Law and Migration

INSIDE ASYLUM APPEALS

ACCESS, PARTICIPATION AND PROCEDURE IN EUROPE

Nick Gill, Nicole Hoellerer, Jessica Hambly and Daniel Fisher

Inside Asylum Appeals

Appeals are a crucial part of Europe's asylum system but they remain poorly understood. Building on insights and perspectives from legal geography and socio-legal studies, this book shines a light on what takes place during asylum appeals and puts forward suggestions for improving their fairness and accessibility. Drawing on hundreds of ethnographic observations of appeal hearings, as well as research interviews, the authors paint a detailed picture of the limitations of refugee protection available through asylum appeals. Refugee law can appear dependable and reliable in policy documents and legal texts. However, this work reveals that, in reality, myriad social, political, psychological, linguistic, contextual and economic factors interfere with and frequently confound the protection that refugee law promises during its concrete enactment. Drawing on evidence from Austria, Belgium, France, Germany, Greece, Italy and the United Kingdom, the book equips readers with a clear sense of the fragility of legal protection for people forced to migrate to Europe. The book will appeal to scholars of migration studies, legal studies, legal geography and the social sciences generally, as well as practitioners in asylum law throughout Europe and beyond.

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Law and Migration

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Inside Asylum Appeals

Access, Participation and Procedure in Europe

Nick Gill, Nicole Hoellerer, Jessica Hambly and Daniel Fisher

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List of Acronyms

AIDA – Asylum Information Database
ANKER – Ankunft, Entscheidung und kommunale Verteilung oder Rückführung (Arrival, Decision and municipal distribution or Return) [Germany]
APDII – Asylum Procedures Directive (Recast)
ASYFAIR – not an acronym, but the short name of our European Research Council funded research project
ATM – Automated Teller Machine
BAMF – Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees) [Germany]
BFA – Bundesamt für Fremdenwesen und Asyl (Federal Agency for Immigration and Asylum) [Austria]
BVwG – Bundesverwaltungsgericht (Federal Administrative Court) [Austria]
CALL – Council for Alien Law Litigation
CCE/RvV – Conseil du Contentieux des Étrangers (CCE) / Raad voor Vreemdelingenbetwistingen (RvV) (Council of Alien Law Litigation (CALL)) [Belgium]
CEAS – Common European Asylum System
CGVS/CGRA – Commissariaat-Generaal voor de Vluchtelingen en de Staatlozen (CGVS) / Commissariat Général aux Réfugiés et aux Apatrides (CGRA) (Commissioner-General for Refugees and Stateless Persons) [Belgium]
CJEU – The European Court of Justice (Luxembourg)
CNDA – Cour Nationale du Droit d'Asile (National Court of Asylum) [France]
COI – Country of Origin Information
DB – Deportation Ban
EASO – European Asylum Support Office (now European Union Agency for Asylum)
ECHR – European Convention on Human Rights
ECRE – European Council on Refugees and Exiles
EMN – European Migration Network

ECtHR – The European Court of Human Rights (Strasbourg, France)
EU – European Union
EUAA – European Union Agency for Asylum (formerly European Asylum Support Office)
EUR – Euros
EURODAC – European Dactyloscopy
FGM – Female Genital Mutilation
FTP – Fast Tracked Procedure
FTT(IAC) – First-tier Tribunal (Immigration and Asylum Chamber) [United Kingdom]
HOPO – Home Office Presenting Officer [United Kingdom]
IARLJ – International Association of Refugee Law Judges (now International Association of Refugee and Migration Judges)
IARMJ – International Association of Refugee and Migration Judges (formerly International Association of Refugee Law Judges)
ICCPR – International Covenant on Civil and Political Rights
ICD – International Classification of Diseases
IPA – International Protection Act 2019 [Greece]
IS – Islamic State of Iraq and the Levant
LEA – Landesamt für Einwanderung (Immigration Office) [Berlin]
NRW – Nordrhein-Westfalen (North Rhine-Westphalia) [a Land (state) in Western Germany]
OFPRA – Office Français de Protection des Réfugiés et Apatrides (French Office for the Protection of Refugees and Stateless Persons) [France]
PTSD – Post-Traumatic Stress Disorder
QDII – Qualification Directive (Recast)
RCDII – Reception Conditions Directive (Recast)
RSD – Refugee Status Determination
SOGI – Sexual Orientation and Gender Identity
TC – Territorial Commissions for the Recognition of International Protection (Commissioni Territoriali per il Riconoscimento della Protezione Internazionale)
UDHR – Universal Declaration of Human Rights
UK – United Kingdom
UKVI – UK Visas and Immigration [a division of the United Kingdom's Home Office]
UN – United Nations
UNCAT – Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNHCR – United Nations High Commissioner for Refugees

USA – United States of America
VG – Verwaltungsgerichte (Local Administrative Courts) [Germany]
VwGH – Verwaltungsgerichtshof (Supreme Administrative Court) [Vienna]
VfGH – Verfassungsgerichtshof (Constitutional Court) [Vienna]
WHO – World Health Organisation
ZAB – Zentrale Ausländerbehörde (Central Foreigner/Aliens Department) [Germany]

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Part I

Setting the Scene

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1 Introduction

In 2014 the European Commission published a brochure outlining its asylum policies, emphasising that Europe must be an area of protection and solidarity for the most vulnerable. The cover image was of a pair of white hands holding a white paper chain of figures (Figure 1.1). The figures symbolised a nuclear family, their genders seemingly obvious but their faces blank. The hands were strong and steady, in stark contrast to the delicate paper figures they contained.

The image represents Europe, and the protection that it offers to refugees, as dependable, and refugees as fragile, faceless and weak. In doing so it omits the resilience of refugees – not only in escaping situations of potential persecution but also in overcoming increasingly exclusionary border controls and in navigating the bureaucratic and legal labyrinth of European refugee status determination.

Furthermore, by locating fragility at refugees' door, the fragility of Europe's own efforts at refugee protection is obscured in the image. The steady, cupped hands occlude a whole range of ways in which the systems that are supposed to protect refugees can and do fail, and end up excluding rather than protecting, dropping rather than catching. The year 2014 turned out to be a watershed moment in the development of the EU's asylum policies, marking the beginning of what has been widely described as Europe's 'refugee crisis'. The years since have been marked by the inaccessibility of international protection in Europe, except perhaps for people fleeing Ukraine in 2022,[1] as well as increasing extra-territorial efforts to deter and repel would-be refugees from Europe's shores. These developments have occurred in the context of inaction borne from political stalemates over the content of reforms, and the influence of far-right political movements and parties across Europe in constraining and diluting refugee protection. The eventual adoption of the EU Pact on Migration and Asylum in April 2024 as this book was going to press, represents the EU's attempted response to such developments.

1 De Coninck, David (2022) The refugee paradox during wartime in Europe: How Ukrainian and Afghan refugees are (not) alike. *International Migration Review* 57 (2): 578–586.

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Figure 1.1 Cover Image from European Commission (2014) "A Common European Asylum System".

Luxembourg: Publications Office of the European Union. Available at: https://ec.europa.eu/home-affairs [accessed 20 September 2019].

What is more, although the image in Figure 1.1 projects an even-handed approach, the reality is that European countries display high disparities in the rate at which they grant refugee protection. Syrians making an initial asylum application between 2017 and 2021, for example, were awarded some form of status 86% of the time in the EU as a whole, but this varied greatly: from over 98% of the time in Slovenia, Ireland, Cyprus, Portugal and Austria to just 41% in Hungary. In the same period, Afghans making an initial asylum claim were awarded some form of status more than 95% of the time in Portugal, Ireland and Poland but less than 20% of the time in Bulgaria, Romania, Croatia and Denmark[2] (we discuss the differences between our case countries in more detail in Chapter 2, 'What Are Asylum Appeals?').

In this book we explore the fragility of refugee protection, using asylum appeal hearings as a lens to understand how contingent legal refugee protection is upon social, political, psychological, linguistic, contextual and economic factors that lie well outside the facts of individual refugees' claims and cases.

We have spent months observing asylum appeal hearings around Europe and interviewing the people involved, finding out about the ways appellants are questioned and observing how legal principles are, or are not, put into

2 Statistics in this paragraph and the following section in relation to the EU-27 are authors' calculations based on data from Eurostat (2022) *First instance decisions on applications by citizenship, age and sex – annual aggregated data* (rounded) MIGR_ASYDCFSTA and Eurostat (2022) Final decisions in appeal or review on applications by citizenship, age and sex – annual data MIGR_ASYDCFINA. Available at: https://ec.europa.eu/eurostat/data/database [accessed 29 June 2022 and 12 July 2024 for updated 2021 figures].

practice. In doing so we have developed a bottom-up, grounded view of what refugee status determination entails for people seeking asylum, as well as for some of the decision-makers involved. This approach challenges the neat, manicured and co-ordinated characterisation of refugee protection that Figure 1.1 implies. From this vantage point, we have had insight into how unreliable and disjointed asylum appeal hearings in Europe can be, as well as the assumptions embodied about refugees themselves.

Inside the Black Box of Asylum Appeals

Asylum appeals are a crucial element of Europe's asylum system. Most initial asylum claims are refused. Between 2012 and 2021 the EU-27 made 5.6 million initial decisions on asylum claims,[3] the majority (54%) of which were refusals of any form of status.[4] What is more, the proportion of initial claims that received such refusals increased from the first to the second half of this period: from 2012 to 2016 49% of initial decisions denied any form of status to the claimant, but between 2017 and 2021 59% did.

If an initial decision-maker refuses an asylum claim, then the asylum appeal represents an opportunity to challenge that refusal by having it reconsidered by an independent authority,[5] and every EU country has an appeal process of some sort. As a result, thousands of appeals are lodged and decided every year. In total, 2.1 million appeal decisions were reached by the EU-27 between 2012 and 2021,[6] and the number of appeals increased markedly in the late 2010s. None of the years from 2012 to 2015 saw more than 170,000 appeals decided, for example, and the average number of appeals decided per year over this period was 133,000. Every year from 2016 to 2021, however, saw over 200,000 appeal decisions reached, peaking in 2018 at over 299,000.[7]

3 Eurostat (2022). Calculations exclude a very small number of claims received from EU countries.

4 The UK is no longer included in the Eurostat data but from 2018 to 2021 38% of 124,853 initial decisions made by the UK refused any form of status (Home Office (2024) Asylum and Resettlement Datasets. Available at: https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#asylum-applications-decisions-and-resettlement [accessed 7 May 2024]).

5 The nomenclature of these authorities vary across Europe – some countries call them tribunals, some boards, some courts. Although we recognise the important distinctions between these, we use 'courts' in what follows for ease of expression, unless there is a particular reason not to.

6 There is a dearth of European-level data on the proportion of initially rejected asylum seekers who appeal. As a result, national statistics are often the best source of information on this issue. In the UK for example, '[b]etween 2004 to 2021, around three-quarters of applicants refused asylum at initial decision lodged an appeal' (Sturge, Georgina (2024) *Asylum Statistics*. House of Commons Library, page 5. Available at: https://researchbriefings.files.parliament.uk/documents/SN01403/SN01403.pdf [accessed 12 July 2024]).

7 Although numbers subsequently declined, the number of asylum appeal decisions reached in 2021 (233,865) still represented almost double the number decided in 2012 (118,110).

Deficiencies in first-instance government decision-making[8] on asylum are well known, including in relation to the style of questioning,[9] the effects of politicisation[10] and the cultures of disbelief that can surround it.[11] Decisions on asylum claims can be complex and challenging, requiring knowledge of a variety of laws as well as different countries of origin, and there is concern that government decision-makers do not always have the required competence to make these decisions. Government decision-making units can be insular[12] and highly variable in their interpretation of the rules and laws.[13] There are long-standing concerns about the independence of decision-making units from other government agendas too, as well as lack of transparency about decision-making protocols.[14]

The result of these deficiencies is a striking reliance on the appeal system to secure justice for asylum claimants. From 2012 to 2021 over a quarter of asylum appeal decisions in the EU-27 were positive, meaning that either some form of status was awarded on appeal when no status had previously been granted,[15] or that an improvement was made to the status that was initially offered.[16] In other words, over a quarter of the initial decisions that were appealed were overturned when they were re-examined at the appeal stage. What is more, the proportion of successful appeals rose significantly over the period. From 2012 to 2016 16% of asylum appeal outcomes were positive for

8 In this work, 'first instance' always refers to the government decision-making level.
9 Memon, Amina (2012) Credibility of asylum claims: consistency and accuracy of autobiographical memory reports following trauma. *Applied Cognitive Psychology* 26 (5): 677–679. Herlihy, Jane, Laura Jobson and Stuart Turner (2012) Just tell us what happened to you: Autobiographical memory and seeking asylum. *Applied Cognitive Psychology* 26 (5): 661–676.
10 Eule, Tobias G, Lisa Marie Borrelli, Annika Lindberg and Anna Wyss (2019) *Migrants before the law: Contested migration control in Europe*. Cham: Springer International Publishing. Wettergren, Åsa, and Hanna Wikström (2014) Who is a refugee? Political subjectivity and the categorisation of Somali asylum seekers in Sweden. *Journal of Ethnic and Migration Studies* 40 (4): 566–583.
11 Jubany, Olga (2011) Constructing truths in a culture of disbelief: Understanding asylum screening from within. *International Sociology* 26 (1): 74–94. Souter, James (2011) A culture of disbelief or denial? Critiquing refugee status determination in the United Kingdom. *Oxford Monitor of Forced Migration* 1 (1): 48–59.
12 Campbell, John R (2016) *Bureaucracy, law and dystopia in the United Kingdom's asylum system*. London: Routledge.
13 Schittenhelm, Karin and Stephanie Schneider (2017) Official standards and local knowledge in asylum procedures: Decision-making in Germany's asylum system. *Journal of Ethnic and Migration Studies* 43 (10): 1696–1713.
14 AIDA and ECRE (2019) *Asylum authorities: An overview of internal structures and available resources*. Available at: https://www.ecre.org/asylum-authorities-an-overview-of-internal-structures-and-available-resources/ [accessed 19 March 2021].
15 Can include Geneva Convention, humanitarian, temporary and subsidiary protection statuses.
16 Note that something of relevance may have changed between the first decision and the appeal. Eurostat refers to 'final' asylum decisions, for definition, see https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Category:Glossary [accessed 23 July 2024].

the appellant in the EU-27, whereas between 2017 and 2021 32% were.[17] In the light of the increasing propensity of EU Member States to refuse initial asylum claims described earlier, one interpretation of these developments is that Member States became more restrictive in granting asylum over the period but, in doing so, adhered less faithfully to asylum law, resulting in an increased role for the appeals process in correcting their errors.

International and European human rights law insists on the right of appeal because it is widely recognised that states are often susceptible to the deficiencies described.[18] Scholarship suggests that states are grudging adherents to the law surrounding refugee protection.[19] They therefore need to be held firmly accountable to their obligations. Asylum appeals are intended to achieve this by providing a check on state decisions.

Despite their significance, however, Europe's governments have no particular interest in promoting asylum appeals.[20] Asylum appeals have the potential to elongate the period of time that people who are initially found not to qualify for international protection can remain in their territories, draw on their resources, and challenge or embarrass them by demonstrating that their initial decision was wrong.

For its part, the attention that the media gives to asylum appeals is highly variable in Europe. Some countries have had extensive debates about asylum appeal processes, although these tend to be triggered when something goes wrong (e.g. a judge acts improperly[21] or an expert is found to be non-credible[22]), which can produce a skewed and partial impression of the work

17 In the UK between 2004 and 2021, almost a third of appeals were positive for the appellant, with the years 2014 to 2019 displaying the highest rates of allowed appeals as a percentage of known appeal outcomes, at 40% or more each of these years (Sturge, 2024).

18 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (APDII); Article 46 (1): The right to an effective remedy: 'Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal'. Also see Chapter 2, 'What Are Asylum Appeals?'.

19 Gammeltoft-Hansen, Thomas (2011) *Access to asylum: International refugee law and the globalisation of migration control*. Cambridge: Cambridge University Press. Moreno-Lax, Violeta (2017) *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU law*. Oxford: Oxford University Press.

20 Although most are obliged to include information on legal remedy in a language that can be reasonably understood by the asylum seeker in the government decision: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast); Article 25.

21 In July 2021 for example the German Federal Constitutional Court [*Bundesverfassungsgericht*] ruled a judge was biased against asylum seekers (Applicant v Administrative Court, No 2 BvR 890/20, 1 July 2021). See: https://www.tagesschau.de/inland/bundesverfassungsgericht-klage-befangenheit-asylrichter-101.html [accessed 16 September 2021].

22 For example, a 'country expert' in Austria was accused of making false statements in their country of origin information report. See [in German] https://www.derstandard.at/story

involved in submitting and deciding appeals. On the other hand, media reporting thrives on dramatic stories and images, which are much more likely to be found in relation to refugees' *arrival* in Europe. Images of boats capsizing off the Italian or Greek coasts and rescuers carrying children away from crashing waves arguably make for more attention-grabbing news stories than the insides of stuffy hearing rooms. The attention of the media is drawn towards the early stages of refugees' experiences, which might explain why the refugee recognition rate that is reported has often not been adjusted for the influence of appeals.[23]

Academically, there are more reasons why aspects of asylum appeals have gone relatively under-scrutinised. The law surrounding asylum in Europe is complex.[24] Rules governing the circumstances under which asylum seekers' claims can be heard and how claims should be treated have been the subject of intense legal debate and disagreement over many years.[25] Steering this debate is a major challenge that requires, above all, legal academic expertise and effort. Wrangling over legal doctrine dominates discussions of refugee claim adjudication in Europe, and it is imperative that there is a healthy debate about the development of asylum rules and procedures in these terms. There is a dominance of doctrinal legal perspectives when researching refugee status determination.

This dominance, however, means that more attention is given in research on refugee law to the 'rules of the road' as opposed to how the car is driven,[26] meaning that non-legal or socio-legal perspectives can be drowned out.[27] Asylum appeals have become 'black-boxed':[28] treated as sealed and

/2000107925766/enthobener-gutachter-mahringer-hinterliess-444-problemausweiungen [accessed 16 September 2021].

23 European Council on Refugees and Exiles (2020) *Asylum statistics in Europe: Factsheet*, page 2. Available at: https://www.ecre.org/wp-content/uploads/2020/06/Statistics-Briefing-ECRE.pdf [accessed 12 March 2021].

24 In the UK alone in 2018 for example, the Immigration Rules ran to 1133 pages, up from under 300 pages in 2008, reflecting the pace of legislative change in the area. Law Commission (2020) Simplification of the Immigration Rules. London. Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/01/6.6136_LC_Immigration-Rules-Report_FINAL_311219_WEB.pdf [accessed 11 March 2020].

25 See for example Chetail, Vincent, Philippe De Bruycker and Francesco Maiani (eds) (2016) *Reforming the Common European Asylum System: The new European refugee law*. Leiden: Brill.

26 Cameron, Hilary Evans (2018) *Refugee law's fact-finding crisis: Truth, risk, and the wrong mistake*. Cambridge: Cambridge University Press, page 5.

27 Beirens, Hanne (2018) *Cracked foundation, uncertain Future: Structural weaknesses in the Common European Asylum System*. Brussels: Migration Policy Institute, 20–21. Available at: http://aei.pitt.edu/102715/1/migration_policy.pdf [accessed 16 September 2021].

28 Tomkinson, Sule (2018) Who are you afraid of and why? Inside the black box of refugee tribunals. *Canadian Public Administration* 61 (2): 184–204. See also Kocher, Austin (2019) 'Immigration courts, judicial acceleration, and the intensification of immigration enforcement in the first year of the Trump administration.' In Kowalski, Jeremy (ed) *Reading Donald*

self-explanatory processes without unpacking the social, emotional, cultural and political dynamics that they entail.

This book is premised on the assertion that socio-legal perspectives can shed light on the happenings on the ground inside asylum appeals, such as the overlooked attitudes and experiences of the actors involved, the power asymmetries that structure their relationships, the forms of speech, humour, comportment and dialogue that characterise their interactions, the spaces and settings within which legal thinking takes place, and the influence of schedules, deadlines and targets over decision-makers. They can provide insight into the legal consciousness of participants, the interactions between legal practice and institutional routines and cultures, the uneven accessibility of law to marginalised groups, and the plural ways different authorities interpret and enact legal rules. The need to attend to the evolution and contestation of asylum rules through a doctrinal lens is clear, but academic attention should also be paid to the variable concrete interpretation and implementation of those rules, the contexts in which they are used, and the various aspects of refugee status determination that operate outside and despite the rules that exist.[29]

Statistical perspectives on asylum appeals also struggle to expose and explore these complexities. There are various statistics produced in relation to asylum appeals by Eurostat[30] and by national government administrations in Europe, which are useful in indicating the success rate on appeal, the numbers of appeals heard annually, and the types of decisions delivered (we discuss these further in the next chapter, 'What Are Asylum Appeals?'). Academic statistical analysis has gone a step further, pointing out how positive decisions seem to vary according to extra-legal factors such as judges' locations and the direction of previous decisions.[31]

While revealing, though, they leave a set of questions unanswered. How accessible are asylum appeals for people with negative first-instance decisions, including those with vulnerabilities? What assumptions about people seeking asylum imbue proceedings? How is communication constrained and enabled? What do the different roles of the various actors involved in the proceedings entail and how are they performed? How is social power distributed? The

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Trump: A parallax view of the campaign and early presidency. Cham: Palgrave Macmillan, 83–101, page 86.

29 Including 'street-level' influences, see Lipsky, Michael (2010) *Street-level bureaucracy: Dilemmas of the individual in public service*. New York: Russell Sage Foundation. See also Eule, Borrelli, Lindberg et al., 2019 who take up the concept in discussing migration and law.

30 Eurostat's data has limitations in accuracy however: in our collection of data directly from government sources, we noted that local data does not always correspond to Eurostat data. It is nevertheless a useful source for a general overview on asylum and asylum appeal statistics.

31 Chen, Daniel L, Tobias J Moskowitz and Kelly Shue (2016) Decision-making under the gambler's fallacy: Evidence from asylum judges, loan officers, and baseball umpires. *The Quarterly Journal of Economics* 131 (3): 1181–1242. Ramji-Nogales, Jaya, Andrew I Schoenholtz and Philip G. Schrag (2007) Refugee roulette: Disparities in asylum adjudication. *Stanford Law Review* 60 (2): 295–412.

emphasis in statistical work that examines refugee status determination is on the outcomes of cases – in other words, the decisions that are reached. These are obviously crucial, but the process by which the decisions are reached is also hugely important.

An Ethnographic Approach

In this book we provide an empirical examination of what happens in asylum appeals from a different perspective to that adopted by doctrinal and statistical scholarship, employing ethnographic methods. Our aims are to examine the practical, grounded challenges facing asylum appeals as an effective form of protection; the roles and experiences of various actors involved in appeals, including appellants; the different ways law is constructed, interpreted, implemented and negotiated on the ground; and to offer realistic, bottom-up suggestions for how asylum appeals might be improved at the level of concrete implementation.

Ethnographers study social practices, sites and institutions first hand, using detailed description based on in-person observations over an extended period of time. The ethnographer is committed to both conducting fieldwork and writing in distinctive ways[32] to reflect the nature of social phenomena in the most honest way that they can irrespective of any discourses, myths, expectations and assumptions associated with their field sites. We make no claims to completeness or exhaustiveness; rather ethnography is employed in this book as a way to see asylum appeal processes in a different light to how they have previously been viewed.

Ethnography requires that the researcher is in the presence of the people they study and that they reflect upon these peoples' activities in terms of what they do rather than in terms of what they say they do or are thought to do. It is capable of *giving a feel* for the practices and lived experiences involved in the processes under study. It is not an exercise in generalisation and universalism, but an exploration of nuance, exceptions, difference and specificity.

These foci are particularly valuable in a legal context because the law, including international refugee law, exists in legal doctrine as abstract and uniform[33] – often imagined or implied to be above the messiness of social and material realities. The socio-legal approach that we adopt holds that legal

32 Clifford, James and George E Marcus (eds) (1986) *Writing culture: The poetics and politics of ethnography (a School of American Research advanced seminar)*. Berkeley: University of California Press.

33 '[A] legal anthropological perspective challenges conventional, doctrinal approaches to law that present it as a concept, universal across time and space … [and] that represents a system of law that is coherent and uniform' (von Benda-Beckmann, Franz, Keebet von Benda-Beckmann and Anne Griffiths (2009) 'Introduction: The Power of Law'. In von Benda-Beckmann, Franz, Keebet von Benda-Beckmann and Anne Griffiths (eds) *The power of law in a transnational world: Anthropological enquiries*. New York: Berghahn Books, 1–31, page 3).

processes, practices and institutions 'are situated in ongoing systems, institutions, communities, states, localities [and] societies'[34]. The socio-legal study of law is built upon an ontological claim that law is a social phenomenon and that legal doctrine and actors are integral parts of society itself.[35]

Formal legal discourse also often tacitly promotes a view of legal decision-making that is autonomous from social and economic differences in litigants' and decision-makers' circumstances, or the socio-political conditions of the countries or regions within which legal decisions are being made.[36] The architecture of courts and tribunals embodies this imagined autonomy, conveying the separateness of legal matters from social influences via elaborate entrances, rituals, symbolism, and cordoned-off spaces within which only elite legal figures can circulate.[37] The language used by legal professionals is also different from lay languages, once again marking out the law as separate and distinct.

