult for appellants in gender-related harm cases because they have overcome a deep sense of shame to recount their story for public consumption. Lesbian appellants interviewed by Bennett described adverse credibility findings as “heart-breaking,” “devastating,” and “humiliating.”¹⁶⁵ This is echoed by Karen’s experience: “You go through so much. Telling everything, it’s hard and then ... waiting, nothing. No-one listens. I am so tired, I don’t know how to go through it.”



The question remains as to how fairness can be built into this “low-trust, low-respect” environment without significant adjustments that go beyond superficial procedural adaptation. It might be suggested that new empathy informed gender guidelines be part of the solution, but the Equal Treatment Bench Book already provides some guidance and recent history shows that gender guidelines will have minimal impact without embedded cultural change. Given the overarching importance of Tyler’s principles of fairness to justice, empathy enhancement needs to be actively pursued through judicial training, appraisal, and peer review. Put simply, procedural fairness is an impossible [AQ5](#) pursuit in the absence of empathy informed reasoning and practice. Building trust, restoring agency, and ensuring overall fairness can only be achieved from an empathic perspective. [AQ6AQ7](#)



¹ The seminal authority is J.W. Thibaut & L. Walker, *Procedural Justice: A Psychological Analysis*, Hillsdale L. Erlbaum Associates, 1975. Their work has been developed and refined by a variety of scholars in different legal contexts, notably Tom R. Tyler, *Why People Obey the Law*, Princeton, Princeton University Press, 2006; T.R. Tyler & E.A. Lind, *The Social Psychology of Procedural*

Justice, New York, Springer, 1988; “Procedural Justice and The Courts”, *Court Review*, 44, 2007–8, 26; T.R. Tyler, “What is Procedural Justice: Criteria Used by Citizens to Assess the Fairness of Legal Procedures”, *Law & Society Review*, 22, 1998, 103.  

2 Thibaut & Walker, *Ibid.*, vii; E. Brems & K. Lavysen, “Procedural Justice in the Human Rights Adjudication: The ECHR”, *HRQ*, 35(1), 2013, 176–200.  



3 D. Singer, “Falling at Each Hurdle: Assessing the Credibility of Women’s Asylum Claims in Europe”, in Arbel, Dauvergne & Millbank (eds.), *Gender in Refugee Law*, Abingdon, Routledge, 2014. [AQ8](#)  



4 S. Mullally, “Migration, Gender and the Limits of Rights”, in R. Rubio-Marin (ed.), *Human Rights and Immigration*, Oxford, Oxford University Press, 2014, 162; see also S. Ismail, “Safe to Return? A Case Study of Domestic Violence, Pakistani Women and the UK Asylum System”, in L. Palmay (ed.), *Gender and Migration. Feminist Interventions*, London, Zed books, 2010.  



5 Upper Tribunal, *NS (Social Group, Women Forced Marriage) Afghanistan* CG [2004] UKIAT 00328.  



6 Mullally, “Migration, Gender and the Limits of Rights”, 159.  



7 *Ibid.*,  

8 T.R.S. Allan, “Procedural Fairness and the Duty of Respect”, *Oxford Journal of Legal Studies*, 18(3), 1998, 500.  

9 C. Crummery, “Why Fair Proceedings Always Make a Difference”, *Modern Law Review*, 83(6), 2020, 1221–124, 1228.  



10 *Ibid.*, 1237; A. Kirby, “Conceptualising Participation: Practitioner Accounts”, in J. Jacobson & P. Cooper (eds.), *Participation in Courts and Tribunals: Concepts, Realities and Aspirations*, Bristol, Bristol University Press, 2020, 65–105.  



11 Tribunal Procedure Committee First Tier Tribunal (IAC) Rules: consolidated version, 21st July 2020, rule 2(1). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926550/consolidated-fts-iac-rules-20200721.pdf (last visited 16 Mar. 2022).  

12 See for example R.M Hayden & J.K. Anderson, “On the Evaluation of Procedural Systems in Laboratory Experiments: a Critique of Thibaut and Walker”, *Law and Human Behavior*, 3, 1979, 21–38.  



13 R. MacCoun, “Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness”,



Annual Review of Law and Science, 14(1), 2018.  



14 By asylum tribunal I refer to the First Tier Tribunal (Immigration and Asylum Chamber) in England and Wales. H. Genn, B. Lever, & L. Gray, *Tribunals for Diverse Users*, London, Department for Constitutional Affairs, 2006.  



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