The cupped hands holding the paperchain of refugees in the European Commission's image in Figure 1.1 are also 'separate' and disembodied, belonging neither to a face nor a body. In reality though, refugee law and policy are implemented by real people doing specific jobs whilst subject to the pressures of performance measures and time constraints, and susceptible to their own habits of thought.

Ethnographers explore the concrete unfolding of events,[38] attending to real life, context, on-the-ground happenings, and lived experience. The focus is consequently firmly on practice and practical phenomena such as the constellations of movements, things, speech, documents, bodies, furniture, expressions, symbols and forms of dress that bring legal processes into being. Our experiences of accessing (and being unable to access) asylum appeals in person reveals important differences in these practical aspects of law, which we discuss further in both Chapter 2, 'What Are Asylum Appeals?' and Chapter 3, 'Approaching Asylum Appeals'.

34 Menkel-Meadow, Carrie (2019) 'Uses and abuses of socio-legal studies.' In Creutzfeldt, Naomi, Marc Mason and Kirsten McConnachie (eds) *Routledge handbook of socio-legal theory and methods*. Abingdon: Routledge, 35–57, page 36.

35 Sarat, Austin (2004) 'Vitality amidst fragmentation: On the emergence of postrealist law and society scholarship.' In Sarat, Austin (ed) *The Blackwell companion to law and society*. Malden: Blackwell, 1–11.

36 See for example The Bangalore principles of judicial conduct (2002). Available at: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf [accessed 24 April 2024]; and the Universal Declaration of Human Rights. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights [accessed 24 April 2024].

37 Mulcahy, Linda (2010) *Legal architecture: Justice, due process and the place of law*. London: Routledge. Rock, Paul Elliott (1993) *The social world of an English Crown Court: Witness and professionals in the Crown Court Centre at Wood Gree*n. Oxford: Clarendon Press.

38 Darian-Smith, Eve (2004) 'Ethnographies of law'. In Sarat, Austin (ed) *The Blackwell companion to law and society*. Malden: Blackwell, 545–568, page 555.

One type of legal ethnography is courtroom ethnography, which uses immersion[39] (i.e. being there, in the flesh) in legal hearings, trials, and tribunals to observe legal events. The intensity of legal hearings may be obscured by legislation and formal court records that display little more than the eventual outcome of the court process. It reveals itself, however, to the legal ethnographer who pays attention to 'posture, glances, timbre of voice, silences, flushes, crying, outbursts of laughter, and the smell of sweat' during hearings.[40] Body posture, yawns, coughs, jokes, the manner of questions, the uncomfortableness and ease of the participants, and the fluency of their communication can each tell us something about refugee status determination that is hard to convey either in legal terms or in terms of the categorical outcomes of the process.

We draw on ethnographic observations of asylum appeal hearings in five European countries (Austria, Belgium, France, Germany and the UK) and interviews with experts[41] in the UK, Greece and Italy. The majority of these were conducted as part of the ASYFAIR project, a European Research Council project that ran from 2016 to 2022.[42] Our ethnography has paid particular attention to the *materiality* and *spatiality* of legal practice. We hold that the abstract categories of law can be rendered more concrete by focussing on the tangible material manifestations of legal practice *in a particular space and time*. In the following chapters the site of the hearing room provides a means to 'cut into' legal practice in a way that is conceptually held together not by the logics of law itself but by the demands and specificities of its enactment in a specific place. In other words, we follow Antonia Layard's suggestion that a 'grounded perspective beginning in the site or event helps us better understand how spatial and legal practices co-produce'.[43] Of equal importance, we argue, are the temporalities of asylum decision-making in courtrooms. Such temporalities include the time taken to wait for an appeal and the speed of the appeal itself as actors present their cases.[44]

39 '[I]mmersement yields what is often unlooked for: it yields precisely the facility and thus a method for "finding" the unlooked-for'. Strathern, Marilyn (1999) *Property, substance, and effect: Anthropological essays on persons and things*. London: Athlone Press, page 3.

40 Dahlberg, Leif. (2009) Emotional tropes in the courtroom: On representation of affect and emotion in legal court proceedings. *Law and Humanities* 3 (2): 175–205, page 184.

41 We include former appellants as experts by experience.

42 Grant number StG-2015_677917.

43 Layard, Antonia (2019) 'Reading law spatially'. In Creutzfeldt, Naomi, Marc Mason and Kirsten McConnachie (eds) *Routledge handbook of socio-legal theory and methods*. Abingdon: Routledge, 232–243, page 232.

44 Conducting legal and court ethnographies is not unproblematic though. Perhaps most fundamentally, there are profound differences in perspective between ethnographic and legal ways of thinking. 'Modern law … is resistant to ethnographic inquiry' Eve Darian-Smith (2004: 554) writes, because it is assumed to be a body of rules that is not subject to 'context, intuition and experience'. As a result 'academic legal scholars and lawyers tend to quickly dismiss the relevance of legal ethnography, which, implicitly and explicitly, challenges the very legitimacy of their reified legal world' (ibid.: 556). Law does not welcome critical inquiry into its limi-

Since our focus is on law in concrete places and times, we draw on legal geographical insights. The practice of law requires that it must be ordered to occur in a sequence, to adopt a particular speed, to be publicly presented and appropriately accessible. Law in real life has edges and boundaries.[45] It involves the collection of people, the deployment of architectural forms, and the assembling of evidence and paperwork, as well as the deliberate exclusion of a range of factors to focus on legal issues. Although law is frequently talked about 'as if space does not matter',[46] legal geographical perspectives are a way to reveal the embodied, material and relational realities of legal processes and institutions.[47]

Legal Fragility

We argue that the protection that is available in practice through asylum appeals is extremely fragile. We take legal fragility to refer to the ease by which the stated or intended functioning and purposes of the law can be knocked off course by social, political, psychological, linguistic, contextual and economic factors. Our analysis finds that despite the rhetoric and symbolism of the separateness and solidity of law, refugee law never fully rises above real-life interference.

Legal fragility is experienced by both the appellants and the professionals involved in refugee status determination. Appellants who embark upon the process of appealing their initial asylum decision put their case to a legal professional (frequently a judge) who considers it and returns a decision to them. During this process, as we shall see, asylum appeals test the communicative ability, cognitive capacity and mental robustness of appellants. What transpires is that, for asylum appeal processes to be effective and to operate fairly, they rely upon appellants' abilities in these various respects. Contrary to the European Commission's image of the cupped hands in which refugees are

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tations, ambiguities and contradictions, she suggests. It depends upon powerful sustaining myths about its potency and sovereignty, which are discredited by acknowledging the deep fallibility of legal process and its contingency on, and imbrication with, social, material and spatiotemporal conditions.

45 See Jeffrey, Alex (2019) *The edge of law: Legal geographies of a war crimes court*. Cambridge: Cambridge University Press.

46 Bartel, Robyn, Nicole Graham, Sue Jackson, Jason Hugh Prior, Daniel Francis Robinson, Meg Sherval and Stewart Williams (2013) Legal Geography: An Australian perspective. *Geographical Research* 51 (4): 339–353, page 339.

47 'By reading the legal in terms of the spatial and the spatial in terms of the legal, our understandings of both "space" and "law" may be changed'. Delaney, David, Richard T Ford and Nicholas Blomley (2003) 'Preface: Where is law?' In Blomley, Nicholas, David Delaney and Richard T Ford (eds) *The legal geographies reader*. Oxford: Blackwell, xiii–xxi, page xvii. Also see Economides, Kim, Mark Blacksell and Charles Watkins (1986) The spatial analysis of legal systems: Towards a geography of law. *Journal of Law and Society* 13 (2): 161–182.

portrayed as passive recipients of protection, we show that asylum appellants are indispensable, active partners in the making of refugee law itself.

For their part, judges within the asylum appeal courts are involved in deciding upon asylum appeals in accordance with the rules set out in national and international law. But they are also engaged at a day-to-day level in micro challenges over the conditions within which their decisions take place. They typically must guard against having too many decisions to make, against being expected to make decisions without enough information, against being influenced by information that is not true, or only partially true, and against the vicissitudes of their own personal predilections and biases.

In other words, judges, and other legal professionals involved in asylum appeals, are vulnerable to misinformation, the incompetence of the other professionals around them, the limits of their own capabilities, and the facilities and technologies with which they work. Furthermore, similarly to appellants, decision-makers who face deficiencies in any of these aspects must struggle to correct them and manage them. Their success in doing so is a function not only of the law as it is written but of their personal qualities of diligence, tenacity and professionalism as well as the particular ways they understand what justice is and how it should be achieved. The idiosyncratic styles of decision-makers therefore also emerge as important sources of variability in the implementation of refugee law.

In summary, our analysis reveals the considerable contingency, precariousness and frailty of legal protection for refugees in Europe. Refugee law, as with much law in general, is in constant need of propping up. It exists so abstractly – as rules and principles – that a great deal depends upon how it is understood, accessed, interpreted, implemented and performed in context by the particular individuals who invoke and enact it. These in turn depend upon the economic climate of the receiving country and the situation of the appellant, the cultural context of the claim, the political position of national governments, and specific policies such as on the time-limits and levels of provision of legal assistance that governments feel are appropriate for asylum appeals, as well as the working conditions of the legal professionals involved. What is more, access depends crucially on the trust that appellants place in the system as well as the effectiveness with which they can communicate within legal processes. The extent to which applicants can communicate is, in turn, influenced by a wide range of factors including appellants' former experiences of legal systems and state authorities, their fluency in the language of the court and the social relations between them and any interpreters or representatives involved.

While we express concern about the fragility of asylum appeal processes in Europe, this is not to suggest that nothing can be done to give refugee law on the ground more robustness. Throughout our observations we observed a wide range of instances in which judges, interpreters, lawyers and appellants made thoughtful and constructive adjustments when things went wrong or when appellants found the process difficult. Legal professionals frequently took account of appellants' circumstances and needs, often despite

bureaucratic pressures to get work done quickly. At a more structural level, we also observed different practical ways of doing things across the countries involved in our study, giving us a unique comparative perspective on the day-to-day running of asylum appeals. We recognise the reality of the diversity of legal systems, but this comparative perspective allows us to identify areas in which the transplantation of practical ideas and approaches between and beyond our various research sites could be useful.

In what follows, we therefore include three short policy and practice compendia. The pursuit of social change has been a mainstay of the activities of socio-legal scholarship since its inception.[48] We want to make it clear, though, that these compendia do not contain recommendations as such. To make general recommendations would be to assume that there is a universally right and appropriate way to conduct an asylum appeal hearing in every national and regional context, and in every case. If our observations have taught us anything, it is that such sweeping approaches to the implementation of refugee law are too blunt. We want to respect the autonomy and discretion of the judges, interpreters, legal representatives, appellants and others who are involved in specific appeals, and we therefore stop short of making recommendations per se. What we include in our compendia should be understood not as edicts, then, but rather as lists or menus from which these situated actors can select any promising suggestions that they feel would improve the policy and practice that prevails in their particular contexts. We present these suggestions in the form of three short chapters (see Policy and Practice Compendia) to make them easy to find and quick to read if time is short.

Plan of the Book

In terms of the scope of the book, we did not study the ways national authorities and courts dealt with unaccompanied asylum-seeking children. We also confined our attention to the first appeal, meaning that subsequent, higher-level appeals were also out of scope. We also want to make clear that the book is not a legal analysis in the classical sense, even though legal processes are the topic, because the focus is on the socio-spatial constitution and enactment of legal processes rather than their written content.

We are nevertheless aware that the book is fairly long, reflecting the richness of the data we collected. We have therefore provided detailed chapter headings, subheadings and abstracts, and included much contextual information in footnotes, such as links to existing literature, to allow the reader the

48 Creutzfeldt, Naomi, Marc Mason and Kirsten McConnachie (2019) 'Socio-legal theory and methods: Introduction.' In Creutzfeldt, Naomi, Marc Mason and Kirsten McConnachie (eds) *Routledge handbook of socio-legal theory and methods.* Abingdon: Routledge, 3–8. Also see Sarat, 2004; Vago, Steven (ed) (2015*) Law and society* (10th edition). New York: Routledge, page 26.

opportunity to read non-linearly or at speed if desired, whilst also having the opportunity to delve into the footnotes at points of particular interest.

In the next chapter we address what asylum appeals are in more detail and set out the legal context surrounding them. In Chapter 3 ('Approaching Asylum Appeals') we outline our methodology, describing our sampling, the ethical considerations of our research and our own position in relation to it. The rest of the book is then divided into three parts: 'Accessing Protection in Asylum Appeals' (Part II), which deals with issues of practical accessibility to asylum appeal hearings, 'Participating in Asylum Appeals' (Part III), which concerns the ways participants take part, or struggle to take part, in proceedings, and 'Procedure' (Part IV), which focusses on the practical dilemmas and challenges of conducting appeals.

The period before an asylum appeal can be crucial. Some appellants are able to prepare for their hearings, recover from their experiences, solicit good advice and collect evidence. Others, however, are unable to carry out these tasks and find the period of waiting stressful and frustrating. Prolonged waiting can put pressure on their mental health and can also cause them to forget details of their testimony. In Chapter 4 ('Before the Hearing'), we explore the uneven experiences of waiting for hearings as recounted by our asylum appellant interviewees and highlight the diversity of responses of judges when faced with appellants who found the waiting period difficult.

Chapter 5 ('Arriving at Court') examines the practical experiences and challenges of arriving at appeal hearings, highlighting how a series of seemingly mundane factors such as journeys to court, court signage and layout, and interactions with ushers, clerks, secretaries and security personnel can influence appellants' propensities to engage with and trust the legal system. While judges are rightly seen as central to the experience appellants have of hearings, they are one of the last, if not *the* last, of the actors involved on the day of their hearing that appellants actually meet. We reflect on what some courts and staff did that raised or lowered the levels of disorientation and intimidation of appellants on arrival.

In Chapter 6 ('Assembling Appeals') we turn our attention to the practical challenge of gathering together all the components and participants necessary to stage appeal hearings. Inspired by the social sciences' attention to the processes of assembling, we conceive of asylum appeals as feats of bodily and material assembly – of people, of information, and of expertise – which requires significant resources for its accomplishment. We examine the difficulty of gathering evidence, for example, and reflect on different countries' approaches to the regulation of evidence. We then consider the frequency of 'no-shows' during appeals, meaning the non-arrival of appellants, legal representatives for the government and legal representatives for the state, which was common in our sample countries. We relate these no-shows to a series of causes including misunderstandings and political-economic pressures and express concern at the 'thinned out' sort of justice they can produce.

Part III is concerned with how appellants and others participated in the appeals we observed. Much of the fieldwork for this book was conducted

following a marked upturn in asylum applications to European countries in 2015 and 2016, which was accompanied by moral panic about Europe's capacity to host refugees. The political context meant that governments and policymakers were keen to reduce their expenditure on the asylum system, including refugee status determination procedures. Chapter 7 ('The Politics of Speed') reviews the various consequent policy changes in our case countries that were designed to streamline asylum appeal processes. It then examines the way speediness affects hearings, arguing that key characteristics of appeals – from the interaction within them, to the way they begin and end – were impoverished by haste.

Chapter 8 ('Barriers to Communication') begins by examining how variable the quality of interpretation was in hearings. It goes on to identify a series of further challenges to effective communication that we observed in hearings, including unruly children, restless members of the public, and loudness from the corridors. Countries and judges differed widely in response to these challenges, giving us plenty of scope to identify ideas for possible policy and practice improvements.

Part IV addresses some of the challenges of adjudicating asylum appeals. Chapter 9 ('Mistakes and Incompetence') reflects on how mistakes made earlier in the process shaped the work of those involved in deciding upon appeals. Some of the typical mistakes uncovered by the courts were administrative, typographical or related to translation rather than to the substance of the claim. These types of mistakes throw into question the levels of investment in linguistic, clerical and legal competence at the initial stages of refugee-status decision-making and produced severe challenges later on for legal representatives, appellants and judges alike. The chapter warns of national governments offloading responsibility onto courts and judges at the appeal stage, especially during periods when higher-than-usual numbers of asylum claims are being made. Mistakes are commonly thought of as unintended aberrations, but we also reflect on the function that incompetence performs in border control as a form of deterrence.

In Chapter 10 ('Judicial Questioning') we reflect on questioning during the hearing, which is normally conducted by the judge and legal representatives. We sketch out various types and tactics of questioning and then reflect on what can help to make questioning effective in asylum appeals. We then examine instances of problematic assumptions that characterised the verbalised reasoning of some of the judges we observed. When judges expressed scepticism about appellants' accounts, they sometimes referenced European, white, mainstream Christian and heteronormative standards of what was 'normal' and hence what could be considered unusual or improbable. By identifying these instances, the chapter draws attention to the importance of reflecting critically on the yardsticks that judges and others employ to define normalcy, deviance and likelihood when making credibility assessments.

Chapter 11 ('Judicial Styles') explores what we call the 'style' of the judges we observed, meaning their observable manner, including their apparent

emotionality, transparency and tactics, the nature of their interactions, their reactions to events in the hearing as it proceeds, and the extent of their attempts to direct proceedings. We rely on judicial demeanour, including the speech, voice, body language and facial expressions of judges, to help us detect different styles. On this basis we outline four 'types' of stylistic approach to conducting hearings, which we characterise as 'inside-out', 'schoolmaster- and schoolmistress-like', 'detached' and 'simmering', each entailing different combinations of emotionality and orchestration. Taken together, they illustrate the variability of judicial approaches to asylum appeals.

Throughout the book, we use social theory to help us elucidate our points and make some of our arguments. Our intention is not to make a single, reified contribution to the social theory of law, though, or to propound a particular theoretical position. Rather, social theory proves to be an expedient way to illustrate, arrange and bring out the importance of our empirical findings. In other words, our employment of social theory develops inductively alongside our empirical insights as the book progresses.[49] In the chapters that follow we draw on theorisations of time and space, ignorance, atmosphere and absence–presence to develop an appreciation of the causes, unusualness, remarkableness, outrageousness, social significance and sometimes the downright absurdity of asylum appeal processes. We also engage with a series of concepts from refugee law and refugee studies, including credibility, trust and equal access. In taking this approach, we develop not only a perspective on the minutiae of asylum appeals but also a series of insights into the problematics of refugee protection and legal processes generally.

49 See Nelken, David (2017) *Beyond law in context: Developing a sociological understanding of law*. London and New York: Routledge.

2 What Are Asylum Appeals?

The question in the chapter's title is a deceptively simple one that turns out to be rather complex. One way to answer it is to consider asylum appeals in their abstract, doctrinal sense. We begin this chapter by locating asylum appeals in international law and considering the interplay between international, European and domestic rules as they relate to appeals. In line with the principles we outlined in the introduction, however, our approach to this question requires going beyond written law. We therefore move on to a more socio-legal account of asylum appeals, describing their complexity, the divergent rates of protection they give rise to, and their contextual characteristics as they take place in the countries we studied. This account of the 'legal' in its everyday setting – including the typical participants and the layout of hearing events – provides the foundation for unpacking the 'black box' of asylum appeals in Europe in the rest of the book.

Given the existence of a "Common European Asylum System", a newcomer to the field could be forgiven for thinking that asylum appeals across Europe look the same. In fact they vary significantly, and so we also set out some of the main procedural and practical forms of diversity they display as the chapter progresses.

Locating Appeals in International and European Law

While the right to seek asylum, and the definition of who qualifies as a refugee, are relatively well defined in law, determination procedures – including rights to appeal negative decisions – are not as clearly delineated.

The right to seek asylum is recognised under Article 14(1) of the Universal Declaration of Human Rights (UDHR)[1] which, although not legally binding,

1 UDHR Article 14(1) 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'. Modified by Article 14(2) 'This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights [accessed 24 April 2024].

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has been influential in the development of refugee and human rights law since its inception. The United Nations Convention Relating to the Status of the Refugee[2] (commonly known at the '1951 Refugee Convention' or simply the 'Refugee Convention') is the main international legal document relating to refugee protection and, at the time of writing, 143 countries had signed both the Refugee Convention and its Protocol,[3] including all members of the EU and almost all members of the Council of Europe.[4] To be recognised as a refugee under the terms of the Refugee Convention, a person must prove they fulfil the definition set out in Article 1(A)2, as modified by the 1967 Protocol, namely that they are someone who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [sic] nationality and is unable or, owing to such fear, is unwilling to avail himself [sic] of the protection of that country.

The question at stake in determining claims for international protection is whether a person fulfils the definition of someone in need of such protection.[5]

The cornerstone of the Refugee Convention is often said to be the Article 33 prohibition on '*refoulement*'. Under this provision, states are prohibited from sending a person (back) to a country where they could either be persecuted or suffer torture or other cruel, inhumane or degrading treatment. It is

2 See https://www.unhcr.org/uk/3b66c2aa10 for full text [accessed 24 April 2024].

3 The 1967 Protocol Relating to the Status of Refugees removed the restrictions in the 1951 convention, which limited refugee status to those who fled Europe 'as a result of events occurring before 1 January 1951'.

4 With the exception of Andorra (see https://www.refworld.org/country,COI,UNHCR,COUNTRYREP,AND,,553a24cf4,0.html [accessed 07 October 2021]) and San Marino (see https://www.refworld.org/pdfid/5dee6f8f7.pdf [accessed 07 October 2021]).

5 This definition is a product of its time and reflects concerns of the international community in the aftermath of the Second World War, thus excluding several of the key drivers of forced migration today, for example, climate change. Some regional treaties provide more expansive definitions of who qualifies as a refugee. For example the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, and the 1984 Cartagena Declaration on Refugees.

a principle firmly established in international,[6] European[7] and EU[8] law. The *non-refoulement* principle, combined with due process guarantees under the UN International Covenant on Civil and Political Rights (ICCPR), lays the foundations for locating a right to appeal in international law.[9]

International human rights law is clear on the need for some sort of appeal in the context of refugee status determination. The Universal Declaration of Human Rights stipulates that 'everyone' has recourse to 'competent national tribunals' if their fundamental rights are in danger of violation[10]; Article 47 of the Charter of Fundamental Rights of the European Union[11] establishes the right to an effective remedy and a fair trial; and the European Convention on

6 Refugee Convention Article 33; Article 3 of *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT). Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1). Available at: https://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf [accessed 24 April 2024]; Article 7 of *International Covenant on Civil and Political Rights* (ICCPR). Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49. Available at: https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf [accessed 24 April 2024]. For a comprehensive discussion of the relevant laws see International Association of Refugee Law Judges and European Asylum Support Office [IARMJ] (2016) *An introduction to the Common European Asylum System for courts and tribunals: A judicial analysis.* Available at: https://www.iarmj.org/iarlj-documents/general/Introduction_to_the_CEAS_FINAL.pdf [accessed 24 April 2024].

7 Article 3, *Convention for the Protection of Human Rights and Fundamental Freedoms.* Signed by all 47 Member States of the Council of Europe, drafted in 1950 and entry into force on 3 September 1953. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed 19 March 2021].

8 Article 4, Charter of Fundamental Rights of the European Union (CFR). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT [accessed 24 April 2024]; also Article 15, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), henceforth QDII. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095 [accessed 24 April 2024].

9 International Covenant on Civil and Political Rights (ICCPR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights [accessed 20 April 2024].

10 UDHR Article 8: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.

11 CFR Article 47 also establishes that everyone exercising their right to legal remedy should have 'a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'. Furthermore, 'everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'.

Human Rights (ECHR) also sets out the right to an effective remedy.[12] With respect to the Refugee Convention in particular, it can be argued that a basic precondition for the exercise of rights under the Convention is the existence of fair and adequate procedures, particularly in light of the potentially grave consequences of getting asylum decisions wrong.[13] Thus, while there is no explicit right to appeal a negative initial decision under the Convention, for the effective protection of rights and enforcement of obligations therein – notably the prohibition on *refoulement* – states must incorporate a layer of review, or appeal, into their asylum procedures.

Beyond stipulating that some sort of appeal process should exist, though, it largely falls to other pieces of legislation and other actors to determine the legal parameters of the appeal process, although guidelines exist that help to define the principles of good practice that should underpin asylum appeal hearings. The office of the United Nations High Commissioner for Refugees (UNHCR),[14] as the international body tasked with supervising implementation of the Refugee Convention, has set out relatively detailed guidelines when it comes to determination procedures, including appeal standards.[15] Aside from reiterating the importance of suspensive (see below) appeal procedures, the UNHCR guidelines state that the appellate authority should be independent of the initial decision-making body, that access to interpreters should be 'prompt' and that asylum seekers should have access to information about procedures, as well as legal advice.[16] The UNHCR also stipulates that the remedy should be available in practice as well as in law, meaning that, for example, the appellant should have time to prepare for the appeal after filing for it, and that they should be able to access the appeal process even if they are detained. They also suggest that a face-to-face interview or hearing 'should generally be provided to give the asylum-seeker an opportunity to present and be questioned about the evidence presented at the appeal stage …'[17] and that, if not provided automatically, an appellant should be able to request an oral hearing.[18] We discuss the practical advantages and challenges of in-person asylum appeals in Chapter 6 ('Assembling Appeals').

12 For a detailed discussion of the right to an effective remedy under EU Law see Reneman, Marcelle (2014) *EU asylum procedures and the right to an effective remedy*. Oxford: Bloomsbury Publishing.

13 ibid.

14 UNHCR (2017) *A guide to international refugee protection and building state asylum systems*. Available at: https://www.unhcr.org/3d4aba564.pdf, page 179 [accessed 24 April 2024].

15 UNHCR (2019) *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*. Available at: https://www.unhcr.org/en-au/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html [accessed 24 April 2024].

16 Without charge in case of need, if free legal aid is available to nationals similarly situated (UNHCR, 2017: 179).

17 UNHCR, 2017: 179.

18 UNHCR (2017) suggests that a face-to-face hearing is less essential if the application is presumed manifestly unfounded or clearly abusive and a face-to-face interview by a fully quali-

Asylum Appeals and the Common European Asylum System

European law fills in many of the gaps left by international law when it comes to specifying procedural standards for refugee status determination, including appeal requirements.

The Common European Asylum System (CEAS) was envisaged in the 1999 Tampere Conclusions. The purpose of the CEAS was to be a 'full and inclusive' application of the Refugee Convention and entail eventual harmonisation of asylum systems across Member States. During phase one, between 2000 and 2005, the focus lay on enacting legislation concerned with minimum standards. However, since 2009, the European Union has been formally working towards establishing common, not simply minimum, standards of international protection, since the Treaty of Lisbon came into force.[19] Key instruments of the second phase of the CEAS include: The Qualification Directive (recast), 2011;[20] The Reception Conditions Directive (recast), 2013;[21] and The Asylum Procedures Directive (recast), 2013.[22] It is in the latter that we find, under Chapter V, requirements regarding appeals procedures and the right to an effective remedy for asylum applicants.

Increasing Complexity

Despite these provisions , attempts at harmonisation of asylum systems across the EU have largely failed. One reason for this is that the systems used to decide whether someone qualifies for international protection in Europe have increased in complexity over the past few decades along two primary axes: i) the forms of status awarded on the basis of international protection and

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fied official has already taken place. However, if new evidence has come to light or if there are outstanding concerns about credibility findings at the first instance, the fairness of the initial process, or that evidence was not fully considered during the first-instance process then UNHCR recommends a face-to-face appeal.

19 European Union (EU), Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01. Available at: https://www.refworld.org/docid/476258d32.html [accessed 24 April 2024]. The European Parliament writes that 'The Treaty of Lisbon, which entered into force in December 2009, changed the situation by transforming the measures on asylum from establishing minimum standards into creating a common system comprising a uniform status and uniform procedures'. European Parliament (2021) *Asylum Policy*. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy [accessed 24 April 24]

20 QDII.

21 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), henceforth RCDII. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033 [accessed 24 April 2024].

22 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), henceforth APDII. Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032 [accessed 24 April 2024].

Refugee Protection	Subsidiary Protection	Other (national) forms of protection
• Definition as per 1951 Refugee Convention	• Definition as per EU Council Directive 2004/83/EC	• e.g. Humanitarian Protection in Italy and Austria • e.g. Deportation Ban in Germany

Figure 2.1 Forms of Protection in the EU (chart by Nicole Hoellerer)

ii) the procedures for making status determinations. We will now discuss both forms of complexity.

First, in terms of the proliferation of the forms of status granted, Member States are free to offer more favourable standards for refugee protection than those laid down in EU law, as long as their provision is compatible with EU law, and they may have different interpretations of international protection definitions. What is more, in cases where a person seeking international protection does not merit refugee protection, Member States must also consider whether they should be awarded subsidiary protection. Subsidiary protection should be awarded to:

> a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 [death penalty or execution; torture or inhuman or degrading treatment or punishment; serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict], and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.[23]

As Figure 2.1 shows, next to the harmonised refugee and subsidiary forms of protection, Member States may also have their own, non-harmonised forms of protection for asylum seekers which are not part of EU Directives, so long as they are compatible with the Qualification Directive (QDII),[24] such as temporary and humanitarian statuses which have different requirements, sometimes

23 QDII Article 2(f).

24 QDII (15): 'Those third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of this Directive.'

specific to the receiving country.[25] According to a study by the European Migration Network (EMN),[26] there are more than 60 national protection statuses across the EU and Norway (the UK was included in the EU at the time of their data collection), which often preceded the EU's drive towards harmonisation.[27] These statuses are sometimes collectively called 'humanitarian protection' or 'non-harmonised statuses'.[28] As the EMN states:

> National protection statuses cater for a wide variety of needs and situations, exceeding the grounds for international protection under the EU acquis. These range from serious health conditions, to humanitarian and non-refoulement principles, to environmental disasters in the country of origin and the interest of a minor to remain on the territory of a State.[29]

EU states have considerable discretion over the exact criteria for attaining these statuses, but in most cases they offer less favourable conditions than the harmonised, refugee and subsidiary protection statuses cited above (e.g. shorter residence permits, restrictions on family reunion, access to labour market, education and benefits, etc.).[30]

25 QDII Article 3.

26 EMN (2019) *Comparative overview of national protection statuses in the EU and Norway: EMN Synthesis Report for the EMN Study 2019.* (May 2020). Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/emn_synthesis_report_nat_prot_statuses_final_02062020_0.pdf [accessed 23 March 2021]. Also see EMN (2010) *The different national practices concerning granting of non-EU harmonised protection statuses.* (December 2010). Available at: https://www.refworld.org/docid/51b05e734.html [accessed 05 November 2021]. Also see ECRE (2009) *Complementary protection in Europe*. Available at: https://www.refworld.org/pdfid/4a72c9a72.pdf [accessed 23 March 2021], although details may be outdated.

27 EMN (2019: 41) notes that their report is limited insofar as not all EU Member States participated in the study, and that protection for 'victims of trafficking or other serious crimes, for family reasons and stateless persons' are no longer included in their study.

28 In Germany, there is no 'humanitarian protection', but a national ban on deportation for persons who may not be returned if '(a) return to the destination country constitutes a breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), or (b) a considerable concrete danger to life, limb or liberty exists in that country'. From https://www.bamf.de/EN/Themen/AsylFluechtlingsschutz/AblaufAsylverfahrens/Schutzformen/Abschiebeverbote/abschiebeverbote-node.html [accessed 07 October 2021].

29 ibid.: 4. EMN classifies non-harmonised statuses as e.g. collective protection; protections based on 'general' humanitarian grounds, exceptional circumstances, medical reasons, non-refoulement principles; protection for victims of climate change and natural disasters; protection for minors, and protections for special programmes such as resettlement. For a full list of non-harmonised protection statuses and their criteria, see EMN, 2019: 5–7; for a list of statuses per Member State, see ibid.: 11–12.

30 ibid.: 4.

The variety of forms of protection within the EU demonstrates that asylum protection is splintered and complicated.[31] It can also be dependent on political developments in EU Member States. For example, Italy had a humanitarian form of protection which was discontinued in 2018 when the right-wing government introduced restrictive legal reforms.[32]

Even harmonised forms of protection are not necessarily the same across the EU. For example, despite the EU Qualification Directive (QDII) stating that '… beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive',[33] Germany has reduced the right to family reunification for those who received subsidiary protection, while those with refugee status have a privileged right to family reunification under German law.[34] During our fieldwork it was therefore common for us to observe so-called 'upgrade claims' at German courts[35] in which individuals who have received subsidiary protection or a deportation ban filed a court appeal in order to gain refugee protection and be entitled to privileged family reunification.

The second source of increasing complexity is the fact that the procedures used to decide upon claims for international protection have also proliferated.

31 The messiness of asylum under the EU is discussed by Vincent Chetail, for example, who identifies the CEAS as 'halfway between a bric-à-brac and a true system'. (Chetail, Vincent (2016) 'The Common European Asylum System: Bric-à-brac or system?. In Chetail, Vincent, Philippe De Bruycker and Francesco Maiani (eds) (2016) *Reforming the Common European Asylum System: The new European refugee law*. Leiden: Brill, 3–38: 36). For more on the complexity of Europe's asylum system: Byrne, Rosemary, Gregor Noll and Jens Vedsted-Hansen (2020) Understanding the crisis of refugee law: Legal scholarship and the EU asylum system. *Leiden Journal of International Law*, 33 (4): 871–892; Bauloz, Céline, Meltem Ineli-Ciger, Sarah Singer and Vladislava Stoyanova (eds.) (2015) *Seeking asylum in the European Union: Selected protection issues raised by the second phase of the Common European Asylum System*. Leiden: Brill.

32 Vianelli, Lorenzo, Nick Gill and Nicole Hoellerer (2021) Waiting as probation: Selecting self-disciplining asylum seekers. *Journal of Ethnic and Migration Studies* 48 (5): 1013–1032. Vianelli, Lorenzo (2019) Warehousing asylum seekers: Salvini's attempt to dismantle the Italian reception system. *Border Criminologies*. Available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/04/warehousing [accessed 10 October 2021].

33 QDII (39).

34 From 2016 to August 2018, family reunification for those with subsidiary protection in Germany was completely suspended. Thereafter, family reunification has been allowed again, but is limited to 1,000 persons per month (non-transferable), and is contingent on humanitarian reasons (as of the time of drafting of this work). See https://www.bamf.de/EN/Themen/AsylFluechtlingsschutz/FamilienasylFamiliennachzug/familienasylfamiliennachzug-node.html [accessed 23 March 2021].

35 For a discussion of upgrade claims see Feneberg, Valentin, Nick Gill, Nicole IJ Hoellerer and Laura Scheinert (2022) 'It's not what you know, it's how you use it': The application of country of origin information in judicial refugee status determination decisions – A case study of Germany. *International Journal of Refugee Law* 34 (2): 241–267.

Aside from the 'regular' procedure for deciding claims, other procedures include Dublin procedures[36] (as per the Dublin-III regulation),[37] admissibility procedures, border and airport procedures, accelerated or fast-track procedures and family procedures. Procedures may also be different (for example, faster) in detention.[38] Even within the regular procedure, there may be prioritised or fast-tracked examinations and processing such as for vulnerable applicants and applicants from specific countries of origin. Different tracks also have different deadlines for filing an appeal, as well as different rules concerning the suspensive effect (see below) of asylum appeals (see Table 2.1).

The Procedures Directive of the Common European Asylum System (APDII) sets out the responsibilities of states to provide an 'effective remedy', including that they should inform asylum seekers of the opportunity they have to challenge negative initial decisions.[39] This opportunity is still available where a claim has been considered inadmissible or unfounded.[40] It makes clear that appellants should normally have free legal assistance and representation at appeal (although it also leaves open the possibility that states can limit this right in various respects[41]). The remedy should also provide for 'a full and *ex nunc* examination of both facts and points of law'.[42] Although there can be deadlines on the opportunity to appeal, 'the time limits shall not render such exercise impossible or excessively difficult'.[43] What is more, a country should only decide that an applicant has lost the right to remain in their territory if the appeal process has been accompanied by the necessary interpretation and legal assistance.[44]

36 The Dublin Regulations determine which EU Member State is responsible for processing an asylum claim. See Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:en:PDF [accessed 24 April 2024].

37 E.g. in Germany the Dublin examination always precedes any other assessment, in order to determine if the applicant is the responsibility of the German state.

38 For insight into the different procedures in EU countries, see ECRE's country reports. Available at: https://asylumineurope.org/ [accessed 24 April 2024].

39 APDII Article 11 (2) 'information on how to challenge a negative decision is given in writing'.

40 See APDII Article 46 (especially 46(1)–(4))

41 For example, states may limit the provision of access to free legal advice and representation if they deem the application to not have a tangible prospect of success, if they find that the appellant could pay for the legal assistance themselves, if the appellant has already passed the first instance appeal, and if the appellant is outside the country in which asylum is claimed (see especially APDII Articles 20–23,).

42 APDII 46(3). *Ex nunc* is a Latin phrase meaning 'from now on'. It is used as a legal term to signify that something is valid only for the future and not the past. The opposite is *ex tunc*.

43 APDII Article 46(4).

44 APDII Article 46(7).

Table 2.1 Deadlines for Appealing [table by Nicole Hoellerer]. Deadlines are normally counted from the day the asylum seeker has been notified of the government's decision on their asylum application. From various AIDA country reports. Available at: https://asylumineurope.org/wp-content/uploads/2020/03/report-download_aida_uk_2019update.pdf [accessed 24 March 2021].

Country	*Deadlines in days, unless otherwise stated (as of March 2021)*								
	General	*Unfounded*[a]	*Inadmissible*	*Dublin*	*Fast track / Accelerated Procedure*	*In detention*	*Border Procedure*	*Withdrawal/ Cessation*	*Suspensive Effect*
Austria	30						7		✓
		30	14	14	7 - 30	6 wks		14	×
Belgium	30	10	10		10	10	10		✓
				30					×
France	30[b]			15		48 hrs	48 hrs	30	✓
		7	30		30				×
Germany	14				14		3	14	✓
		7	7	7	7				×
Greece	30 FTP[c]: 5	30				20	7		✓
			14	14	20		FTP: 10		×[d]
Italy	30							30	✓
		15	30	30	15–30[e]	15	30		×
UK	14								✓
		14	14[f]		28				×

[a] See individual AIDA country reports for lists of safe countries.
[b] 2 months if lodged from French overseas departments.
[c] FTP – Fast-track border procedure: Applications on the Eastern Aegean islands subject to the EU–Turkey statement.
[d] For inadmissible and Dublin claims, suspensive effect can be granted by the authorities.
[e] Fast-track/accelerated procedures are particularly complex in Italy.
[f] If the appeal was made out of the country, the deadline is 28 calendar days.

EU law also sets out the circumstances under which asylum seekers who appeal should be allowed to remain in the territory of the state making the decision until the decision is made – the so-called 'suspensive effect'.[45] It also stipulates the circumstances in which this right is not automatic and may depend upon an application being made, such as under certain conditions when the application is considered 'manifestly unfounded' or 'inadmissible'.[46]

Although EU law sets out various procedural requirements in relation to asylum appeals, however, there remains a great deal of diversity in how asylum appeal processes are organised across (and even sometimes within) European countries. For example, as the European Asylum Support Office (EASO, now EUAA) noted in its 2020 report:

> The recast Asylum Procedures Directive, Article 46 ensures the right to an effective remedy but it does not prescribe harmonised standards in terms of the organisation of the appeal or the procedure to be followed. In some Member States, the appeal instance examines and decides on the case *de novo* in fact and in law, while in others, the appeal is only decided on the legality of the decision taken in the first instance. In other words, in some Member States, the relevant second instance bodies take decisions on the merits of each application, while in others responsible authority is ordered to review its first instance decision. [47]

This difference is an important one. In some countries in Europe the legal authorities reviewing initial decisions start from scratch in assessing the claim (*de novo*), while in others they review whether the first-instance decision was taken in the appropriate way.

Furthermore, while many countries in Europe have judicial or quasi-judicial appeal processes, some countries deal with appeals via a dedicated administrative authority that is separate from the judiciary and the formal court system.[48] What is more, some countries have created a dedicated court or tribunal for dealing specifically with asylum appeals (such as the Cour nationale du droit d'asile (National Court of Asylum, CNDA) in France), while others nest the asylum appeal process within other legal fora (such as in Germany, where asylum appeals are within the administrative adjudication system). These are differences that relate to the historical development of legal institutions and

45 APDII.

46 APDII Articles 46(6–9).

47 European Asylum Support Office [EASO] (2020) *EASO Asylum Report 2020: Annual report on the situation of asylum in the European Union*, pages 73–74. Available at: https://easo.europa.eu/sites/default/files/EASO-Asylum-Report-2020.pdf [accessed 07 October 2021].

48 European Council on Refugees and Exiles [ECRE] (2016) *The length of asylum procedures in Europe*. Brussels: Asylum Information Database (AIDA), page 9. Available at: https://www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf [accessed 24 April 2024].

structures of Member States and touch on issues of sovereignty, making it hard to see how they would be eradicated.

Additionally, some countries have maximum deadlines for examining an asylum appeal and delivering the decision while others do not (and still others have deadlines that are ineffectual in practice).[49]

The Asylum Procedures Directive (APDII) also does not prescribe a particular time limit for filing an asylum appeal,[50] which means that deadlines for appealing vary significantly between countries. This is all the more true for non-standard asylum tracks.[51] In the accelerated procedure, for example, the number of days allowed to file an appeal varied from 5 to 60 days in 2017 depending upon the country in question, the kind of claim, as well as what kind of decision the government body made.[52] General information on appeals and deadlines in the EU is limited and is constantly changing. Table 2.1 shows a snapshot of deadlines at the time when we were conducting our research, and so should be considered with caution, but it is nevertheless useful to gain a broad overview of the differing deadlines in 2021.

Although the free provision of legal and procedural information, as well as free legal assistance and representation in appeals procedures, are mentioned in the Asylum Procedures Directive (APDII),[53] there are differences in national provision in these areas too. Member States can opt not to offer free legal assistance and representation in appeal processes if they consider that the likelihood of success is very low, and the way countries assess this likelihood varies. In some countries financial legal assistance is dependent upon a merits test according to which the court or a legal authority rates the chance of success of the claim. Remuneration for lawyers also varies across countries, affecting the quality of legal representation, which we discuss in more detail in Chapter 4 ('Before the Hearing') and Chapter 6 ('Assembling Appeals').

On top of the proliferation of forms of status and fragmentation of procedures, there are at least two additional sources of complexity. First, refugee status determinations are sometimes deemed to be particularly difficult decisions. In the context of cultural unfamiliarity with origin countries, assessing the credibility of asylum claims at both the initial and appeal stages can be particularly challenging. The possibility that what appellants say in their statements may be enough to secure them international protection means that the outcome of asylum claims can very often turn on the (perceived) credibility of

49 ECRE, 2016: 9.

50 APDII Article 46(4) simply asserts that reasonable time limits shall not render the exercise of the right to an effective remedy impossible or excessively difficult.

51 ECRE, 2016.

52 Ibid: 10.

53 APDII, Articles 19–20, see also Article 21 on conditions over these provisions and Articles 22–23 on the right to and scope of legal assistance and representation.

Table 2.2 Overview of Selected Differences Between Asylum Appeals in ASYFAIR Countries in 2018/19 (Table by ASYFAIR Team)

Country	*Refugee Status Determination (Asylum applications)*	*1st Appeal*	*Locations*	*Nature of Body*	*In-person hearing*	*Legal Rep Required*	*Public*
UK	Home Office UK Visas and Immigration (UKVI)	First Tier Tribunal, Immigration and Asylum Chamber (FTT (IAC))	22 (as of 2022)	Judicial	✓	✗	✓
France	Office for the Protection of Refugees and Stateless Persons *Office Français de Protection des Réfugiés et Apatrides (OFPRA)*	National Court of Asylum *Cour nationale du droit d'asile (CNDA)*	1 (Paris)[a]	Judicial	✓	✗	✓
Germany	Federal Office for Migration and Refugees *Bundesamt für Migration und Flüchtlinge (BAMF)*	Administrative Courts *Verwaltungsgericht (VG)*	Various (52)	Judicial	✓	✗	✓
Austria	Federal Agency for Immigration and Asylum *Bundesamt für Fremdenwesen und Asyl (BFA)*	Federal Administrative Court *Bundesverwaltungsgericht (BVwG)*	4 (Vienna, Linz, Graz, Innsbruck)	Judicial	✓	✗	✓
Italy	Territorial Commissions for the Recognition of International Protection *Commissioni Territoriali per il Riconoscimento della Protezione Internazionale*	Civil Court *Tribunale Civile*	Various (26)	Judicial	✓	✓	✗

(*Continued*)

Table 2.2 (Continued)

Country	*Refugee Status Determination (Asylum applications)*	*1st Appeal*	*Locations*	*Nature of Body*	*In-person hearing*	*Legal Rep Required*	*Public*
Belgium	Commissioner-General for Refugees and Stateless Persons *Commissariaat-generaal voor de Vluchtelingen en de Staatlozen (CGVS) / Commissariat général aux Réfugiés et aux Apatrides (CGRA)*	Council of Alien Law Litigation (CALL) *Conseil du contentieux des étrangers (CCE) / Raad voor Vreemdelingenbetwistingen (RvV)*	1 (Brussels)	Judicial	✓	✗	✓
Greece	Asylum Service *Υπηρεσία Ασύλου*	Independent Appeals Committees (Appeals Authority) *Ανεξάρτητες Επιτροπές Προσφυγών (Αρχή Προσφυγών)*	20 (end of 2019)	Administrative	✗	✗	✗ *(no hearings)*

[a]Although additional satellite site during our fieldwork (see discussion above) and video linked locations.

the claimant. Although guidance exists on how to assess credibility,[54] the EU lacks 'a predetermined and structured approach'.[55] This means that individual countries can take diverging approaches to the assessment of credibility.

The International Association of Refugee Law Judges (IARLJ) identifies various 'challenges of fact-finding and prospective assessment of risk in this field' that 'should not be under-estimated'.[56] Alongside the frequent lack of corroborative evidence and independent witnesses, judges must grapple with a high volume of legislation and case law, owing to the national *and* international nature of the relevant issues.[57] Conditions in countries of origin can evolve rapidly, requiring a good deal of research[58] to keep abreast of the issues. The IARLJ also notes that the core legislation in the area, including the Refugee Convention and the European Convention on Human Rights, are 'living instruments' that require 'a dynamic or evolving interpretation in the light of social and political developments'.[59] The IARLJ discusses the specific difficulties that trauma and special vulnerabilities in this area can pose, especially in the context of cross-cultural communication and judicial assessment. It also notes the potential difficulties of maintaining independence in a highly charged political climate.[60]

54 UNHCR (2013) *Beyond proof: Credibility assessment in EU asylum systems*. Brussels: UNHCR. Available at: https://www.unhcr.org/uk/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html [accessed 24 April 2024]. International Association of Refugee Law Judges [IARLJ] (2013) *Assessment of credibility in refugee and subsidiary protection claims under the EU Qualification Directive: Judicial criteria and standards*. Haarlem, Netherlands. Available at: https://www.iarmj.org/iarlj-documents/general/Credo_Paper_March2013-rev1.pdf [accessed 24 April 2024].

55 Craig, Sarah and Karin Zwaan (2019) 'Legal overview'. In Gill, Nick and Anthony Good (eds) *Asylum determination in Europe: Ethnographic perspectives*. Cham: Palgrave Macmillan, 27–49, page 42.

56 IARLJ (2013), page 19.

57 Goodwin-Gill, Guy and Hélène Lambert (eds) (2010) *The limits of transnational law: Refugee law, policy harmonization and judicial dialogue in the European Union*. Cambridge: Cambridge University Press.

58 On the part of judges in some jurisdictions. Judges in civil law jurisdictions have a greater fact-finding role than those in common law countries.

59 IARLJ, 2013: 14.

60 The IARLJ (2013: 17) quotes Sir Stephen Sedley on this matter: 'What affects judges in such a situation is not a targeted critique of their own role but an ambient pressure to stem the tide, to stop the rot; to reject the stories they hear from asylum seekers so that they can be sent home. At times this becomes nationality or ethnicity-specific. It does not mean that adjudicators will all lurch in one direction. There is just as much risk that conscientious judges will over-compensate from the pressures they sense around them as that they will succumb to the noise. But the hothouse itself is, I think, peculiar to asylum law adjudication'. Sedley, Stephen (2002) Asylum: Can the judiciary maintain its independence? *International Association of Refugee Law Judges World Conference*. Available at: https://www.wgtn.ac.nz/law/research/publications/about-nzacl/publications/special-issues/hors-serie-volume-iii,-2003/Sedley.pdf [accessed 06 October 2021].

Second, initial assessments of asylum claims, before the appeal stage, often-shape the work that is carried out at appeal, and initial assessment varies across EU countries too. It is carried out by government officials in countries (or at the borders of countries) in which asylum is claimed, and in 2019 the European Council on Refugees and Exiles (ECRE)[61] published a comprehensive report examining first instance decision-making across the EU. The report noted a high degree of diversity between first-instance decision-makers in different EU countries, including whether interviewers are also the ones who make the decisions, the degree of centralisation and specialisation of decision-making systems, the internal supervision and checking processes, and the degree to which initial decision-making authorities co-ordinate and work with law enforcement authorities and international organisations. The report also identified very significant differences in financial resources allocated to initial decision-making bodies, producing different staffing levels and backlogs of cases. It also noted differences in the training of staff, the tools they used to support their decisions, the degree of quality controls applied, the profile (such as the gender profile) of decision-makers and the experience and permanence of staff (some countries, including the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge* - BAMF) in Germany, had over 50% temporary staff in 2019). It voiced concerns about the independence of decision-making units from governments too, as well as the closeness of law enforcement agencies to the work, ad hoc staffing strategies and lack of transparency about decision-making protocols.

If there is a well-resourced, independent and properly managed initial decision-making system then there is likely to be less pressure put upon appeal systems. However, the effect of these deficiencies in initial decisions and processes over asylum appeal systems can be profound (as we discuss in Chapter 9, 'Mistakes and Incompetence'). Moreover, some asylum seekers may not appeal a negative decision because they do not want to, or do not know about, trust, or understand the appeal system, or lack the resources or access to legal aid or advice necessary in some countries to lodge an appeal, and hence the first-instance decision is vital.

Divergent Rates of Protection

In the light of the complexity surrounding asylum appeals, it is perhaps unsurprising that there are significant differences in rates of protection in both

61 ECRE (2019) *Asylum authorities: An overview of internal structures and available resources.* Available at: https://www.ecre.org/asylum-authorities-an-overview-of-internal-structures-and-available-resources/ [accessed 19 March 2021].

first-instance and appeal decisions across the various EU countries, even for similar countries of origin of claimants as noted in Chapter 1.[62]

Here we reiterate the point by showing the different percentage rates of protection granted to asylum claimants by the ASYFAIR countries in both first-instance decisions (i.e. governmental decisions of asylum applications) and appeals in 2018 (Figure 2.2).

Percentages do not reveal the full picture of course; it is useful to engage with the actual number of asylum decisions and appeals too. For example, whilst Germany has an overall lower recognition rate than Austria, the marked difference in actual numbers of asylum seekers and appellants shown in Figure 2.3 reveals a different picture.

Figure 2.3 shows that, regardless of Germany's average percentage protection rate, the individuals affected by these decisions significantly outnumbered any other European country in the ASYFAIR sample in 2018.

Asylum Appeals in ASYFAIR Countries

It is difficult to generalise about what happens in asylum appeals, because of the wide variety of differences in practice across European countries. Aside from the formal procedural differences that we have already discussed, there is a swathe of practical differences at the level of operationalisation, meaning how appeals are organised and staged. We now briefly describe the procedures in the countries we studied with the intention of highlighting some of these. They are ordered according to the number of hearing observations made in each country, and in the case of Italy and Greece by the number of interviews we conducted. In the following paragraphs we draw on the Country Reports made available in the Asylum in Europe database curated by the European Council on Refugees and Exiles (ECRE) and the Asylum Information Database (AIDA).[63]

62 For a discussion of the correlates with rates of asylum protection see, for example, Neumayer, Eric (2005) Asylum recognition rates in Western Europe: Their determinants, variation, and lack of convergence. *Journal of Conflict Resolution* 49 (1): 43–66; Plümper, Thomas and Eric Neumayer (2021) Human rights violations and the gender gap in asylum recognition rates. *Journal of European Public Policy* 28 (11): 1807–1826. Toshkov, Dimiter D. (2014) The dynamic relationship between asylum applications and recognition rates in Europe (1987–2010). *European Union Politics* 15 (2): 192–214. For discussions based on America and Canada see Ramji-Nogales, Jaya, Andrew I. Schoenholtz and Philip G. Schrag (2011) *Refugee roulette: Disparities in asylum adjudication and proposals for reform*. New York: New York University Press. Chen, Daniel L., Tobias J. Moskowitz and Kelly Shue (2016) Decision-making under the gambler's fallacy: Evidence from asylum judges, loan officers, and baseball umpires. *The Quarterly Journal of Economics* 131 (3): 1181–1242. Rehaag, Sean (2012) Judicial review of refugee determinations: The luck of the draw. *Queen's Law Journal* 38 (1): 1–58.

63 The information in the following subsections was collected at the time of our research. For up-to-date country reports see https://asylumineurope.org/reports/ [accessed 11 November 2022].

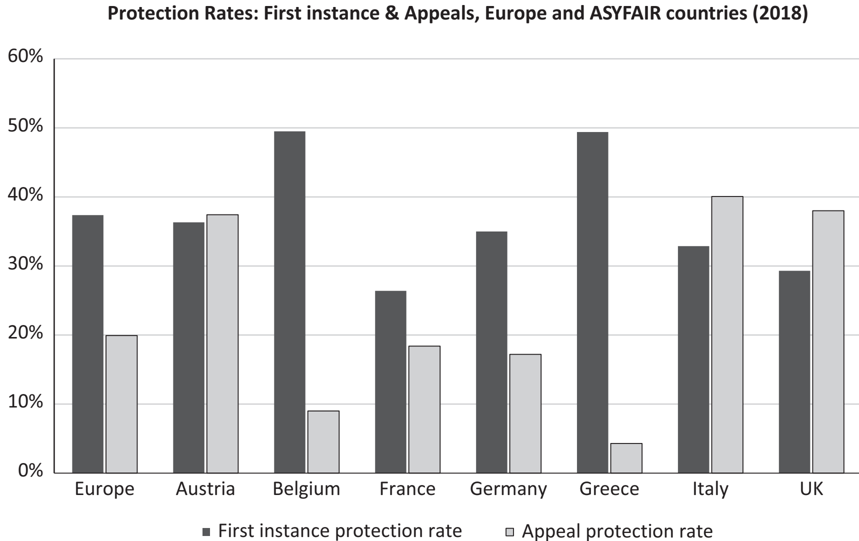

Figure 2.2 Protection Rates at First Instance (i.e. Governmental Decision on Asylum Application) and Appeals (*Note on Italian data: data only available on combined first appeal instance (Civil Court)* and *second appeal instance at the Court of Appeal.*) in 2018. Data from various sources (*Data taken from various AIDA country reports. Available at: https://asylumineurope.org/wp-content/uploads/2020/03/report-download_aida_uk_2019update.pdf [accessed 21 May 2019]. Austria data from https://www.bmi.gv.at/301/Statistiken/files/Jahresstatistiken/Asyl-Jahresstatistik_2018.pdf and https://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tps00193&language=en [accessed 21 May 2019]. Italian first instance data from http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/riepilogo_anno_2018.pdf, appeal data from https://ec.europa.eu/eurostat/documents/2995521/9747530/3-25042019-BP-EN.pdf/22635b8a-4b9c-4ba9-a5c8-934ca02de496 [both accessed 25 May 2019].*).

Graph by Nicole Hoellerer.

Germany

Asylum appeals in Germany are heard by local administrative courts (*Verwaltungsgerichte*, VG), of which there were 52 across the country, dealing with asylum appeals alongside hearings in other areas of administrative law during our research. Administrative courts hear appeals *de novo* (in other words they consider the case anew and afresh) on points of fact and law, and can confirm the initial asylum decision made by BAMF by dismissing the case, or require BAMF to amend their decision. Most appellants are summoned to attend an in-person hearing (although some appeal cases can be decided on paper only), to be cross-examined by the judge(s) on aspects of their asylum claim, and are provided with an interpreter. In-person hearings of adult asylum

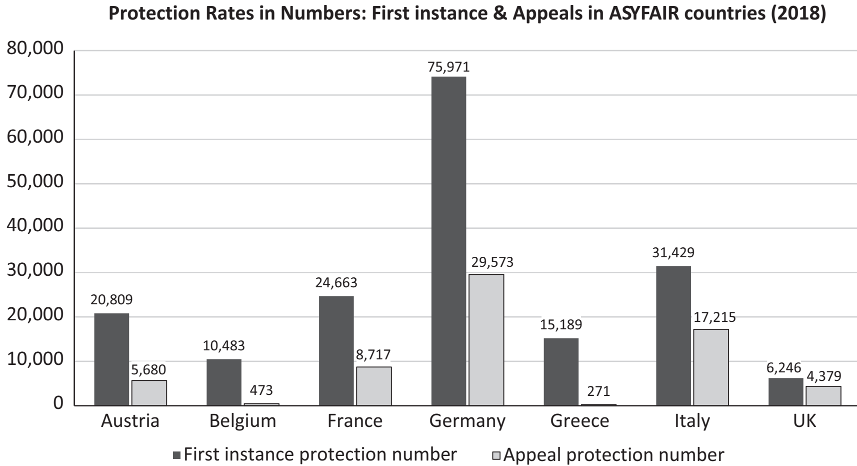

Figure 2.3 Protection Rates in Numbers at First Instance (i.e. Governmental Decision on Asylum Application) and Appeals (*Note on Italian data: data only available on combined first appeal instance (Civil Court) and second appeal instance at the Court of Appeal.*) in 2018. Data from various sources (as in Figure 2.2).

Graph by Nicole Hoellerer.

appellants are generally public, although appellants and their legal BAMF representatives can apply to have their case heard behind closed doors (which is rarely granted). Judges are required to record the minutes of the hearing by speaking into a voice recorder, although occasionally court writers are provided (e.g. if a judge is new to the court or chamber, or if there is a panel of judges, both of which are rare occurrences). During our fieldwork, no video hearings took place. Asylum appeal hearings are normally free of charge for asylum appellants. Legal aid for legal advice and representation is available on the basis of merit, assessed by the responsible judge prior to the hearing. Legal aid is in the form of financial support, which often only covers basic legal representation (i.e. may not cover the full costs of legal representation).

The various administrative courts have several hearing rooms across either purpose-built courts or other buildings, such as historic or office buildings. There are generally security checks at the entrance of each German court, where bags are scanned, and visitors have to pass through a metal detector.

Appeals are usually heard by a single judge, who belongs to a chamber. Some chambers are country-of-origin specific or are comprised of factual experts, i.e. the chamber will hear only cases from one country of origin, or concerning one specific topic, such as religious conversion. Panel hearings are possible for 'junior' judges, with two senior judges, one junior judge and two lay judges from the public. In most hearings, the judge will sit on a raised platform (see Figure 2.4), but some hearing rooms may be arranged differently. If there is a court

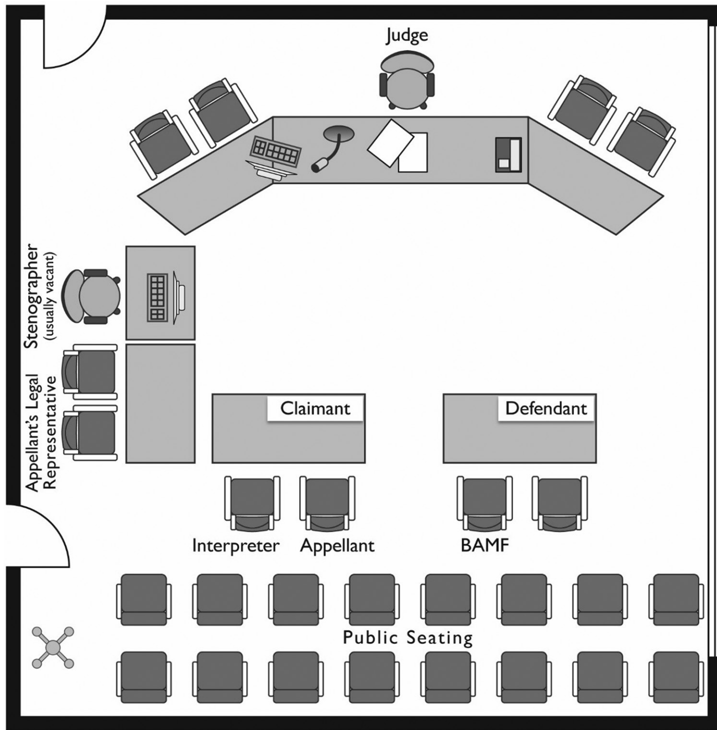

Figure 2.4 Example of Hearing Room Layout in Berlin, Germany (Credit: Nicole Hoellerer and Yamen Albadin).

writer, they sit next to the judge or on a separate table near the judge. Opposite the judge, on ground level, sit the appellant, their legal representative, if they have one, and the interpreter. Next to them, in the same row, sit the BAMF representative, if they are present. Members of the public (e.g. supporters of the appellants) sit in the public seating area at the back of courtrooms. Witnesses are required to leave the courtroom during the appellants' testimony, but legal representatives can request to keep the witness in the hearing room.

Judges at administrative courts can hear several hearings a day, which varied greatly during our fieldwork: some judges only hear one or two hearings per day, whilst others can hear eight to ten in a single day. This variation mostly depends on the country of origin and the complexity of the cases being heard. Hearing times vary (see below and Chapter 7 'The Politics of Speed'): appeals we observed in Germany during our fieldwork were on average 69 minutes long but ranged from a few minutes to several hours (the longest German hearing we observed was 6 hours 48 minutes long). Judges usually do not announce their decision on the day of the hearing, although sometimes they do.

Further appeal instances are possible, first at one of the 15 regional Higher Administrative Courts (*Oberverwaltungsgericht* – OVG) /

Verwaltungsgerichtshof – VGH)[64], and then at the Federal Administrative Court in Leipzig (*Bundesverwaltungsgericht* – BVerwG). In both instances, however, cases are only assessed on points of law, and legal representation is required. Once all instances have been exhausted, an appellant may lodge a constitutional complaint to the Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG) if it relates to the fundamental right to asylum. As further appeals have to be approved by these higher courts before they are heard, the numbers of appeals at these courts remains small.

Figure 2.4 depicts an example of a hearing room layout in Berlin.[65]

United Kingdom

In the UK, there is a right to appeal against an initial decision taken by the Home Secretary to the First-tier Tribunal (Immigration and Asylum Chamber) – FTT(IAC). This judicial body is more specialised than a general administrative court, being one of seven Chambers of the First-tier Tribunal. The tribunal hears appeals on immigration and nationality matters, as well as asylum. Appeals can be made on points of fact and law, and the Tribunal can consider evidence that was not previously before the Home Office decision-maker, although both the appellant and the Home Office are encouraged to narrow the issues under dispute before the hearing rather than going over the whole case anew.

Appellants are invited to give evidence at an appeal in-person and are provided with an interpreter on request . Hearings are public, although reporting restrictions will generally apply, and it was much more common for hearings to be closed (i.e. held in private) in the UK than in Germany (we discuss this in Chapter 8, 'Barriers to Communication'). Unlike in Germany, there is no audio-recording of the proceedings or court writers, although the judge will typically make notes. Another feature of the British system is that it is adversarial rather than inquisitorial, which has implications for the role of the judge: they are, for example, encouraged to be only minimally involved in the questioning and organisation of the hearing (we discuss different judicial styles in Chapter 11, 'Judicial Styles'). They also typically do not undertake fact-finding, unlike in Germany, although they may spend time researching case law. Depending on whether each side is represented, witnesses (including the appellant) are cross-examined by each representative, before oral submissions are made to the judge. In the absence of a representative on either side, the judge may take a more investigatory approach.

Video-hearings were used sporadically during the lockdowns owing to the COVID-19 pandemic, and are used for immigration detainees, but in-person hearings remain the norm. In theory, asylum appellants are entitled to legal

64 See also Feneberg, Gill, Hoellerer et al. (2022)

65 Hearing room layout varies across Germany, and even within a court complex.

aid, subject to a means and merits test in England and Wales (in Scotland there is no merits test for legal aid at the first appeal). A practising solicitor, barrister, or immigration adviser registered with the Office of the Immigration Services Commissioner may represent an asylum seeker at appeal. In practice, however, it can often be difficult to access a lawyer, and many appellants go unrepresented (15% of cases we observed in the UK were unrepresented). The provision of legal aid in this jurisdiction also faces a series of structural obstacles and challenges related to the way it is regulated, often resulting in low, delayed or unreliable remuneration for legal practitioners.[66]

At the time of research, there were 19 hearing centre locations spread across the UK, with some in inner city, metropolitan settings, and others in more peri-urban and remote areas. Like in Germany, the judge typically occupies a raised dais, which in the British context of adversarial hearings conveys the intention that they remain above the fray of the dispute between the parties. Unlike in Germany and elsewhere, though, the opposing parties in the hearing typically literally face each other across a table, again reflecting the adversarial nature of the proceedings (see Figure 2.5).

Appeals are usually adjudicated by a single judge appointed by the Judicial Appointments Commission. A Home Office Presenting Officer (HOPO), who may or may not have legal training, or a barrister, usually represents the Home Office at the appeal. Hearings often take several hours, and generally no more than two asylum appeals will be heard by a judge in one day. As with Germany, decisions are rarely given on the day of the hearing; instead, a reasoned decision letter is sent some weeks later.

Further appeals would typically be considered by the Upper Tribunal Immigration and Asylum Chamber with permission of the FTT(IAC), or, if refused, of the Upper Tribunal itself. Beyond this, appeals to the Court of Appeal are only possible on a point of law with permission from the Upper Tribunal or the Court of Appeal itself, and a final appeal to the Supreme Court would only be allowed if the issue were deemed to be of sufficient public importance.[67]

France

Asylum appeals in France are heard by the CNDA – the National Court of Asylum. The CNDA is a specialised administrative court situated on the outskirts of Paris that hears appeals from all over France (meaning appellants may be required to travel long distances). The CNDA examines appeals on points

66 Wilding, Jo (2021) *The legal aid market: Challenges for publicly funded immigration and asylum legal representation*. Bristol: Policy Press.

67 AIDA (2021) *AIDA Country Report: United Kingdom* (2021 Update) Available at: https://asylumineurope.org/wp-content/uploads/2022/03/AIDA-UK_2021update.pdf [accessed 13 December 2022].

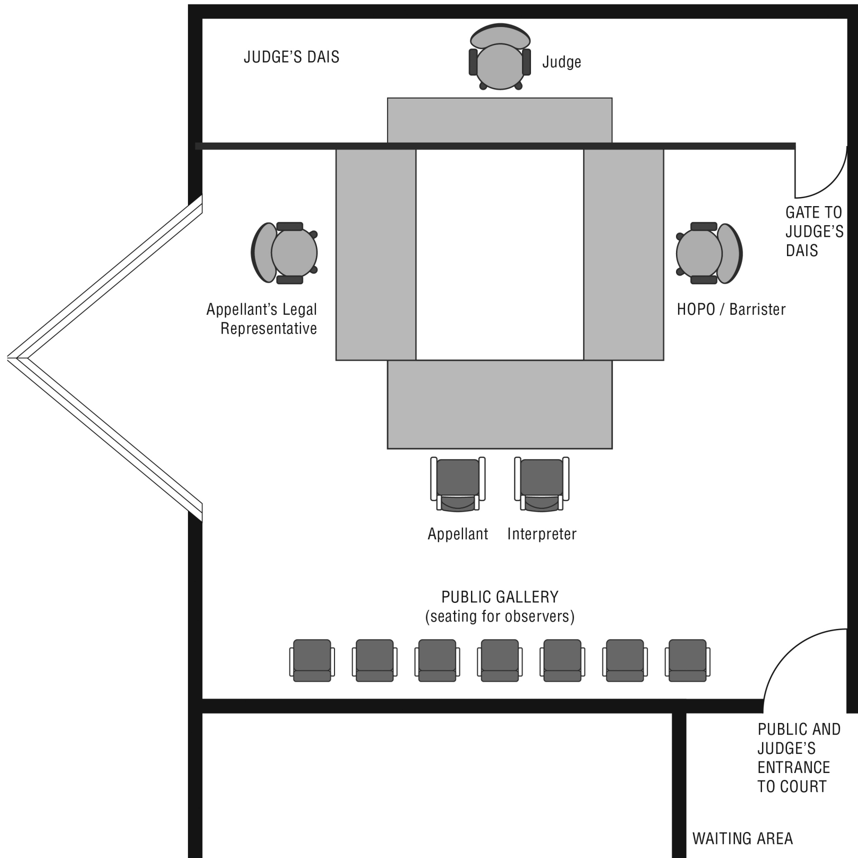

Figure 2.5 Example of Hearing Room in the UK (Credit: Rebecca Rotter, Nicole Hoellerer and Yamen Albadin). Although a gate is depicted in this figure leading from the general court area to the judge's dais, many court rooms have a separate door into the room leading directly onto the judge's dais.

of fact and law, and can confirm or annul the initial asylum decision made by the government.[68] After lodging an appeal, many appellants are invited to attend an in-person hearing at the CNDA and be cross-examined on aspects of their claim. However, a significant proportion of appeal decisions are made by *ordonnance* (on the basis of a written application alone).

In 2018, at the time of fieldwork, there were 19 hearing rooms at the CNDA, spread across two floors of an office-style building. As in Germany and the UK, the CNDA has security checks, where appellants and visitors

68 By OFPRA (*Office Français de Protection des Réfugiés et Apatrides* – Office for the Protection of Refugees and Stateless Persons).

have their bags scanned and pass through a metal detector upon entry to the building. Some hearing rooms were equipped with audio-visual technology to enable appeals from overseas departments and territories to be heard. To combat the ever-mounting backlog of cases, at the time of research, video appeals to other court locations on the French mainland were being piloted but were heavily resisted by lawyers and refugee advocacy organisations who saw the lack of in-person appeals as an affront to standards of justice (we discuss remote hearings, including their use in France, in Chapter 8, 'Barriers to Communication'). In 2019, the CNDA employed a 'satellite' site, separate to the main court, next to the historic Sainte Chapelle in the Palais de Justice complex in central Paris. The status of the grandiose Palais as one of the highest and oldest courts in France, and the Sainte Chapelle as a major tourist attraction, meant large numbers of security personnel were present, and tourists were audible in courtrooms. The soaring ceilings and marble floors were a stark contrast to the unremarkable, modern, bureaucratic feel of the CNDA main site.[69]

The CNDA is divided into 23 chambers. Appeals that have hearings are heard by either a single judge or a panel of three, and are heard in public unless a closed hearing (*huis clos*) is requested. In panel hearings, three judges sit on a slightly raised platform (see Figure 2.6): the President (a member of the *Conseil d'Etat*, or other specified judicial offices) with, to their left, an associate judge (*assesseur*) nominated by the UNHCR[70], and, to their right, another *assesseur* nominated by the Vice President of the *Conseil d'Etat*. To the right of the panel, also on the platform but at a right angle to the judges, sits the '*rapporteur*', an independent agent of the court tasked with studying the appeal file and preparing a report prior to the hearing. Each appeal starts with the *rapporteur* reading aloud their report. Like in the UK, asylum appeal hearings are not audio recorded in France. At the time of our fieldwork the French Office for the Protection of Refugees and Stateless Persons (*Office Français de Protection des Réfugiés et Apatrides* - OFPRA) typically did not attend. The secretary sits opposite and facing the *rapporteur*. On ground level, a long bench mirrors that of the judges. The appellant sits at the centre of the bench, with the interpreter to their left and their lawyer to their right.

Judges at the CNDA hear up to 13 appeals each day, each scheduled to last 40 minutes. Many appellants will sit through appeals heard before their own, watching and listening from the public gallery. Appellants are entitled to state-funded legal representation, with legal aid awarded in most cases. Onward appeal is possible from the CNDA to the Council of State if either the

69 For detailed fieldnotes on entering the CNDA, see Chapter 5, 'Arriving at Court'.

70 The UNHCR appointee is an irregularity in comparison to most other appeal systems analysed in this book. Greece included an independent member on Appeals Committees at the time of our research, see Hambly, Jessica, Nick Gill and Lorenzo Vianelli (2020) Using multi-member panels to tackle RSD complexities. *Forced Migration Review* 65: 32–35.

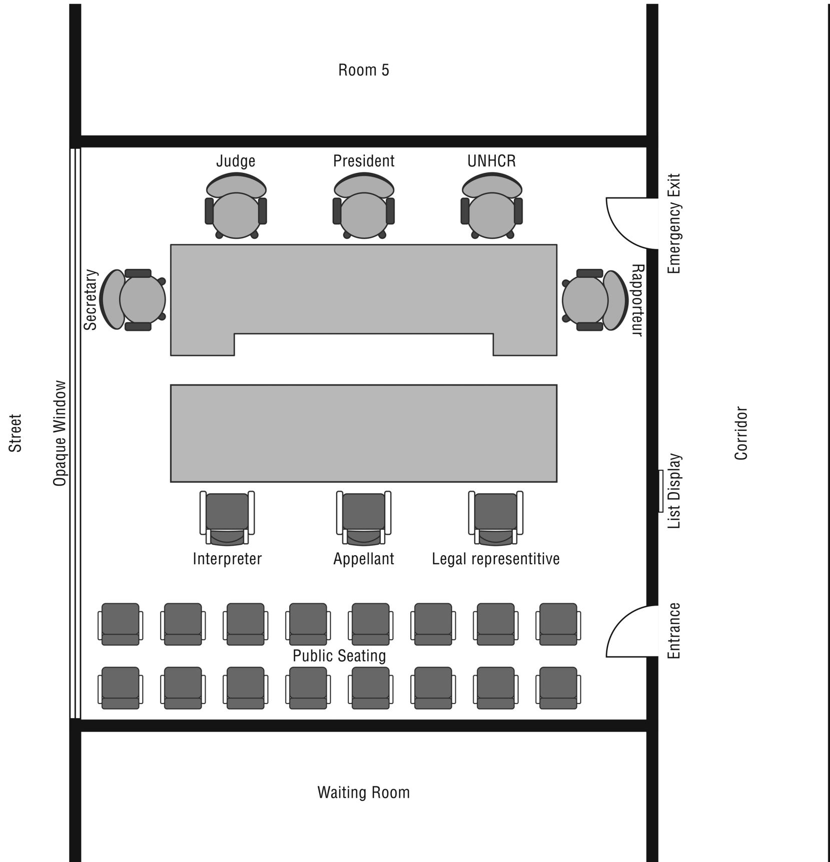

Figure 2.6 Example of Hearing Room Layout at the CNDA, France.
(Credit: Jessica Hambly, Nicole Hoellerer and Yamen Albadin).

appellant or OFPRA decide to contest the CNDA's decision. Onward appeals, however, are limited to points of law.

Belgium

Following an overhaul to the asylum system in 2007 as a result of a backlog of asylum cases, asylum appeals in Belgium are now heard by a single, specialised, independent administrative court called the Council for Alien Law Litigation (CALL – *Conseil du contentieux des étrangers* – CCE / *Raad voor Vreemdelingenbetwistingen* – RvV). Although appeal hearings in Belgium take place in-person and can challenge both facts of the case and application of the law, the result of the changes to the asylum appeals process is that hearings rarely extensively re-examine the facts of each case. Instead, judges analyse

the government's decision and the appellants' written arguments against their rejection in advance of the appeal, and the hearings predominantly serve to allow judges to seek clarification on matters in the written casework. Indeed, the CALL can choose to apply a wholly written procedure if it does not consider an oral hearing necessary, although the parties do get an opportunity to protest against this choice and request an oral hearing.

Because of the emphasis on written procedure in the appeal system, having a lawyer is a de facto necessity. First-line legal assistance is organised locally and given free of charge regardless of income or financial resources. Whether more specialist second-line assistance can be accessed free of charge depends upon the characteristics of the claimant (e.g. adult or child) as well as their income and financial resources. There is concern among pro-asylum groups that the criteria lawyers must fulfil to offer second-line legal assistance is not demanding enough, and therefore lawyers are not always competent or specialised enough in the field.

In comparison to in-person appeals in other countries observed by ASYFAIR, hearings in Belgium are relatively short at about 20–25 minutes per case. As a result, the appeal process in Belgium can appear somewhat formulaic (discussed further in Chapter 7, 'The Politics of Speed'). Despite these changes, we were informed at the time of our research that judges at the court were experiencing 'burnout' and that many were leaving their posts.

In most cases in Belgium the appeal is heard by a single judge who is accompanied by a clerk (*griffier*). The clerk's role is to take notes for the judge and to check that the correct people are present at the hearing. Similar to the architecture in the countries already discussed, both the judge and the clerk sit on a raised dais at the head of the room and enter through a separate doorway to the other participants in the hearing (we did not become aware of any appeal hearings taking place via video conference at the time of our research). In front of the judge are two lecterns separated by an aisle. The representative for the Commissioner-General for Refugees and Stateless Persons will usually stand behind the lectern on the right-hand side of the room (from the perspective of the public gallery) and appellants and their legal representatives will occupy the lectern on the left. Unusually among our case countries, while judges sit throughout the proceedings, the other participants in the hearing will typically stand. Interpreters, if present, stand beside the appellant and have separate seats from the public gallery, which they use when their services are not required. Behind the lecterns is the public gallery, which consists of two or three rows of individual chairs. Although there is a main waiting area in the hearing centre, appellants will usually wait for their case to be called in the public gallery. Given that judges will typically hear 10–15 cases per session (although on occasion this can be over 25), the public gallery can be packed at the start of each session. The doors of the hearing rooms are almost always kept open and, during our observations, there was never a request made by a legal representative to have their client's case heard in private.

An interesting feature of appeals in Belgium is that hearings take place in either French or Flemish – but not both. The language of the appeal will depend on the language that a person's asylum claim was submitted in. Sessions are therefore grouped by the language in which the appeal will take place, as well as the country of origin of the appellants. Appellants are generally not permitted to speak to the judge in another language even if, for example, both were to speak English or French but the court is sitting in Flemish.

The CALL has no investigative powers of its own, and so, if it considers important information to be lacking, it has to annul the initial decision and send the case back to the responsible government department for further investigation. Onward appeal against decisions by the CALL are possible to the Council of State (*Conseil d'Etat/Raad van State*), but, similar to France and Germany, they can only concern matters of law and not matters of fact. In other words the Council of State has to decide if the CALL respected the applicable legal provisions and requirements in making their decision. If not, then the CALL's decision is annulled and they are required to make a new decision.

Italy

The asylum appeal process in Italy underwent significant changes during our fieldwork. Both the asylum decision-making body, known as the Territorial Commissions for the Recognition of International Protection (*Commissioni Territoriali per il Riconoscimento della Protezione Internazionale* – TCs), and the appeals process were reformed in 2017. These alterations to the Italian asylum determination system were made in large part with the aim of addressing Italy's severe backlog of asylum cases, though they have also been critiqued by legal associations for going against Article 111 of the Italian constitution (namely, the right to a fair trial and the right of defence).[71]

Although there is no formal time frame for lodging an asylum claim, Italian immigration legislation states that a claim should be made as soon as possible – which is considered to be within eight days of arrival in Italy.[72] Asylum applications in Italy are considered by the Territorial Commission. While in 2010 there were just ten TCs in operation, by 2019 these had risen to 45. People seeking asylum whose asylum case is rejected have 30 days to appeal the decision at the competent Civil Court (*Tribunale Civile*), or 15 days if

71 Camilli, Annalisa (2017) Il decreto Minniti-Orlando sull'immigrazione è legge. *Internazionale* [online], 12 April 2017. Available at: https://www.internazionale.it/notizie/annalisa-camilli/2017/04/12/decreto-minniti-orlando-legge [accessed 07 September 2022].

72 AIDA (2022) *Short overview of the asylum procedure – Italy* (Update: May 2022). Available at: https://asylumineurope.org/reports/country/italy/asylum-procedure/general/short-overview-asylum-procedure/#_ftn6 [accessed 12 September 2022].

the claim was determined to be manifestly unfounded[73] (see Table 2.1 for the deadlines in our other case countries). Appeals must be submitted by a lawyer and appellants must therefore find lawyers willing to work for the relatively low fee they receive through the Italian legal aid system.[74] Prior to the changes in 2017, appellants could appeal their case in person before a judge alongside their legal representative at the Civil Court. Such appeals would predominantly take place behind closed doors. The reforms in 2017 planned to replace oral hearings with judges basing their decisions on video recordings TCs make of asylum interviews (as well as the written appeal received from the appellant's representative). However, as far as we know (at the time of writing in 2022), TCs do not have the necessary infrastructure and tools to record and store such video recordings, and these changes are not implemented on the ground. A judge can request an in-person appeal hearing, if the judge deems the original interview conducted by the TC to be lacking in rigour or if elements are unclear; if further clarification is needed; if the appeal is based on factual elements that were not included in the original interview; if the appellant has successfully justified their need for an in-person appeal; or if the judge decides to arrange for technical advice in the hearing.[75] In-person hearings are common, although they routinely take place not in courtrooms but in the individual offices of the judges deciding the case. Italian hearings stand out in this regard.

Prior to the changes made in 2017, unsuccessful appellants could attempt to make an onward appeal on both the facts of the case and on matters of law. However, since the changes, only matters of law are now considered at the second level of appeal.[76] A third level of appeal exists in exceptional circumstances, where cases can be heard at the Supreme Court of Cassation (*Corte Suprema di Cassazione*) in Rome.

Austria

Asylum appeals in Austria are heard at the Federal Administrative Court (*Bundesverwaltungsgericht* – BVwG), of which there are four centres across the country (Vienna, Linz, Graz, Innsbruck). We were advised that cases are divided across these courts by country of origin, rather than the current

73 Refugee Info Italy (2022) *Appealing your asylum decision*. Available at: https://www.refugee.info/italy/asylum-info-it/appealing-your-decision-judiciary-procedure [accessed 13 September 2020.

74 Sorgoni, Barbara (2019) 'What do we talk about when we talk about credibility? Refugee appeals in Italy.' In: Gill, Nick and Anthony Good (eds) *Asylum Determination in Europe: Ethnographic Perspectives*. Cham: Palgrave Macmillan.

75 Albano, Silvia (2018) Protezione internazionale, il diritto di impugnazione e le sezioni specializzate. *Questione Giustizia* (16 May 2018). Available at: https://www.questionegiustizia.it/articolo/protezione-internazionale-il-diritto-di-impugnazione-e-le-sezioni-specializzate_16-05-2018.php [accessed 13 September 2022].

76 Refugee Info Italy, 2022.

location of the appellant. The Federal Administrative Court hears asylum appeals next to hearings in other areas of administrative law, and hears appeals *de novo* on points of fact and law. Judges can confirm the initial asylum decision made by the Federal Agency for Immigration and Asylum *(Bundesamt für Fremdenwesen und Asyl* – BFA) by dismissing the case, or require the BFA to amend their decision. Austrian judges can assess cases with respect not only to asylum law in particular, but also general immigration law, and can take into consideration 'integration actions' undertaken by appellants, potentially awarding forms of protection based on integration.[77] In contrast to Germany, where interpreters have to be present,[78] appellants and their legal representatives can apply to have no interpreter present.

Most appellants are summoned to attend an in-person hearing to be cross-examined by the judge(s) on aspects of their asylum claim, although some appeal cases can be decided on paper only. There were no video conference hearings at the time of our research. In-person hearings of adult asylum appellants are generally public. Unusually among our case countries, hearings are recorded by a court writer, who types the transcript (i.e. everything that is said in German) on a computer. At the end of the hearing, the transcript is printed out, and translated for the appellant by the interpreter, as well as given to the representatives. The appellant, their legal representative and the BFA representative have to sign the transcript to confirm its accuracy before the hearing is closed. At the time of our research there was free access to legal assistance at the appeal stage, which was given by external service providers contracted by the state, although the money given by the state was not enough to cover the cost of the necessary advice.

There are several hearing rooms at the court in Vienna. There are security checks at the entrance, where bags are scanned, and visitors have to pass through a metal detector. Appeals are normally heard by a single judge, who belongs to a chamber (some chambers are country of origin or factual experts, as in Germany). The judge often sits on a raised platform, but some hearing rooms may be arranged differently. Court writers sit next to the judge. Opposite the judge, on ground level, sit the appellant, their legal representative (if they have one) and the interpreter.[79] Next to them, in the same row, sit the BFA representative(s), if they are present. Members of the public (e.g. supporters of the appellants) normally sit in the public seating area at the back of courtrooms. Judges at administrative courts can hear numerous hearings a day, depending on the country of origin and the complexity of the case. Hearing times vary, and the longest hearing we observed across all countries was in Austria, with a length of more than seven hours.

77 Vianelli, Gill and Hoellerer (2021).

78 But interpreters do not have to interpret, if the appellant wishes to speak German.

79 Their seating arrangements can vary.

Further appeals are possible at the Supreme Administrative Court (*Verwaltungsgerichtshof* – VwGH) in Vienna, which only hears cases concerning legal questions of 'fundamental importance'. Appeals at the Constitutional Court (*Verfassungsgerichtshof* – VfGH) are possible, but only on points of human rights and constitutional law. In both instances, legal representation is obligatory. As in Germany, numbers of asylum appeals at these courts are negligible.

Greece

Appeals against initial decisions by the Greek Asylum Service are heard by 21 Independent Appeals Committees under the Appeals Authority (*Ανεξάρτ ητες Επιτροπές Προσφυγών – Αρχή Προσφυγών*).[80] Greece's 2019 International Protection Act (IPA)[81] significantly changed the functioning of asylum appeals. At the time of our research, Appeals Committees were composed of two administrative judges plus one independent member with experience in the field of international protection, human rights or international law, the latter appointed by UNHCR or by the Greek National Commissioner for Human Rights. However, the IPA altered this, so that either a single member, or three judges, all of whom are active administrative judges, now examine appeals. Since 2017, the law also establishes the possibility that rapporteurs from the EUAA (formerly EASO) can be used to write a report on the appeal case to help inform the Independent Appeals Committees, striking some parallels to the French system.

The appeal procedure is largely written. Up until the end of 2019, requirements for filing an appeal were relatively easy to fulfil: on receipt of a negative initial decision, an asylum seeker could fill out an appeal form and the Appeals Committee would do a full review, on points of fact and law, of the appeal based on the content of the application. Since the IPA came into force in 2020, however, access to the appeals procedure has become highly restricted and all but impossible without the assistance of a Greek lawyer. Since 2017 there has been a state-funded legal aid scheme for appeal procedures, but capacity is extremely limited in practice. In 2019, only one in three appellants received free legal assistance under the state-funded legal aid scheme.[82]

80 Hellenic Republic Ministry of Migration and Asylum (2022) Appeals Authority, Available at: https://migration.gov.gr/en/appeals/archi-prosfygon-i-ypiresia/#:~:text=Twenty%2Done%20(21)%20Independent,Administrative%20Courts%20upon%20their%20request [accessed 10 November 2022].

81 Law 4636/2019 'on international protection and other provisions'. Available at: https://bit.ly/2Q9VnFk [accessed 4 July 2022].

82 AIDA (2020) *AIDA Country Report: Greece* (2020 Update). Available at: https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_gr_2019update.pdf [accessed 10 May 2021].

Under the previous appeals regime, oral hearings were very rare with most appeals examined on the basis of the case file only. At the time of writing, it remained the case that oral hearings were the exception, rather than the rule. In 2021, a total of 17,500 appeals were lodged with the Independent Appeals Committees, and of these only 250 invited the appellant to an oral hearing. However, under the IPA, even those who are not called for an oral hearing are obliged to appear in person in Athens, before the Appeals Committee on the day of the examination of their appeal, on penalty of rejection of their appeal as 'manifestly unfounded'.[83] Appeals are not open to the public, and our fieldwork was limited to interviews with lawyers, appellants, and others with experience of the Appeals Authorities.

In theory, appellants are able to appeal the decision of an Appeals Authority Committee before the Administrative Court of First Instance in Athens or Thessaloniki, but there are substantial practical and legal obstacles that undermine the effectiveness of this remedy in practice. These include the fact that such an appeal can only be lodged by a lawyer, involves high legal fees and can take a long time to process. Like various other countries' systems described above, when considering onward appeals the Administrative Court can only examine the legality of the decision and not the merits of the case.

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This brief introduction to the procedural and operational work of asylum appeal adjudication in the countries we studied highlights a variety of differences between them (Table 2.2). The technology used in the courts varies, for example. Court writers and note-takers were common in Austria and Belgium during our observations but were much rarer elsewhere. In Germany, almost all the hearings we observed were recorded on a voice recorder[84] by the judge. Many would stop frequently to speak into it, often with information that everyone had already heard, to make an official record of what had been said, making the conversation disjointed and repetitive. In France, Italy, Belgium and the UK, by contrast, hearings are not electronically recorded.[85] France and the UK had started to experiment with video-linked hearings at the time of

83 IPA Articles 97(2) and 78(3). There are certain exceptions, for example a lawyer may appear instead of the appellant, or a certificate from the head of the asylum accommodation or reception centre may be provided in advance to the Appeals Committee – but significant practical barriers prevent appellants fulfilling these requirements.

84 Dresden and Chemnitz (both in Saxony) stood out for using old-style tape recorders not digital devices.

85 Appellants who mount a second appeal to challenge the legality of the process during their first appeal might face more difficulties when there is no record, and legal authorities too may find it harder to defend themselves. Judges also have no official record to refer back to when writing their judgements.

our research, while they had not been introduced in Germany, Belgium and Austria to our knowledge.

Countries also varied in terms of the extent of the review, the use of paper-based appeals, single judges or panels of judges,[86] the degree of specialisation of the reviewing body, the degree to which they were judicial, and according to a range of other idiosyncrasies. The UK stood out as having adversarial hearings, while French hearings stood out for typically having a rapporteur and often involving judicial panels including UNHCR appointees. Countries varied in terms of the publicness of hearings too. Some countries like France, Belgium, the UK and Germany had public hearings that anyone (including researchers) could attend, unless specific exceptions were made, while Italy had in-person hearings which were not publicly accessible. In the light of the legal principle that justice should not only be done but be seen to be done,[87] this variation in publicness (and research access) was itself revealing, representing a fascinating geography of the (in)visibility of law (we discuss publicness in Chapter 6, 'Assembling Appeals').

Arrangements for interpreters differed as well (we discuss this in Chapter 8, 'Barriers to Communication'). Hearing centres also had different security arrangements and administrative support in the form of clerks and secretaries. The spatio-temporalities of courtrooms varied in terms of both layout and the duration of hearings too not only between but also within countries.

A further key distinction between the countries we examined concerned the degree of centralisation of the structure of their refugee claim adjudication practices. France and Belgium had a single central venue, while the UK, Germany and Italy had multiple regional courts at the time of our research.[88] Appellants living in remote parts of the country can have significantly longer journeys to centralised courts. In decentralised systems though, the more remote courts outside major conurbations can suffer higher rates of unrepresented appellants.[89] Nearly all appellants were represented at the CNDA. In Germany, 91% of appellants we observed had a legal representative in Berlin, whereas in Augsburg, a less densely populated region, only 34% were represented at their hearing. Lawyers, especially more experienced and better-established ones, are

86 Hambly, Jessica, Nick Gill and Lorenzo Vianelli (2020) Using multi-member panels to tackle RSD complexities. *Forced Migration Review* 65: 32–35.

87 *The Bangalore principles of judicial conduct* (2002). Available at: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf [accessed 24 April 2024], value 3.2, namely that '[t]he behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done' (page 4).

88 Austria does not fit into the centralised/decentralised dichotomy because there are regional federal courts, but each specialises in particular countries of origin, turning them into single courts within Austria for their allocated countries of origin.

89 Burridge, Andrew and Nick Gill (2017) Conveyor-belt justice: Precarity, access to justice, and uneven geographies of legal aid in UK asylum appeals. *Antipode* 49 (1): 23–42.

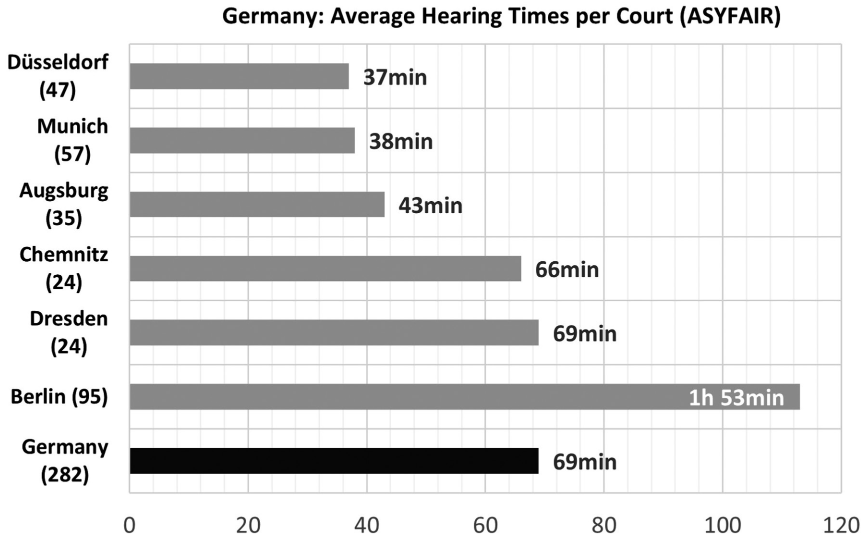

Figure 2.7 Average Court Hearing Times in Germany, as Observed During the ASYFAIR Project (2018/19) (For quantitative data on Germany produced by ASYFAIR, see Hoellerer, Nicole and Nick Gill (2021) ASYFAIR Germany dataset: Asylum Adjudication in Germany (2018/19). Dryad, Dataset. Available at: https://doi.org/10.5061/dryad.sxksn032f [accessed 6 October 2021].). Number of hearings observed in brackets next to court names.

Graph by Nicole Hoellerer.

sometimes reluctant to travel to remote locations. The availability of interpreters for unusual languages is also sometimes constricted in courts located away from capital cities or major conurbations, which provide the requisite diversity to support unusual language needs.

In comparison to a single centralised court, a system of regional courts can result in different local cultures arising at different hearing centres. In the UK, for example, adjournments were significantly more common in London than elsewhere.[90] In Germany we observed markedly quicker hearings in certain federal states (see Figure 2.7). In Düsseldorf for instance, some hearings were scheduled for only 15 minutes each. In Berlin, by contrast, hearings were normally scheduled for around two hours.

90 Gill, Nick, Rebecca Rotter, Andrew Burridge and Jennifer Allsopp (2018) The limits of procedural discretion: Unequal treatment and vulnerability in Britain's asylum appeals. *Social and Legal Studies* 27 (1): 49–78. Adjournments are important when appellants have not been able to disclose all the important facts about their case, perhaps because of trauma or shame that can accompany sexual violence, or not having time to gather evidence.

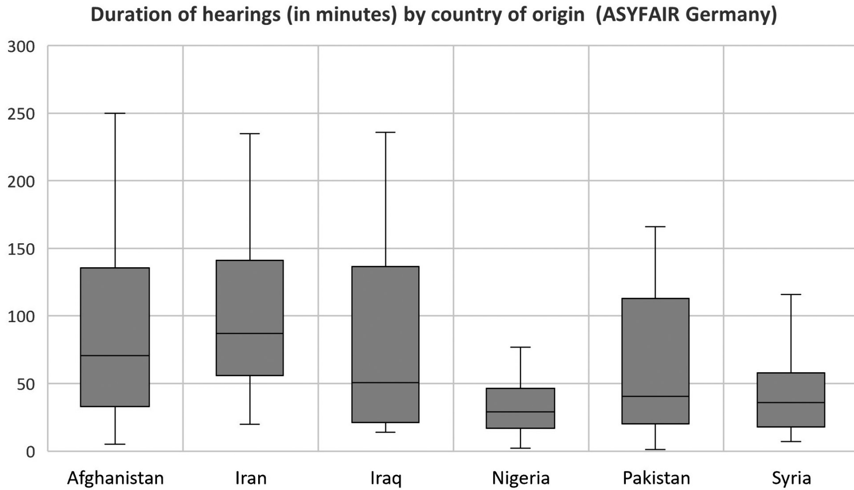

Figure 2.8 Duration of Court Hearings (in Minutes) by Country of Origin, According to ASYFAIR Observations in Germany.

Graph by Nicole Hoellerer.

In part, this discrepancy is a result of cases from certain countries being more-commonly heard at certain courts.[91] Nigerian cases are normally faster[92] whilst Afghan cases tend to be significantly longer (Figure 2.8).[93] Some types of cases, like complex religious conversion cases, tend to take longer.[94] There are,

91 This is due to the dispersal mechanisms across Germany. See e.g. https://www.bamf.de/EN/Themen/AsylFluechtlingsschutz/AblaufAsylverfahrens/Erstverteilung/erstverteilung-node.html;jsessionid=D745FAF4E9110DC8026B872BB5847659.internet541 [accessed 25 March 2021].

92 From 2014 to 2020, the overall protection rate for Nigerian asylum seekers at BAMF level was on average 10% (data on BAMF decisions via the website of Pro Asyl. Available at: https://www.proasyl.de/thema/fakten-zahlen-argumente/statistiken/[accessed 31 March 2021]). At appeal, the protection rate for Nigerian appellants was even lower, at an average 7% over the same time-span (data on court decisions from various sources, available [in German] at: https://dip .bundestag.de/[accessed 31 March 2021]). In the 90s, there was even a discussion in the German parliament to include Nigeria in the list of so-called 'safe countries', which was later abandoned (see http://soli-komitee-wuppertal.mobi/2013/05/politisch-verfolgte-genossen-asyl/[accessed 08 October 2021]). During our observations, several judges argued that Nigerian appellants are not entitled to forms of protection, as their claims are mostly based on 'private feuds', rather than persecution.

93 The bars in the Figure show the range of duration per country of origin, demonstrating that the duration of hearings depends on a variety of factors (e.g. complexity of cases, amount of evidence, witnesses, etc.), with outliers (whiskers) showing that some hearings are significantly below or above the average (the horizontal lines in bars represent the mean).

94 Hoellerer, Nicole and Nick Gill (2021) 'Assembly-line baptism': Judicial discussions of 'free churches' in German and Austrian asylum hearings. *Journal of Legal Anthropology* 5 (2): 1–29.

nevertheless, regional cultural differences. In Berlin for example, most judges assess each case *de novo*, whereas in Düsseldorf and Munich, judges we saw more frequently only asked 'follow-up' questions, taking their cue from the initial government decision and the associated paperwork, rather than fully revising the facts of the case in the hearing, often depending on origin countries.

Our interviewees in Italy also drew attention to the regional differences in tribunals, pointing towards the markedly different backlogs across regions, which meant some appellants waited much longer than others for their hearings. Some interviewees also pointed towards different training and degrees of judicial specialisation at different centres.

In terms of architecture, courts varied from bland and functional, to old, grand and impressive. Figure 2.9 shows a modern but rather functional court in the UK, whereas Figure 2.10 depicts the administrative court in Düsseldorf which is housed in the *Stahlhof*, an imposing and well-known building constructed in 1908 for the German Steelworks Association (*Deutscher Stahlwerksverband)*. Although adapted for court use, the hallways offer vast paintings of the steel industry and busts of steel industrialists, giving the court a particular flair. As proud as judges were of this unique venue, some remarked that such an old building has its downsides, such as leaks in the roof making some courtrooms unusable. We return to this court in Chapter 5 ('Arriving at Court').

All in all, the courts and countries we visited differed in a range of procedural and operational ways. Table 2.2 provides a summary of some of the key differences.

Reckoning with Diverse Appeal Systems

The European Commission's booklet that bore the cupped hands on the front cover that we discussed in the previous chapter (Figure 1.1) asserts that 'asylum must not be a lottery',[95] taking this as a rationale for introducing the Common European Asylum System. While useful for holding decision-making systems to account, it is important to also reflect critically on the value of consistency per se. Consistency in outcomes and even consistency in process is not the same as fairness. Both outcomes and processes could be consistently unfair. Furthermore, differences may simply reflect alternative ways of doing things, none of which are intrinsically fairer. It is not clear, for example, whether an auspicious or modest courtroom is preferable. 'Many diverse procedural forms are intrinsically fair', Costello and Hancox write, 'so there would seem to be little justification for general harmonisation in the name of fairness'.[96]

95 European Commission (2014) *A Common European Asylum System*. Brussels: EC, page 3. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf, [accessed 19 March 2021].

96 Costello, Cathryn and Emily Hancox (2016) 'The Recast Asylum Procedures Directive 2013/32/EU: Caught between the stereotypes of the abusive asylum seeker and the vulnerable refugee'. In Chetail, Vincent, Philippe De Bruycker and Francesco Maiani (eds) (2016)

Figure 2.9 Taylor House, London.
Image by Rebecca Rotter (2014).

Furthermore, in the light of the differences we have described, it seems as though a one-size-fits-all approach is unrealistic. While the EUAA has a mandate to target the practical and operational aspects of refugee status determination in order to support harmonisation, work to address all of the differences that we have described in this chapter would represent a hitherto uncharted degree of standardisation of Member States' justice systems.[97] This would involve more regulation, more legislation and a good deal of political wrangling that may very well still not produce consensus. There may also be

Reforming the Common European Asylum System: The new European refugee law. Leiden: Brill, 377–445, page 383.

97 For a discussion of EASO (now EUAA) see Tsourdi, Evangelia L. (2016) Bottom-up salvation? From practical cooperation towards joint implementation through the European Asylum Support Office. *European Papers – A Journal on Law and Integration* 1 (3): 997–1031. Tsourdi, Evangelia L. (2020) Holding the European Asylum Support Office accountable for its role in asylum decision-making: Mission impossible? *German Law Journal* 21 (3): 506–531.

Figure 2.10 Düsseldorf Court.
Image by Nicole Hoellerer (2019).

a degree of levelling out of provision to the lowest common denominator if consistency is pursued at the expense of other principles.[98]

For these reasons we treat the diversity of asylum appeal systems in Europe as not necessarily problematic. Rather, we detect an opportunity to assess different ways to approach common challenges. Having visited and researched a variety of different appeal systems we are in a position to record and disseminate the practices that seemed to be effective (and ineffective) in overcoming some of the challenges and risks that asylum appeals face and which we discuss

98 Thomas, Robert (2011) *Administrative justice and asylum appeals: A study of tribunal adjudication*. Oxford: Hart Publishing. See also Uçarer, Emek M. (2022) EU asylum governance and e(xc)lusive solidarity: Insights from Germany. *Social Inclusion* 10 (3): 36–47, page 36 on the concern that the CEAS acts as a 'defensive integration producing the lowest common denominator policies'.

in greater detail in the three short policy and practice compendia at the end of Parts II, III and IV.

Conclusion

In this chapter we have set out the relevant international legal framework for asylum appeals. At the same time, we have indicated that there is more than one answer to the chapter's question. First, different countries, and even regions within countries, have different asylum appeal systems. This is true not only procedurally, but also in terms of practice and can make a difference to refugee protection on the ground. Second, while it is possible to answer the chapter's question ('What are asylum appeals?') in a formal, legal sense, there is also a need to respond socio-legally to the same question. This socio-legal approach yields a very different response and is couched in very different language. Our intention in the empirical parts of this book (Sections II, III and IV) is to present this socio-legal perspective with a particular emphasis on the happenings in court and voices and experiences of people involved in the system, including appellants. Before doing so, in the next chapter ('Approaching Asylum Appeals'), we reflect upon our methods.

3 Approaching Asylum Appeals

Methodology

Before describing our methods, some notes on methodology.[1] Ethnography is a particular approach to understanding legal phenomena that is ideally suited to capturing the complexity of experiences of law and legal sociology.[2] Though rigorous, it departs from a positivist approach to law (or other social phenomena) in important ways.[3] First, the account that we construct in this book is not, and makes no pretensions to be, independent from the people who have been involved in collecting the data and writing it up. We hold that a complete or exhaustive account of legal phenomena is impossible because, when one observes the law and its operation up close, one reveals such a rich world of plurality, perspectives and experiences that attempting to represent

1 While method refers to the 'process' or technical means of collecting data, methodology embraces uses of methods of data collection and analysis informed by a specific view of the nature of 'reality' (ontology) and the basis on which knowledge claims are made (epistemology) (Gillespie, Josephine (2019) 'Challenges in legal geography research methodologies in cross-cultural settings.' In O'Donnell, Tayanah, Daniel F. Robinson and Josephine Gillespie (eds) *Legal geography: Perspectives and methods*. Abingdon: Routledge, 19–36, page 21). '[M]ethodology is the *craft* of working through an inquiry or question' (Braverman, Irus (2014) 'Who's afraid of methodology? Advocating a methodological turn in legal geography.' In Braverman, Irus, Nicholas Blomley, David Delaney and Alexandre Kedar (eds) *The expanding spaces of law: A timely legal geography*. Stanford: Stanford University Press, 120–141, page 121).

2 '[D]eep and thick ethnography is one of the best routes we have in comprehending the complexity of law and legal processes in a changing society' (Starr, June and Mark Goodale (2002) 'Introduction: Legal ethnography: New Dialogues, Enduring Methods.' In Starr, June and Mark Goodale (eds) *Practicing ethnography in law: New dialogues, enduring methods*. New York: Palgrave Macmillan, 1–10, page 8).

3 The critique of positivism in geography and other disciplines is long and ongoing, but can be summarised in the following points: (i) facts do not speak for themselves, they are always embedded in politics of interpretation, (ii) social relations of power shape our understandings of truth, (iii) theory helps shape our understanding of the world and the means of understanding it, yet should be reflexive and provisional, (iv) the physical sciences (that privilege rationality and observability) are also fallible and limited by the context of their application (Gregory, Derek, Ron Johnston, Geraldine Pratt, Michael Watts and Sarah Whatmore (eds) (2011) *The Dictionary of Human Geography*. Chichester: Wiley-Backwell).

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legal phenomena from all angles becomes at best impractical and, at worst, potentially misleading. As a result, our account, like any account of legal phenomena, is written from a particular point of view and represents a unique 'slice' through the reality that we observed.[4] In acknowledging our agency over the representations that follow in the subsequent chapters of this book, we reject any attempt to maintain what has been called an 'impossibly distanced objectivity'.[5] Just as a cartographer exerts influence over what appears on a map, so the ethnographer's shadow is cast over all that they observe and write via their conscious and unconscious selectivity in receiving, noting and recounting phenomena. The standpoint of the book is subjective: subject to our collective worldviews, disciplinary training and the decisions we made during our fieldwork. It cannot be otherwise. All that we can do is to be as transparent as we can be: a practice that ethnographers call 'reflexivity'. The relative substance of this chapter reflects our commitment to doing this.[6]

Second, and relatedly, our aspirations are necessarily modest. As a result of our partiality, we cannot and do not aim to provide any sort of 'definitive' account of asylum appeals. What is more, as a result of our anthropological, socio-legal and geographical disciplinary perspectives, we do not aim to comment upon the law *as such* in the way that doctrinal legal scholars might (so-called 'black-letter' legal scholarship). Indeed, our perspective is not really to be considered legal in the formal sense of the term. Our focus is not upon the content of law in terms of its written regulations and statutes, but upon the various ways in which this body of rules intersects with everyday forms of speech, comportment, reflection and representation as it is encountered, enacted and practised in particular places and at certain times. In other words, we are interested in the contextual enactment of law. As a result of this preoccupation, we shift our attention to a much more fine-grained and situated level of analysis that attends to 'all those minor details which together, little by little, by minor brushstrokes, allow one to redefine … law'.[7]

4 This is a key insight of feminist scholars concerning the production of knowledge: that all knowledge is partial and situated, meaning that it is related to the context in which it is produced. Knowledge is also embodied (Haraway, Donna (1988) Situated knowledges: The science question in feminism and the privilege of partial perspective. *Feminist Studies* 14 (3): 575–599; Rose, Gillian (1997) Situating knowledges: Positionality, reflexivities and other tactics. *Progress in Human Geography* 21 (3): 305–320). These insights dispel the myth of objectivity, the 'god-trick' of 'seeing everything from nowhere' (Haraway, 1988: 581).

5 Crang, Mike and Ian Cook (2007) *Doing ethnographies*. London: Sage, page 21.

6 Following the recommendations of Kritzer (Kritzer, Herbert M (2009) 'Research is a messy business: An archaeology of the craft of socio-legal research.' In Halliday, Simon and Patrick Schmidt (eds) *Conducting law and society research: Reflections on methods and practices*. Cambridge: Cambridge University Press, 264–285). Braverman (2014: 122) further notes that 'The legal discipline … is arguably not as reflective as many other disciplines about its methods' which we take to indicate the importance of a full explication of our methods here.

7 Latour, Bruno (2010) *The making of law: An ethnography of the Conseil d'Etat*. Cambridge: Polity, page 199. It is for this reason that socio-legal scholars advocate beginning with the

Our analysis is indeed a sort of redefinition. There is something fundamentally disruptive about an ethnographic approach to law.[8] One consequence of an ethnographic perspective, for example, is that the divisions between law and socio-spatial reality tend to look rather unstable at this level of analysis. The awesome volume of things – files, training materials, bodies, records, evidence, buildings, screens, voices, signatures, etc. – that must be collected for the law to function, illustrates the immense fragility and contingency of Law-as-such. This fragility jars with its projected, self-proclaimed stability, universality and dependability, which are themselves indispensable if the rule of law is to be maintained.[9]

While it is common to think of the law as a cause, an active social agent that brings about certain changes in society and inhibits others, the ethnographer is much more likely to see law as an *effect* of the arrangement of a series of social, spatiotemporal and material practices that themselves need to be accounted for. This view lays bare the radical contingency of 'the law' on social and material reality. Perhaps some legal minds do not like to be reminded of it, like an aeroplane pilot might not like to be reminded of the immense and unlikely work of a litany of engineers that goes into keeping them up in the air.[10] It is, after all, an almost irrelevant insight for their daily work and may also precipitate an uncomfortable sense of vertigo. And yet it is at this level that not only the inseparability of 'Law' from its context, but also its reliance on that context, can be observed. This is not to say that the ethnographer would know how to operate an aircraft, or how to judge an asylum claim. Thus, the ethnographer is both humble and provocative at the same time, ignorant and insightful in equal measure.

A third characteristic of an ethnographic approach, which distinguishes it once again from a scientific one, is its flexibility. This is perhaps clearest

'minutiae' of legal processes (Moorhead, Richard and Dave Cowan (2007) Judgecraft: An introduction. *Social and Legal Studies* 16 (3): 315–320). For Latour, this meant starting from the material involved in assembling law rather than its written content. 'Yes', he writes, 'let us begin law at the beginning, that is to say at the stamps, elastic bands, paperclips and other office paraphernalia which are the indispensable tools of cases. Jurists always speak of texts, but rarely of their materiality. It is to this materiality that we must apply ourselves' (Latour, 2010: 71).

8 Flood, John (2005) 'Socio-legal ethnography.' In Banakar, Reza and Max Travers (eds) *Theory and method in socio-legal research.* Oxford: Hart, 33–48.

9 Tamanaha, Brian Z (2004) *On the rule of law: History, politics, theory.* Cambridge: Cambridge University Press.

10 Latour, in discussing technology, draws an analogy with the pilot who is said to fly. 'It is by mistake, or unfairness, that our headlines read "Man flies", "Woman goes into space". Flying is a property of the whole association of entities that includes airports and places, launchpads and ticket counters. B-52s do not fly, the U.S. Airforce flies. Action is simply not a property of humans, *but of an association of actants*' (Latour, Bruno (1999) *Pandora's hope: Essays on the reality of science studies.* Cambridge, MA: Harvard University Press, page 182 [italics in the original]. It might also be said that the (refugee law) judge does not judge.

in relation to theory. While a positivist might start with a theory, develop a hypothesis, test the hypothesis against observable data and then reappraise the theory on the basis of the results, the ethnographer's relationship to theory is very different. While they may have one or two hunches before entering the field, the entire venture is fundamentally more exploratory.[11] Data collection might begin fairly early on in a research project as a result (for example, as literature is still being reviewed) and might proceed on the basis of an 'area' of interest rather than for the purpose of 'solving' tightly defined research problems. In other words, the collecting of data helps to shape the research questions and analysis in a process of reflexive iteration.

One consequence of this approach is a distinctly inductive form of analysis, which means that the data collected in the field is used to determine the theoretical perspectives that a project adopts, which can themselves be multiple and diverse.[12] In order for this to be possible, one needs to attend closely and systematically to the data collected in order to 'hear' what it is conveying in theoretical and conceptual terms. It is for this reason that ethnographers spend a good deal of time analysing their data, which entails the gradual process of building up a theoretical understanding of the phenomenon under study from the empirical material they have collected (see section on 'Sampling' below). The ethnographer also needs to have a reasonably broad knowledge of a range of theories in order to be able to recognise a theoretically interesting insight when they see it.[13] The resulting written form of the ethnography might reflect a combination of theoretical insights, and 'speak back' to a variety of academic schools of thought.

Another form of flexibility inherent to ethnographic practices concerns the ethnographer's relationship to methods. These, too, are often eclectic and contingent. An ethnography involves, at a minimum, an extended, immersive

11 'It is probably true of most research methodologies that there will be slippage between the project as originally conceived and as finally executed and written-up… Imagination and a willingness to adapt must be the stock in trade of all researchers. The tendency for slippage, and the requirement for imagination and flexibility, is particularly marked in qualitative research. This is because qualitative research, or certainly ethnographic research, is inherently exploratory' (Choongh, Satnam (2007) 'Doing ethnographic research: Lessons from a case study.' In McConville, Mike and Wing Hong Chui (eds) *Research methods for law*. Edinburgh: Edinburgh University Press, 72–89, page 87).

12 'Writers in the ethnographic tradition are, generally, rather suspicious of theoretical generalizations. For them, the particular contexts of specific social situations are all-important, and they therefore tend sometimes to have difficulty in generalizing from these particulars. In so far as they do generalize, they have a strong preference for the inductive rather than the deductive approach to theory construction: that is to say, they prefer to build theory 'upwards' from an understanding of specific social situations, rather than formally testing hypotheses' (Bottoms, Anthony (2000) 'The relationship between theory and research in criminology.' In King, Roy and Emma Wincup (eds) *Doing research on crime and justice*. Oxford: Oxford University Press, 15–60, page 30).

13 They may also have no particular a priori commitment to a specific theoretical worldview, although they may have theoretical 'sensibilities' like a sympathy for feminist research.

engagement with a community and a period of writing this up reflexively, but, within this, various activities can be put to work including observation, surveys, interviews, archival work and creative methodologies.[14] Various factors can precipitate a change in methods used, including the realisation that something was not as interesting as it at first appeared, the discovery that something planned is not going to be possible, or the arrival of an unforeseen opportunity or interesting avenue for investigation.[15] Under these circumstances '[m]ethods become eclectic because a loyalty to a single technique, even something like participant observation, commonly stultifies research'.[16]

Methods: What We Did

896 in-person observations of asylum appeals were conducted; 601 of these involved researcher-completed surveys recording details of the hearings. We also conducted 145 interviews. Table 3.1 indicates the breakdown of these data by country.

The mainstay of our research method was in-person observation. Most of our observations were conducted from 2018 to 2019 as part of the ASYFAIR project, which is what we refer to in the discussion that follows, although the majority of the observations in the UK came earlier (2013–2015) as part of a previous project.[17] We are very grateful to the researchers on that project, including Jennifer Allsopp, Andrew Burridge, Melanie Griffiths and Rebecca Rotter, for the observations they conducted during this period.

Observation has been taken for granted as something that occurs 'naturally'.[18] 'Indeed, observation is commonly – and unfairly – regarded as

14 We follow Paul Willis and Mats Trondman in viewing ethnography as: 'a family of methods involving direct and sustained social contact with agents, and of richly writing up the encounter, respecting, recording, representing at least partly *in its own terms*, the irreducibility of human experience. Ethnography is the disciplined and deliberate witness-cum-recording of human events' (Willis, Paul and Mats Trondman (2000) Manifesto for ethnography. *Ethnography* 1 (1): 5–16, page 5, italics in the original).

15 Schmidt and Halliday extol the virtues of an 'ability to respond to the unexpected, to serendipitous opportunities, and, almost inevitably, to a certain level of disappointment' (Schmidt, Patrick and Simon Halliday (2009) 'Introduction: Beyond methods – Law and society in action.' In Halliday, Simon and Patrick Schmidt (eds) *Conducting law and society research: Reflections on methods and practices*. Cambridge: Cambridge University Press, 1–13, page 2).

16 Nader, Laura (2002) 'Moving on – Comprehending anthropologies of law'. In Starr, June and Mark Goodale (eds) *Practicing ethnography in law: New dialogues, enduring methods*. New York: Palgrave Macmillan, 190–201, page 198.

17 Economic and Social Research Council grant number: ES/J023426/1.

18 Kearns, Robin A. (2016) 'Placing observation in the research toolkit.' In Hay, Iain (ed) *Qualitative research methods in human geography*. Oxford: Oxford University Press, 313–333, page 313.

Table 3.1 Breakdown of ASYFAIR Data Collected by Country

Country	*Germany*	*UK*	*France*	*Belgium*	*Italy*	*Austria*	*Greece*	*TOTAL*
Ethnographic observations	282	400	165	45		4		896
Researcher-completed surveys	269	290	38			4		601
Interviews	1	70			62	1	11	145

'inherently easy' and 'of "limited value"'.[19] Among social scientists, however, observation is a crucial means of collecting data, and among court researchers its value has been vaunted.[20] Legal geographers, for example, have stressed how in-person observation can reveal 'the affective, intimate, and bodily politics of courtroom subjects, spaces, and moments, connecting these with wider structural processes of legal, sociocultural, political, and economic life'.[21] This applies even to the seemingly 'dull, everyday [and] unspectacular'[22] periods in legal hearings because it is precisely here, in the expressions, interruptions and humour that judges and other legal actors involved in the hearings employ, that a plethora of kindnesses and indifference, compromises and 'micro-aggressions'[23] can be located. We attend to such dynamics not with the intention of 'catching out' a particular judge or person in authority. Instead, our methods are aimed at understanding the ways structural processes of law are manifested in practice and encountered by those involved. Observation is also 'more than just seeing'.[24] It includes listening as well as using the other bodily senses to perceive social dynamics.

19 Kearns (2016: 313) citing Fyfe, Nicholas R (1992) Observations on observations. *Journal of Geography in Higher Education* 16 (2): 127–133, page 128.

20 Benson, Melinda H. (2014) 'Rules of engagement: The spatiality of judicial review.' In Braverman, Irus, Nicholas Blomley, David Delaney and Alexandre Kedar (eds) *The expanding spaces of law: A timely legal geography.* Stanford: Stanford University Press, 215–238. Jepson, Wendy (2012) Claiming space, claiming water: Contested legal geographies of water in South Texas. *Annals of the Association of American Geographers* 102 (3): 614–631. Valverde, Mariana (2015) *Chronotopes of law: Jurisdiction, scale and governance*. London: Routledge.

21 Faria, Caroline, Sarah Klosterkamp, Rebecca Torres and Jayme Walenta (2020) Embodied exhibits: Toward a feminist geographic courtroom ethnography. *Annals of the American Association of Geographers* 110 (4): 1095–1113, page 1095.

22 ibid.: 1107.

23 Torres, Rebecca (2018) A crisis of rights and responsibility: Feminist geopolitical perspectives on Latin American refugees and migrants. *Gender, Place and Culture* 25 (1): 13–36, page 32.

24 Kearns, 2016: 316.

Sampling

Key decisions about which countries to conduct research in were made at the design stage.[25] Countries were selected on the basis that they needed to determine a sufficient number of asylum appeals per year to make sustained fieldwork viable. In other words, we did not want to spend days hanging around at courts waiting for asylum cases to come along. This led to a focus on countries that considered relatively high numbers of claims. Although we wanted to observe hearings, we were aware that not all countries in Europe conduct in-person asylum appeals. What is more, not all countries that conduct in-person asylum appeals allow the public (including researchers) to observe.[26] We also wanted to capture a balance between adversarial and inquisitorial legal systems. Taking all these factors into account we settled upon the UK, France and Germany as the primary locations of our in-person appeal observations (Austria and Belgium were added later to our sample as a result of the opportunities provided by our researchers' connections and language abilities) and the UK, Italy and Greece as sites for interviews.

Researchers attended court during weekdays, and cross-checked announcement boards at court or in front of courtrooms to select which cases to attend. Before setting out into the field, the team established appropriate parameters – for example, trying to select cases from certain countries of origin that were common across the Member States where we conducted research, such as Afghan cases, with the idea that it would be easier to appreciate differences in how asylum appeals were conducted when comparing similar countries of origin of appellants. While this did not completely determine our sampling, each researcher made sure to sample some Afghan cases as a result. Therefore, researchers used their judgement to select cases based on country of origin, often inferring this information from the names of appellants researchers saw on the case announcements at court, as well as by court chambers (certain chambers at court are country experts). Furthermore, as the research progressed,

25 Our design was also informed by the previous research project, conducted in the UK between 2013 and 2016. This project also involved ethnographic observations of asylum appeals and the generation of ethnographic notes, although it was confined to the UK rather than an international comparison. We are grateful to the researchers on that project, Jennifer Allsopp, Andrew Burridge, Melanie Griffiths and Rebecca Rotter.

26 The Greek Independent Appeals Committees (Appeals Authority), for example (Ανεξάρτητ ες Επιτροπές Προσφυγών (Αρχή Προσφυγών)) – which is an administrative, rather than a legal body – usually only conducts written procedures based on case files (page 65; and see Chapter 2 'What are asylum appeals?'). Before 2020, appellants in Greece could request an oral hearing in complex cases (page 66). However, with the new International Protection Act (IPA) that came into force in January 2020, the rights of appellants to request an oral hearing were further restricted (page 61) and are criticised by various human rights bodies (and others) for running contrary to EU law (e.g. Article 46 of the recast Asylum Procedures Directive and Article 47 of the EU Charter of Fundamental rights) (page 65). From *AIDA Country Report: Greece, 2019 Update*. Available at: https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_gr_2019update.pdf [accessed 25 March 2021].

interest arose among the ASYFAIR team in religious conversion cases, and we then made an effort to actively select such cases to obtain a sample for data analysis.[27] For example, Nicole used the familiarity she established with judges, interpreters and lawyers in Germany to obtain information on when the next conversion hearing at a particular court would take place. Moreover, some judges or lawyers would occasionally point out 'interesting' cases to the researchers, who would then follow their advice to attend such hearings.

One of our early hypotheses was that asylum appeals had a different feel and were conducted subtly differently towards the end of the day. Therefore, researchers tried to sometimes select a courtroom in which the same judge or panel of judges were scheduled to hear several cases in a row. Although our sampling was driven by our interest and intentions, however, we were also constrained by practicalities. At smaller courts for instance, in which there were sometimes only one or two asylum cases per day, our abilities to select cases based on this criterion were limited.

During hearings we took notes from the public areas of the courts. Usually we used pen and paper to write a record of the hearings (in the CNDA, for example, laptops and phones were not allowed), including keywords, snippets of dialogue, as well as gestures and verbal communication that is not formed into words (e.g. laughter, volume and pitch, hesitation, sarcasm – we report on many of these in our discussion of judicial styles in Chapter 11, 'Judicial Styles'). These fieldnotes were usually in English, because where necessary the researchers immediately translated (from e.g. French or German) whilst writing. On the basis of these 'raw' notes we produced detailed field-note diaries 'as accurate as memory and ear allow[ed]',[28] leaving no more than a few days between the original observation and the production of this text. During this process we also wrote 'memos' with preliminary interpretations, links to theory or open questions that we could return to during our remaining fieldwork.[29]

The writing up of fieldnotes into substantive diaries often took a considerable amount of time,[30] yet 'discipline for such "homework" is a key part of field observation: notes are invaluable sources of data and prompts to further reflection'.[31] This activity also took on added importance in the context of a

27 See Hoellerer, Nicole and Nick Gill (2021) 'Assembly-line baptism': Judicial discussions of 'free churches' in German and Austrian asylum hearings. *Journal of Legal Anthropology* 5 (2): 1 –29.

28 Van Maanen, John (1982) 'Fieldwork on the beat.' In Van Maanen, John, James M Dabbs and Robert R Faulkner (eds) *Varieties of qualitative research. Vol. 5.* Beverly Hills/London/New Delhi: SAGE Publications, 103–151, page 105.

29 Strauss, Anselm L and Juliet M Corbin (1996) *Grounded theory: Grundlagen qualitativer Sozialforschung.* Weinheim: Beltz.

30 See also Good: 'writing up these notes often took longer than the original hearing' Good, Anthony (2007) *Anthropology and expertise in the asylum courts.* London: Routledge-Cavendish, page 44.

31 Kearns, 2016: 329.

team of researchers: it was imperative to produce an intelligible written record so that other researchers could use one's notes. Such was the time commitment that we were unable to confine the writing of diaries to the end of days or evenings. Rather, one or two days a week would typically be spent writing up field-notes during our fieldwork.

One question that inevitably arose, both during the writing of diaries from notes, and the writing of eventual publications, was the extent to which it was appropriate to provide 'verbatim' records of what was said and done.[32] In the material that follows we have generally given verbatim quotes because we are of the opinion that doing so conveys the experience of being in asylum appeals most effectively, including the limitations in linguistic ability that can play a decisive part in appellants' successes and failures. We have nevertheless made very minor modifications to utterances when we have deemed it necessary, for example to ensure anonymity and to guarantee that the intended meaning, obvious from the wider context of the data, is conveyed in the quote.

We are also conscious that the task of translation from one language to another may impact on the content as well as the 'flavour' of speech. Our team consisted of native or advanced speakers of the languages in which observations were conducted, and the researchers have translated their own field-notes (usually whilst taking notes at court), to ensure accuracy. We sometimes retained terms or phrases in their original language, to convey the meaning of complex language, such as unique regional expressions and dialects.

We analysed the observations using the qualitative data analysis software NVivo. Our transcription and analysis of ethnographic and interview material went through several stages. First, Nick and Nicole, who did most of the coding, had several meetings to agree on overarching 'nodes' under which to code the data. These 'master nodes' were created based on reading the ethnographic data and assessing the extent to which nodes applied across ASYFAIR countries or different sites within them. Each ASYFAIR country was coded (by either Nick or Nicole) in a separate NVivo file using the same codes, as well as creating new 'nodes' applicable to the peculiarities of the specific country. The coding allowed us to compile related qualitative material to form arguments for publications and underline conceptual ideas.

When it came to writing up the project for academic publication, as well as other forms of dissemination, in order to maintain a consistent 'voice' one of us usually led the writing up and shared drafts with the other authors for comment, rather than involving them more substantively at the early drafting stage. Nick drafted this book for example.

32 See Good, 2007: 46.

Multi-Methodological Research

One danger of relying too heavily on observations is that certain social forces, like social class and power dynamics, could remain outside of the purview of the researcher because they are sometimes difficult to 'see'.[33] We were also aware that what we saw in one particular situation may be a one-off, and we wanted some way to systematically compare the cases we observed. The surveys we completed captured a wide variety of characteristics of the hearings we observed, including who was present at the hearings, basic characteristics of the case (e.g. grounds for claiming asylum) and the behaviours of the parties involved.[34] Once again, we are grateful to Andrew Burridge, Rebecca Rotter and Jennifer Allsopp on the earlier UK-based project for collecting survey data in the UK.

The survey data is interesting in its own right. Female judges in the UK, for example, were more likely to follow a series of best practice guidelines and undertake a variety of helpful behaviours that we watched for than their male colleagues. Moreover, appellants who were male were more likely to benefit from such behaviours.[35] The quantitative data also provides a useful backdrop against which some of the ethnographic findings can be considered, and we refer to it at various points in the chapters that follow.[36]

Interviews

A good deal of social scientific work examines the processes used to govern the lives of people seeking asylum, but only a minority of it takes account of their own experiences in their own words.[37] Although interviewing people

33 Kearns, 2016: 332 citing Gupta, Akhil and James Ferguson (eds) (2007) *Anthropological locations: Boundaries and grounds of a field science*. Berkeley: University of California Press.

34 For example, did the judge follow any procedural guidelines or best practice for conducting hearings?

35 Gill, Nick, Rebecca Rotter, Andrew Burridge and Jennifer Allsopp (2018) The limits of procedural discretion: Unequal treatment and vulnerability in Britain's asylum appeals. *Social and Legal Studies* 27 (1): 49–78.

36 It is also a resource for future researchers. The challenges and costs of fully and safely anonymising the qualitative data for re-use by researchers were prohibitive, but we have published anonymised versions of both the UK and German quantitative data generated by our surveys for re-analysis. See Hoellerer, Nicole and Nick Gill (2021) *ASYFAIR Germany dataset: Asylum adjudication in Germany (2018/19)*. Dryad, Dataset. https://doi.org/10.5061/dryad.sxksn032f [accessed 27 April 2024]; Gill, Nick and Rebecca Rotter, Andrew Burridge and Jennifer Allsopp (2019) *Asylum appeal hearing observations at first-tier tribunal hearing centres in the UK, 2013–2016.* [Data Collection]. Colchester, Essex: UK Data Archive 10.5255/UKDA-SN-852032. Available at https://reshare.ukdataservice.ac.uk/852032/ [accessed 28 April 2024].

37 Haridranath points to 'acute lack of an engagement, particularly in official and government discourse, but also in academic research, with the everyday experience of refugee communities' (Haridranath, Ramaswami (2007) 'Refugee communities and the politics of cultural identity.' In Bailey, Olga, Myria Georgiou and Ramaswami Haridranath (eds) *Transnational*

seeking asylum was neither easy (see below) nor perfect,[38] it was important to us that we represented their views and experiences in order to attempt to counter-balance this tendency. In total, 66 people who have sought asylum were interviewed about their experiences of the legal process.[39] We are grateful to Natalia Paszkiewicz and Lorenzo Vianelli for carrying out the majority of interviews with appellants, in the UK and Italy respectively.

Interviews were conducted in English in the UK; Italian, French or English in Italy; and French or English in Greece. We had ethical concerns about involving interpreters for our research interviews given the small size of many local migrant communities in Europe with specific language competences, combined with the potential sensitivity of information being shared. Local specialist interpreters that we were likely to be able to contact could also have worked at the asylum courts, which could create difficulties in establishing trust with interviewees, and may lead respondents towards untruthful replies. We therefore conducted interviews ourselves rather than through interpreters. Most interviews were face-to-face, except a small number of the Greek ones which were conducted via Skype.

Recruitment of asylum appellants for interviews was separate from our observations. This was important because we did not want to run any risk that appellants at their hearings might think the interview was related to the legal process (and, in particular, that giving us an interview was required as part of the claim determination process, or advantageous to it). To recruit appellants, we approached refugee community organisations and non-governmental organisations such as charities. Once contact had been made, we attempted to snowball (i.e. ask our interviewees if they could recommend more interviewees) from existing contacts to others in a community.

Legal representatives were also interviewed. Perhaps unsurprisingly, we found it much easier to access lawyers for the appellants than lawyers or representatives for the state, and so the vast majority of our interviews with legal representatives are with lawyers who acted for appellants.

Aside from a small number, mostly in Italy, we did not interview judges. Partly this was due to access problems: although we sometimes had permission to do so – for example, from court presidents in Germany – our attempts to interview them often failed because of the workload and time pressure they cited. Additionally, we were concerned that interviews can invite a sanitised

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lives and the media: Re-imagining diasporas. Basingstoke: Palgrave Macmillan, 133–148, page 138).

38 Interviews are imperfect windows onto human experience because interviewees might misremember or misrepresent their experiences and struggle to put them into words.

39 See Gill, Nick, Jennifer Allsopp, Andrew Burridge, Daniel Fisher, Melanie Griffiths, Jessica Hambly, Jo Hynes, Natalia Paszkiewicz, Rebecca Rotter and Amanda Schmid-Scott (2020) *Experiencing asylum appeal hearings: 34 ways to improve access to justice at the first-tier tribunal.* Exeter University and the Public Law Project. Available at: https://publiclawproject.org.uk/resources/experiencing-asylum-appeals/ [accessed 26 April 2024].

and idealised account of what occurs in particular situations, especially among elites with not only well-developed ideas, norms and discourses about their role but also potentially an interest in promulgating a view of their own profession as neutral and diligent. Interviewers can become absorbed in the world that interviewees project, and ultimately become mouthpieces for powerful groups of interviewees. Interviewing judges formally could also have involved a written application to the relevant authority, which may have included clauses allowing them some degree of oversight of our work.[40] So, whilst wanting to remain sympathetic to the difficulties of their role, we were wary of becoming too formally immersed in the world of judges.

We nevertheless found that judges often spoke to us during breaks, as well as before and after hearings. These informal conversations were less stilted than formal interviews can be, and judges seemed to be less guarded (although they always knew that we were researchers). In the heat of debate during hearings judges can arguably be expected to be less mindful of projecting a particular version of themselves and their roles. By observing them in action, in their professional environments and roles, we attempted to minimise the risk of an artificial representation of their work.

Transcription of the majority of the interviews was straightforward: we used transcribers we knew or had been recommended to us, and most of the interviews were in English. The Italian transcripts posed more of a challenge and, with the help of the Italian researcher on the project, Lorenzo Vianelli, we were forced to go through relatively distant academic networks to locate transcribers with the necessary translation skills, a process that was much more laborious because no single transcriber that we could identify had the capacity to take on all of the work. We are grateful to Lorenzo for supporting our search for reliable transcribers and his preparation of a common glossary of terms for their work. We are also grateful to the transcribers who carried out the work at short notice during the first wave of the COVID-19 pandemic in Europe (see the acknowledgements at the start of this book).

Being Part of a Team

To study multiple courts and countries simultaneously, our ethnographic efforts had to extend beyond what a single researcher was able to carry out. Ethnography as a research practice, however, has historically been understood

40 Indeed, in the UK permission was sought to interview judges in 2015. Permission was granted to approach a limited number of senior judges, with various conditions, but when we approached individual judges for interviews all but one declined to talk to us or ignored our request. At the prospect of providing our draft work for comment by judicial authorities prior to publication for the sake of the inclusion of one interview (which was unrecorded at the interviewee's request) we decided against including any material from it in subsequent work.

largely as 'the province of the lone researcher'.[41] The opportunities and challenges of working as a team therefore deserve some scrutiny.

Working as part of a team allowed the research project to develop a critical perspective on an international system that exists beyond any particular, localised setting. The asylum system in the European Union is international, making a research approach that is able to make connections and draw distinctions between its multiple sites highly valuable. Traditional ethnographic practices have evolved over the last few decades to address the issues raised by global phenomena, developing communicative practices and approaches to work allocation that allow researchers to study more than one site simultaneously.[42]

Working as a team in ethnographic contexts allowed researchers to share their data immediately within their research groups, which was helpful in identifying particularly unusual occurrences. Although they usually worked alone, researchers would be in touch regularly (roughly weekly during fieldwork) and also visited the sites at which the other researchers were working at various times. These practices not only allowed the resemblances and differences between sites to come to the fore, but also provided an indispensable sounding board for preliminary ideas and insights relating to interpretation of the data. The shared visits afforded the opportunity to observe the same hearing from different subject positions and disciplinary perspectives, which further enriched the insights we were able to gain.[43] Regular conversations and comparisons between the fieldwork settings also enabled the ethnographers to attune themselves to dynamics that they might otherwise have missed in their setting. For example, the effects of the absence of an official court note-taker in the UK became clearer in comparisons with Belgium and Austria where judges have clerks in the courtroom to take notes.

A community of researchers also offers various other advantages. Given the difficult subject matter involved, the existence of a research team sometimes acted as an emotional support[44] (although see below on secondary trauma). It

41 Jarzabkowski, Paula, Rebecca Bednarek and Laure Cabantous (2015) Conducting global team-based ethnography: Methodological challenges and practical methods. *Human Relations* 68 (1): 3–33, page 3.

42 Marcus, George E (2009) 'Multi-sited ethnography: Notes and queries.' In Falzon, Mark-Anthony (ed) *Multi-sited ethnography: Theory, praxis and locality in contemporary research*. Abingdon: Routledge, 181–196. However, our approach was not a multi-sited ethnography in the sense that Marcus describes it. Marcus had in mind the examination of different but related sites along a network of power, whereas our approach examines broadly comparable sites within a power hierarchy.

43 Roach Anleu, et al. (2016) also appreciated 'the value of dialogue between … two researchers in interpreting observed events' when two researchers observed the same hearing (Roach Anleu, Sharyn, Stina Bergman Blix, Kathy Mack and Åsa Wettergren (2016) Observing judicial work and emotions: using two researchers. *Qualitative Research* 16 (4): 375–391, page 375).

44 E.g. Jessica wrote in 2020: 'continuing to work and write with the team has helped control feelings of isolation and loneliness'. See also Roach Anleu, Bergman Blix, Mack et al.

was also necessary to clearly articulate the purpose of the study in a transparent, easily communicable way to researchers joining the team, which helped to ensure rigour.

Another important advantage was the interdisciplinarity that a team-based approach offered. The ASYFAIR team drew on insights from geography, law, anthropology and migration studies, which allowed us to reflect on findings from a variety of different perspectives. The presence of a socio-legal scholar (Jessica) in the research team was particularly valuable, in order to broach the differences in terminology and concepts between social science perspectives and legal perspectives.[45]

On the other hand, the team-based approach was not without challenges. While not amounting to the 'friction' and 'incompatible standpoints'[46] that sometimes arise in interdisciplinary settings, we sometimes disagreed. For example, at one stage we planned to observe 'fatigue' among the actors at court. We disagreed about how effectively we could 'survey' specific behaviours that indicated fatigue. Some of us were content to count the number of yawns, slouches and confused sentences uttered, accepting that, while not perfect, these phenomena were likely to be correlated to levels of fatigue in the courtroom. Others of us, however, pointed out the myriad reasons why any of these behaviours could occur, and were unwilling to make the inference that a certain frequency of them could be interpreted in a prescribed way.[47]

There were also challenges generated by the scale of our work. The literature on team ethnography emphasises the challenges that divisions of labour within a research team can produce.[48] At times, as this literature describes, the Principal Investigator (Nick) felt distanced from the close perspectives generated by the other members of the team involved in the day-to-day ethnography. While the data collection process was dissipated, however, the data analysis and writing up for this book was largely conducted by Nick and

(2016: 386) who note the 'emotional support during the demanding research process' that co-researchers can provide.

45 We also made sure that we presented our work at legal academic conferences in order to further enrich the legal perspectives that we were able to take into account. This grounding in legal perspectives has helped with the dissemination of some of our findings in legal journals. See for example Hambly, Jessica and Nick Gill (2020) Law and speed: Asylum appeals and the techniques and consequences of legal quickening. *Journal of Law and Society* 47 (1): 3–28.

46 Roberts, Paul (2017) 'Interdisciplinarity in legal research.' In McConville, Mike and Wing Hong Chui (eds) *Research methods for law*. Edinburgh: Edinburgh University Press, 90–133, page 92.

47 After much soul-searching we eventually abandoned any attempt to 'measure' fatigue, probably for the best.

48 See for example, Bikker, Annemieke P, Helen Atherton, Heather Brant, Tania Porqueddu, John L. Campbell, Andy Gibson, Brian McKinstry, Chris Salisbury and Sue Ziebland (2017) Conducting a team-based multi-sited focused ethnography in primary care. *BMC Medical Research Methodology* 17 (1): 1–9. Jarzabkowski, Bednarek and Cabantous (2015).

Nicole, which brought its own challenges. How well and to what extent could the book represent the diverse findings of all the researchers involved?[49]

Divisions of labour in the ASYFAIR research team that looked like a good idea at the start of the fieldwork could also backfire towards the end of the project when critical members of the team finished their contracts. In reality, it proved difficult to ensure that the work demands associated with the project ceased when researchers' contracts came to an end, and it was common for researchers to continue to work on journal articles without being paid. Relying on team members to co-ordinate IT systems or contribute key skills such as quantitative analysis could also backfire when the demand for these skills and responsibilities exceeded the term of the contract that the project supported.

Access

Socio-legal scholars, including those who have studied the legal aspects of border control systems, report that access to the field can present 'fundamental challenges'.[50] These can range from the sheer emotional labour of gaining and maintaining the requisite connections,[51] to years of waiting for institutional approval. Maintaining academic independence can be hard if approval is difficult to obtain and maintain. Max Travers, for example, describes waiting for roughly two years to conduct research on British asylum appeals, during which time he had to offer assurances that he would 'give the different organisations drafts of what I was planning to publish. I also sent regular reports about my progress and research questions'.[52] Mary Bosworth, who studied British immigration detention, reports a 12-month period before gaining access, during which time she had to convince the border authorities that the study would be of value to them. 'I needed to conceive and pitch my project as more than just an "academic" study', she writes.[53] 'What could I do for the UK Border Agency?' What is more, Bosworth invested considerable effort in finding and working with gatekeepers to secure research access. This can potentially dampen critique she suggests, if the researcher is keen to maintain research access to the same or similar sites in the future. '[I]t is difficult to find fault and retain research access. Nobody wants to admit toning down their assessment

49 See Charmaz, Kathy and Richard G Mitchell (1996) The myth of silent authorship: Self, substance, and style in ethnographic writing. *Symbolic Interaction* 19 (4): 285–302 on the intricacies of developing an authorial ethnographic voice.

50 Kearns, 2016: 323.

51 Bergman Blix, Stina and Åsa Wettergren (2015) The emotional labour of gaining and maintaining access to the field. *Qualitative Research* 15 (6): 688–704.

52 Travers, Max (1999) *The British immigration courts: A study of law and politics.* Bristol: Policy Press, page 41.

53 Bosworth, Mary (2014) *Inside immigration detention*. Oxford: Oxford University Press, page 54.

or failing to raise particular issues, yet when research access can so easily dry up, it is sometimes difficult to be frank'.[54]

Some anthropologists have advocated 'studying up' institutions.[55] Studying up means accessing the everyday, micrological settings and situations within institutions to understand and critique the operations of power within them and, by extension, within society more broadly. As an imperative, it responds to the need for anthropologists not only to study the 'exotic' or Indigenous subject, but to 'train the focus of our research on the structures of privilege, power, and marginalization'.[56]

Yet there are significant problems associated with studying up. Not least, 'those in power do not want to be observed and have elaborate systems of protection in place to guard their privacy'.[57] Eule et al., for example, who studied everyday control of irregular migrants in Europe and described their access as 'a constant struggle',[58] noted that border control practices are frequently 'hidden from public view and explicitly geared to avoid public scrutiny'.[59] The effect of this on researchers' access can be distinctly constraining. John Campbell, who studied British legal representatives in asylum cases, describes 'the elaborate steps which officials take to cover up or obscure their work by "acts of self-censorship, the careful management of paper trails, and a tendency towards off-the-record kinds of communication"':[60]

> I waited two months without hearing from [a gatekeeper], at which point I emailed him and asked for a decision. He replied that my request had been 'lost'. I was directed to a different official who was very defensive, though he too failed to get back to me. I emailed my gatekeeper [within the government], but my emails went unheeded.[61]

54 ibid.: 55.

55 Nader, Laura (1974) 'Up the anthropologist: Perspectives gained from studying up in reinventing anthropology.' In Hymes, Dell (ed) *Reinventing anthropology*. New York: Vintage Books, 284–311.

56 Howitt, Richie and Stan Stevens (2016) 'Cross-cultural research: ethics, methods and relationships.' In Hay, Iain (ed) *Qualitative research methods in human geography*. Oxford: Oxford University Press, 45–75, page 69. For an anthropological perspective, see e.g. Gellner, David and Eric Hirsch (eds) (2020) *Inside organizations: Anthropologists at work*. Abingdon: Routledge.

57 Braverman, 2014: 125.

58 Eule, Tobias G, Lisa Marie Borrelli, Annika Lindberg, and Anna Wyss (2019) *Migrants before the law: Contested migration control in Europe*. Cham: Springer International Publishing, page 22.

59 ibid. Also see Lindberg, Annika and Lisa Marie Borrelli (2019) Let the right one in? On European migration authorities' resistance to research. *Social Anthropology* 27: 17–32.

60 Campbell, John R (2016) *Bureaucracy, law and dystopia in the United Kingdom's asylum system*. London: Routledge, page 12, quoting Walby, Kevin and Mike Larsen (2012) Access to information and freedom of information requests: Neglected means of data production in the social sciences. *Qualitative Inquiry* 18 (1): 31–42, page 37.

61 Campbell, 2016: 12.

There were various aspects of our court observations that made securing access easier than the experience many of these researchers had. In particular, we took into account which countries of Europe conducted public asylum appeals when we designed our study, thus building in a certain level of virtually guaranteed access to our object of research. At the same time, access was not entirely straightforward. Certain fast-tracked and remote procedures carried out at the border were practically inaccessible to us, for example. Furthermore, not only were countries with closed appeal hearings excluded from our in-person observations, but from the public area of hearings one has only a very specific and limited view of an asylum appeal. We did not have access to case files, for example. We only had access to the public areas of courts (except in rare moments when judges would take us 'backstage') and, more often than not, we did not learn the outcome of the hearing after it had taken place.[62] These differences illustrate how dependent legal visibility is on legal culture.

At certain times during our observations we benefited from the networking skills of the researchers to secure access that was not available from the public areas of courts. For example, during strikes at the CNDA Jessica developed networks with lawyers, gained information about protests taking place and was able to observe them. She was also invited on a couple of occasions to access the canteen where many of the lawyers, judges and rapporteurs go for lunch, a development that proved useful in understanding the strikes. In some German courts, Nicole established good rapport with judges, who invited her to join them for lunch or coffee in between hearings. These were opportunities for us to share more detailed information about the research project with judges, as well as a chance to ask questions about the judges' experiences in asylum adjudication, and the judges' views on political and social issues at the time. Nicole was also able to establish a good rapport with some interpreters, who were keen on sharing their experiences with her in conversations over coffee. Such 'informal' conversations were invaluable in gaining an insight into the personal views of the professionals involved in asylum adjudication.

Additionally, as our research progressed, we realised that access to an asylum appeal hearing meant different things in different countries. As noted in Chapter 2 ('What Are Asylum Appeals?'), some countries use the in-person

62 In the UK the decision is sent to the appellant privately after the hearing. In France, during our fieldwork, the outcome was posted on a noticeboard a few days after the hearings, but we found it difficult to collect the information because the security guards would not let us linger at the noticeboards for the required length of time. In Belgium anonymised court verdicts can be accessed online for free (see https://www.rvv-cce.be/nl/arr [accessed 07 December 2021]). In German courts anonymised verdicts were available on request for a small fee (if they were not on a public verdict portal such as in NRW: https://www.justiz.nrw.de/Web-Portal_Relaunch/BS/nrwe2/index.php [accessed 26 March 2021]). Requests to German courts required the provision of the hearing date and case file number. In some instances – and due to the connections we were able to establish during our fieldwork – courts waived the fee for us, and we appreciated their support.

hearing to essentially discuss and reassess the whole case, while other countries confine the discussion simply to additional matters that have not been dealt with on paper. The access that we had was therefore in no sense complete or exhaustive, and our work represents only a very particular snapshot of the legal process.

Aside from the structural ways in which our access was determined, we also encountered idiosyncratic limitations over our access in practice. Often the asylum appeals in a court all began at the same time of day. If we had selected an appeal that was postponed, withdrawn or heard *in camera* (behind closed doors) at the last minute, it meant that either we joined one of the other appeals part-way through or had to spend time in the waiting room. Additionally, the court lists were on occasion inaccurate, and we found ourselves at court when no asylum appeals were being heard.

In relation to access to our interviewees, again we designed our project in such a way as to make access as easy as possible. For example, unlike Bibler Coutin, who chose to ask her interviewees about their legal situation in interviews, we focussed the topic of our interviews on the interviewees' reflections on the legal process they had gone through.[63] This allowed the interviewees to largely steer clear of the substance of their cases, unless they specifically raised it, and, we suspect, made it easier to recruit interviewees because they did not have to go through painful memories related to their reasons for claiming asylum during their interviews with us.

This is not to say that access to interviewees was easily achieved, however. Former appellants needed to have a degree of trust in our work, and were sometimes reluctant to meet, distrustful about the research objectives, and reticent during the interviews themselves. Among legal representatives and the small number of Italian judges we interviewed, it was also possible that only the more committed, possibly even politicised, professionals took part in our study, raising the issue of sampling bias.

Reception of Project

The reception of our project among the professionals working in the tribunals and courts in which we conducted our observations was usually positive. Although we had formal access to the public areas of the hearing rooms and

63 Bibler Coutin's study is reported in her book (Bibler Coutin, Susan (2003) *Legalizing moves: Salvadoran immigrants' struggle for US residency*. Ann Arbor: University of Michigan Press), but see also Bibler Coutin, Susan (2002) 'Reconceptualizing research: Ethnographic fieldwork and immigration politics in Southern California.' In Starr, June and Mark Goodale (eds) *Practicing ethnography in law: New dialogues, enduring methods*. New York: Palgrave Macmillan, 108–127, where she discusses some of the methodological challenges she encountered. In particular, she writes in the context of her attempts to recruit people seeking asylum for interview, that 'many individuals probably concluded that it was better not to discuss their legal situation with strangers' (page 115).

therefore did not need to officially ask for permission to attend,[64] we contacted authorities in advance in order to notify them of our activities. We did this to minimise the risk of any adverse reactions to our research if we arrived unannounced. We were aware that there was a minor risk that actors in the courts might change their behaviour because they knew we were coming, but we reasoned that this risk would still be present if we arrived on the day with no forewarning, and it might even be heightened if people were surprised by our presence. Every authority we contacted in Austria, Belgium, Britain, France and Germany voiced no objections to us conducting observations from the public areas of the courts and tribunals.[65] In fact, in Austria and at some German courts, our notifications prior to our arrival had a positive effect: some judges and court presidents took the time to speak with us in person in their offices to answer any questions we had about the legal process or made court schedules available to us that were otherwise impossible to obtain.

Once working within the courts, we received a small number of negative comments about our research. One judge in Augsburg, for example, was 'exceptionally dismissive of the research'.[66] When we tried to explain that we intended to circulate some suggestions for good practice so that judges in different localities can learn about each other's approaches, he responded that he did not 'see the point at all in a good practice guide' and that he thought we were 'researchers jumping on the asylum bandwagon'.[67] Another judge, in Düsseldorf, gave us pause for thought about how to position ourselves and our research.[68] Immediately after receiving the email notification that we sent, he said he had been excited about the project, but having looked through our project information he detected a 'liberal' flavour running through our research, which he felt was bound to influence our results. His concern was that judges would be criticised in our work whatever they did, and that we were liable to assume that everyone should be entitled to asylum. Having looked through our website, he said, he detected a 'strong bias in favour of asylum seekers' and suggested that although this may be our personal views, as researchers we have to – or at least have to pretend to – appear to be neutral, or we risk alienating those who do not agree with this view. He therefore urged us to amend our project material and web presence.

64 In the UK, for example, 'Despite the personal and sensitive nature of the issues that frequently emerge in asylum appeal hearings, every appeal must, in the interests of open justice, be held in public; members of the public may be excluded only on the basis of specific reasons such as the interest of public order or national security' (Thomas, Robert (2011) *Administrative justice and asylum appeals: A study of tribunal adjudication*. Oxford: Hart Publishing, page 30).

65 In Britain they asked for the dates and locations of our study. We sent a notification to the French authorities and received no reply.

66 Fieldnotes, Germany, 2018, Nicole Hoellerer.

67 Fieldnotes, Germany, 2018, Nicole Hoellerer.

68 Fieldwork updates, Germany, 2019, Nicole Hoellerer.

We discussed his comments as a research team in some detail. We felt that he had read too much into the project material about how we were likely to treat the data. On the other hand, there is no denying the strongly critical and pro-asylum stance of many of the previous publications of the research team, including the Principal Investigator, Nick. Researchers sometimes do emphasise or de-emphasise certain aspects of their identity in the interests of generating a rapport with interviewees, but concealing the previous publications of the research team would have been not only difficult but also disingenuous. For this reason we did not alter our web presence, although from that point on we were careful to emphasise even more strenuously than before that we would approach the data with an open mind, and we were also mindful that there could be potential participants who did not engage with our project (for example, by giving interviews) because of the perceived bias that they detected.

Negative comments like these were highly exceptional though. Once judges and legal representatives were assured about who we were,[69] the vast majority of their comments were encouraging and welcoming. The comparative element of our work was particularly appealing. In Berlin, for example, one judge

> expressed his interest in ASYFAIR, and [said] that the research is 'really important for our insight … to improve adjudication … often we judges think that what we do is the best, and the only way of doing things … But then we meet colleagues from abroad, and they tell us something, we realize that there is a huge difference.'[70]

Legal representatives too seemed very receptive. 'What a fascinating study,' one legal representative for the appellant in Augsburg remarked. 'I am very interested in what is happening in other countries … I hope you share it with us lawyers as well.'[71]

At times judges were so pleased that we were conducting the research that they addressed us as 'colleagues',[72] expressed their 'admiration'[73] for our work and told us that it was 'fundamentally important'.[74] Some judges were also academics and those seemed inclined to approve of our work as part of the pursuit of knowledge that they too were engaged in. A cynic might suggest

69 Many initially thought we were from the press or were a government representative. One judge in Vienna had to be reassured we were not from the authorities of the appellant's country of origin.

70 Fieldnotes, Germany, 2018, Nicole Hoellerer. Some judges even asked for feedback on their style, 'Did you notice anything?' one judge in Augsburg asked, 'Because I am not opposed to critical feedback – I'd welcome any suggestion.' (fieldnotes, Germany, 2018, Nicole Hoellerer).

71 Fieldnotes, Germany, 2018, Nicole Hoellerer.

72 Fieldnotes, Germany, 2018, Nicole Hoellerer.

73 Fieldnotes, Germany, 2018, Nicole Hoellerer.

74 Fieldnotes, Germany, 2018, Nicole Hoellerer.

that judges may have been nervous about the potential for a critical depiction of their work in our publications, thus accounting for their friendliness, but we are sceptical of this view. Judges' enthusiasm about the project was often accompanied with efforts to help us understand the processes we were observing, such as talking to us before or after the hearings and answering questions we had, which is not the behaviour of judges who were afraid of the limelight.

One feature of judges' interest in (even their excitement about) our work was the fact that it was often provoked by our *non*-legal focus. 'Research like yours is really important to improve the judicial system,' one judge in Berlin remarked. 'Too much research in courts is too legal,' she continued 'rather than focussed on practice'.[75] In a similar vein, another judge in Düsseldorf commented that it was 'good to do some actual research to see how it works on the ground'.[76] Judges may also have perceived 'non-legal' research as less threatening because it does not directly challenge their reasoning or judgements.

Consent

Having discussed the reception of our research among professionals working at the courts and tribunals we visited, we now turn to the question of how appellants themselves viewed our work, which leads us to the question of consent. It is an established principle of observational research that a researcher would ordinarily gain informed consent from research subjects. The gold standard in this regard is written informed consent, meaning a signature on a paper form that details the research being conducted and the uses to which the data will be put. This form should give the participants an opportunity to withdraw, such as by giving a named contact or a website where a withdrawal request can be made.[77]

In accordance with these conventions, we prepared information and consent forms, including guidelines about withdrawing from the research, which used terminology that we expected appellants to understand.[78] Because court lists were produced only very shortly before hearings, however, we had no way of knowing who was going to be appearing on any particular day in court and

75 Fieldnotes, Germany, 2018, Nicole Hoellerer.

76 Fieldnotes, Germany, 2019, Nicole Hoellerer.

77 However, in 'classic' anthropology, it is common to rely upon verbal rather than written consent, especially if fieldwork takes place in illiterate communities. For a recent discussion on anthropological research and data protection see e.g. Yuill, Cassandra (2018) 'Is anthropology legal?': Anthropology and the EU General Data Protection Regulation. *Anthropology in Action* 25 (2): 36–41.

78 Copies of these information and consent forms could be found on the project website, www.asyfair.com, as well as a facility for withdrawing from the study. The languages we produced the consent forms in (next to the field-site languages of English, French, German and Italian) were based on the most common languages spoken by appellants in our researched countries, and included Arabic, Farsi, Pashto and Urdu.

therefore did not have an opportunity to gain consent before the day of the hearing. Our strategy was consequently to go to hearing centres with a variety of consent forms and information about the project in multiple languages to disburse on the day.

Soon into the research process we were forced to be flexible.[79] The primary reason for this was the intense stress that appellants were often under on the day of their hearings. They were frequently so busy and focussed on the impending case that it would have been impossible or inappropriate to approach them. Even if we could have done, having a researcher approach appellants with a request for research access immediately ahead of their asylum appeal hearing could distract them or add to their stress, and we often felt it was inappropriate. Many appellants also only had a limited window of opportunity to discuss their case and prepare their approaches with their legal representatives ahead of their hearings. Even appellants who were alone would often spend the time acclimatising to the court surroundings or watching preceding cases, which was a valuable form of initiation to the social conventions of the hearings. Most of the time then, we felt it was inappropriate to occupy this valuable time with our request for research consent. As Nicole reflected:

> Appellants speak with their lawyers before and after the cases, and I don't want to jump in and go – 'hey, here's a piece of paper, do you want to read everything and sign it for me?' When I spoke with one lawyer (who is Iranian herself) about that issue and showed her the information and consent sheet, she laughed (which made me feel very embarrassed) and said … that cases are public, appellants have to expect listeners (and are advised to expect them), and appellants would never read the whole information sheet and then sign a piece of paper, as this would make them suspicious. I did hand out a lot of information sheets though. [80]

After the hearing, appellants often wanted to get away as quickly as possible or were busy discussing the case with their legal representative or supporters as they left (some had children they were minding as well). So, while we were occasionally able to catch up with them as they prepared to leave, we often found this route to consent impractical too. Given that legal authorities are duty bound to keep the contact details of appellants out of the public domain, it was also impossible for us to follow up with appellants after they had left.

79 In fact, we had anticipated that the strategy of approaching appellants for consent directly before or after their hearings could be problematic in our research ethics proposals to the University of Exeter and the European Research Council and had set out a series of second-best approaches to be used in this eventuality.

80 Fieldwork updates, Germany, 2018, Nicole Hoellerer.

Researchers have noted the frequent incongruence between ethical principles[81] and the practicalities of research.[82] Crang and Cook, for example, discuss 'two kinds of research ethics'. The first, with a capital 'E', is necessary at the initial, planning stage and composed of broad and widely accepted principles. The second, with a small 'e', evolves through everyday encounters in the field.[83] Others have noted a potentially conflicting relationship between these two types of ethics, warning that ethics processes can sometimes discourage independent thinking about what is the most appropriate course of action.[84] According to this view, 'the universalist ethical stance' embodied in 'rigid codes' cannot always deal with 'the variability and unpredictability' of research.[85] Indeed, it is possible to question how efficacious common procedures for garnering informed consent are in certain challenging research contexts, such as when working in communities with high levels of illiteracy, poor levels of education, language differences and difficulties, and highly asymmetrical power relations.[86]

In the context of work with refugees, researchers have noted that fieldwork often throws up ethical dilemmas that 'cannot easily be resolved with guidance from existing ethical principles and guidelines'.[87] Concerns have been raised not only about how informed consent procedures can 'discourage members of communities from participating in research projects'[88] but also about how an insistence on bureaucratic forms of meaning making can paradoxically reproduce the very dehumanising characteristics of immigration control systems that much research purportedly critiques. The need for a paper trail, for

81 For example: beneficence (doing good), non-malfeasance (not causing harm during the conduct of research), autonomy (making sure that participants' personal liberties are not violated during the research) and justice (treating participants equally).

82 O'Reilly (2019), for example, advocates a feminist approach to ethics in which, 'Rather than being based on abstract concepts such as justice and benevolence' emphasis is placed on 'responsibility, relationships, context and particularity' (O'Reilly, Zoë (2019) *The in-between spaces of asylum and migration: A participatory visual approach*. Cham: Springer Nature, page 121).

83 Crang and Cook, 2007: 32.

84 Valentine, Gill (2005) Geography and ethics: moral geographies? Ethical commitment in research and teaching. *Progress in Human Geography* 29 (4): 483–487.

85 Dowling, Robyn (2016) 'Power, subjectivity and ethics in qualitative research.' In Hay, Iain (ed) *Qualitative research methods in human geography*. Oxford: Oxford University Press, 29–44, citing Hay, Iain (1998) Making moral imaginations. Research ethics, pedagogy, and professional human geography. *Ethics, Place and Environment* 1 (1): 55–75, page 65.

86 E.g. Howitt and Stevens, 2016, 58: 'Even if one concedes that some sort of consent can be constructed in such circumstances, how is one really held accountable for one's immediate or subsequent actions in relation to the people involved, their representations of their lives and cultures, and one's interpretations of them for other audiences?'

87 Birman, Dina (2005) 'Ethical issues in research with immigrants and refugees.' In Trimble, Joseph E. and Celia B. Fisher (eds) *The handbook of ethical research with ethnocultural populations and communities*. Thousand Oaks: Sage Publications, 155–177, page 155.

88 ibid.: 165–6.

instance, often originates not from a concern for research participants' welfare, but from an institutional need to manage risk within universities.[89]

Faced with the difficulty of gaining written informed consent from the appellants themselves, we put a series of second-best measures in place. We took the opportunity wherever possible to hand the appellants an information sheet or a calling card either before the hearing, during a break, or at the end (we produced information sheets in a range of languages). The information sheet described our project and contained details about how to withdraw. The calling card contained our web address, which led to the same information. We also handed information sheets and calling cards to any legal representatives of the appellant that were present, or occasionally other supporters like partners of the appellant, when we had the opportunity.[90] Furthermore, sometimes judges drew attention to our presence at the start of the hearing and checked with the appellant if they minded us being there. In France, judges would often ask the appellants if they wanted a private ('closed door') hearing for any reason and, if they said that they did, we were required to leave. All of us were fully briefed and prepared on these different approaches and made judgements about the best option for consent based on the context.

From what we could tell, our presence did not cause the appellants discomfort or distress. Nicole wrote, for example, that she 'never had the impression that the appellants felt uncomfortable. Indeed, I am not the only visitor – there are often trainee lawyers, and there is one trainee judge who attends many hearings.' We tried to be as inconspicuous as possible when observing cases (see our reflections about 'Position' below on our potential impact on the hearings). We would not normally speak and would 'dress down' to avoid drawing attention to ourselves.[91] On occasion, we were also able to make ourselves useful to appellants in minor ways. 'Yesterday I spent a hearing playing with a two-year old girl', Nicole wrote, recalling that the girl's mother was being questioned during that time and had appreciated how the two-year-old had been distracted and entertained – 'I really don't feel unwelcome at all'.[92]

89 Adler, Patricia A. and Peter Adler (2002) 'Do university lawyers and the police define research values'. In van den Hoonaard, Will (eds), *Walking the tightrope: Ethical issues for qualitative researchers.* Toronto: University of Toronto Press, 34–42.

90 Very occasionally legal representatives asked us to leave, and we honoured these requests and left without asking any further questions.

91 The fact that at least some appellants seemed to not notice our presence was evidence of the effectiveness of this strategy. For example one appellant said to Nicole when they met after the hearing, 'Oh, you were at my case?' Nicole wrote: 'I sat right there and you didn't even notice me!' (fieldnotes, Germany, 2018, Nicole Hoellerer).

92 During, or at the end of hearings, we sometimes indicated our respect to the appellants. 'I normally say "I wish you all the best and good luck" to appellants before they leave following their cases, Nicole wrote for example. 'Most say (in German) thank you, and very often "thanks for coming". I feel that this is more than enough in terms of consent' (fieldwork updates, Germany, 2018, Nicole Hoellerer).

All in all, we felt that our observations were unobtrusive enough to justify our research into an area of practice that is often obscured from critical analysis. We recognise, however, the responsibility that research of this nature lays upon the researchers to manage data carefully to ensure anonymity and to disseminate findings and feedback results in multiple forms, including to elite decision-makers in charge of the systems that we observed.

We have dwelt on the ethics of our observational work in asylum appeals, but interviewing asylum seekers and refugees can entail a host of complicated ethical issues as well.[93] Although the information we made available to interviewees was similar to that made available at the hearings, including the purposes of the study, and how to withdraw from it, in the case of interviews we did collect informed consent from all former asylum appellants. We also took the decision to offer appellant interviewees a gift (in the form of gift vouchers redeemable online) in recognition of the fact that they had taken the time to participate in the project.[94]

There were also wider ethical considerations. We did not observe cases involving children (under 18-year-olds) as primary appellants,[95] nor did we interview children, due to the additional ethical challenges involved and the scope of our project.[96] In some countries (e.g. Germany) hearings involving minors as primary appellants are not public, and therefore inaccessible to us.

Over the period of the research, we grappled with these and other questions in the context of a partnership with the Geography Departmental Ethics Committee at the University of Exeter[97] that entailed multiple submissions over numerous years, both before the research commenced and during the research itself. Although this was a requirement of our funding, we came to highly value the insights and reassurance that the ethics committee provided.

93 Including suspicion of informed consent forms and unease about the questioning format and unequal power relations. Mackenzie, Catriona, Christopher McDowell and Eileen Pittaway (2007) Beyond 'do no harm': The challenge of constructing ethical relationships in refugee research. *Journal of Refugee Studies* 20 (2): 299–319. Birman (2005).

94 See Collier, Jane F (2002) 'Analyzing witchcraft beliefs.' In Starr, June and Mark Goodale (eds) *Practicing ethnography in law: New dialogues, enduring methods*. New York: Palgrave Macmillan, 72–86.

95 We did not observe children as appellants, but they were sometimes present accompanying their parents. We sometimes encountered children and became entangled with them in some way, including collecting prams from outside the hearing room, sitting or playing with crying children/babies in the waiting area while their parents were in a hearing, distracting or trying to cheer up crying children during cases, and being inexorably drawn into games in hearings rooms while cases where in session (to the researcher's intense embarrassment).

96 This was an important decision because it meant that children's views are not reflected in our analysis. Bloom, for example notes how paternalistic some decisions to exclude certain asylum seekers from the analysis can be. See Bloom, Tendayi (2010) Asylum seekers: Subjects or objects of research? *The American Journal of Bioethics* 10 (2): 59–60.

97 We are grateful to members of the Committee, for their considerate and patient reading and re-reading of our ethical proposals. We are similarly grateful to the ethics officers of the European Research Council.

All direct identifiers were either never included in our notes, or have been removed from the data, including the names of the appellants, judges, legal representatives, interpreters and witnesses involved in hearings.[98] Data anonymisation had to go much further than simply substituting names for pseudonyms though.[99] Sensitive, case-specific information whose disclosure could pose a risk of harm to individual appellants, such as details about the asylum claim itself, have also been removed from the dataset, not only for ethical reasons but to avoid breaching the rules surrounding reporting and anonymity at the various courts we visited. In some publications, we have chosen not to mention the name of the court, to further ensure anonymity, as well as to omit the exact dates of hearings. Similarly, in this work we often only mention the country, year and researcher when referencing fieldnotes or interview data.

The data also included indirect identifiers which, when linked with other publicly available information sources – such as the daily court listings posted on the court websites which specify the appeal reference number, the legal firm and occasionally the name of the appellant for each hearing centre each day – could enable the identification of individuals. Examples of indirect identifiers in the data include the date of the hearing, the name of the hearing centre, the courtroom number, the identity of witnesses, the legal firm and the interpreter language. Some cases involved rare features, such as an underrepresented country of origin, a large number of witnesses or the presence of an expert witness, which meant that they could be easily identified by individuals close to the work. Again, this information has been removed or altered.

We also took care with the storage of data. Anyone who came into contact with the data was required to fill out a confidentiality agreement including transcribers. Data itself was stored using encrypted cloud software and transferred using encrypted file sharing (not email). Raw data that was collected in the field diaries was destroyed after the notes were transcribed, and copies of interviews were removed from our voice recorders as soon as they were uploaded to the cloud. Researchers were also asked to back up their project files on memory sticks or drives every couple of months through the project to avoid losing data, and these drives too were securely stored and encrypted.

Position

During the research we were double outsiders: both outside the legal community that was comfortable and adept at carrying out the appeals, and outside the communities to which appellants belonged. At the same time, we

98 In general we applied the same level of data anonymisation to judges, legal representatives and others involved in the hearings as we did to appellants, since our critique is, for the most part, structural rather than directed at individual professionals and actors within the system.

99 See Hopkins, Peter (2008) Ethical issues in research with unaccompanied asylum-seeking children. *Children's Geographies* 6 (1): 37–48.

were sometimes seen as more 'inside' than we expected: judges would assume certain types of specialist knowledge, for example, and after a few weeks in certain courts we got to know not only the judges but some of the lawyers and security guards too, who would pass the time with us during quiet periods. These connections often proved useful, allowing us the chance to ask 'naive' questions, for example, or providing a way back into a research site having been absent from it for a few months.

It is also appropriate for us to reflect upon the influence we may have had over our research sites and subjects. Sometimes judges seemed to want us to convey particular grievances in our research, such as in relation to how much money legal representatives charge or how poorly government representatives made initial decisions. Occasionally our researchers were mistakenly assumed to be playing a role in the hearings, too, such as in one case in Berlin during which a legal representative assumed that Nicole was a judge observing the judge who was hearing the case. Judges are more frequently observed when they are junior, and the judge was affronted when the legal representative mentioned they were 'still under observation'.

It is now well-established that social scientists exert an influence over the places and people that they research. '[F]ieldwork does not take place in a vacuum', Gillespie[100] writes, 'the researcher is an inherent part of the research process'. What is more, rather than intending to cover-up the researcher's influence, 'best-practice qualitative research embraces methodology that puts both the researcher and the researched front and centre'.[101] This approach to researcher positionality has roots in feminist scholarship, which has advocated for greater sensitivity to power relations in fieldwork.[102]

Throughout our observations of cases, although we tried to influence hearings as little as possible, it is uncertain whether complete detachment was possible. During his ethnography of court hearings at the French Council of State (*Conseil d'État*), Bruno Latour[103] 'found himself in the position that newer methods in anthropology sometimes describe as impossible, not to say indecent, that of being "a fly on the wall", an observer reduced to silence and invisibility'. Others, however, are sceptical of the notion that a social situation can be unaffected by an observable observer. '[U]ndisguised entry of others into a social situation is bound to alter behaviour', Kearns writes,[104] 'there is no such thing as a non-participant in a social situation: even those who believe they are

100 Gillespie, 2019: 23.

101 O'Donnell, Tayanah, Daniel F. Robinson and Josephine Gillespie (2020) 'An Australasian and Asia-Pacific approach to legal geography.' In O'Donnell, Tayanah, Daniel F. Robinson and Josephine Gillespie (eds) *Legal geography: Perspectives and methods*. Abingdon: Routledge, 3–16, page 8.

102 England, Kim VL. (1994) Getting personal: Reflexivity, positionality, and feminist research. *The Professional Geographer* 46 (1): 80–89.

103 Latour, 2010: 6.

104 Kearns, 2016: 319.

present but not participating in a research context often unwittingly alter the research setting'. For Bibler Coutin, who observed asylum court hearings in the USA in the late 1990s, her very presence was sometimes legally significant:

> Once, when I was waiting for an asylum hearing to begin, I observed the judge ask an attorney if the attorney's client was in court. The attorney responded that the client – an indigenous Guatemalan – had not yet arrived. 'Maybe he went back to the mountains' the judge remarked. The attorney interpreted this remark as a sign of prejudice against his client. Because this remark was not on the record, the attorney asked me to sign an affidavit describing what I observed. My Affidavit became part of an appeal of the judge's denial of this asylum petition.[105]

Bibler Coutin interprets this event in a broader context of turning her connections with her research subjects to positive ends, forming relationships with the communities her research subjects belonged to, and playing an important role in those communities, such as acting as spokesperson in the press to raise the profile of campaigns and struggles.[106] Other legal ethnographers have rued the effects of their presence, however. In conducting an ethnography of a police squad, for example, Van Maanen[107] speculated that officers turned more vicious and brutal to prove to the researcher their sovereignty on the streets. Despite their differences however, these studies are in agreement that one's presence influences the social situations under study. 'It is difficult to be disengaged from interaction and the researcher is frequently drawn in by stealth'.[108]

There were various instances in which our presence could have been influential. On one occasion Nicole overheard an appellant admit to a witness in the waiting area that they had rarely been to church over the past few months, even though their asylum claim was based upon religious conversion. Once inside the hearing it transpired that the representative for the government had also overheard the conversation between the witness and the appellant. Although the witness testified that the appellant attended church regularly, the legal representative referred to the conversation as part of their rebuttal and pointed Nicole out as a potential corroborator.

> I got really nervous at this point. I don't want to get involved in this. The government legal representative may have seen that I wrote in my notebook in the waiting area. I wonder if she can request to see my notebook? Would I be obliged to show it to them? Would they ask me

105 Bibler Coutin, 2002: 120.

106 See for example Bibler Coutin's 2002 reflections on writing press releases for the Guatemalan community she studied (Bibler Coutin, 2002: 119).

107 Van Maanen, 1982.

108 Flood, 2005: 43.

> to testify? … A thousand scenarios raced through my head. Because in the end, I know that the government representative was right – I listened to the same conversation, and I also suspect that the witness is lying.[109]

The conversation moved on and she was never asked to reveal her notes as evidence, but the incident reveals the ways in which researchers can become entangled in legal procedures no matter how inconspicuous they attempt to be.

In other circumstances, our presence could have affected the degree of explanation that judges offered about what they were doing and why. 'Normally, I wouldn't state it,' one judge in Augsburg explained in reference to his reasoning for making a decision which he had announced a few seconds before, 'but I can tell you why I ruled this way', whereupon he proceeded to give the court (but primarily for the benefit for the researcher) his reasoning for his decision.[110] In other instances, judges went through the background of certain cases for the benefit of the researcher. 'I will quickly mention a few details so our visitor [pointing me out…] knows more or less what is going on,' one judge in Munich said.[111] These explanations were appreciated, but also a little embarrassing because the appellant had to sit through them, waiting for proceedings to continue.

Another way we sometimes suspected that our presence impacted upon proceedings was to increase the likelihood that judges did things by the book. Sometimes, upon halting proceedings and backtracking in order to make sure the procedure was correct, judges would stare meaningfully in our direction. In one case a legal representative asked the judge if they even needed to go through the facts of the case, which is best practice. 'As we have the researcher here, we should,'[112] he responded. Judges sometimes mentioned 'public scrutiny' as a justification for a certain minor procedure, such as announcing the start of the hearing on the public announcement system,[113] or waiting a full fifteen minutes when an appellant had not arrived before moving on with the case.[114] One legal representative for the appellant in Britain put the point more forcefully:

> I'm sure that your presence … does actually affect the hearing whether you want it to or not. I think that's a good thing because I think that probably your presence makes the judge up their game, behave properly. I used to note that if there was a group of students, or a visiting judge or anybody coming to watch, they would sit up straighter and they would

109 Fieldnotes, Germany, 2018, Nicole Hoellerer.
110 Fieldnotes, Germany, 2018, Nicole Hoellerer.
111 Fieldnotes, Germany, 2018, Nicole Hoellerer.
112 Fieldnotes, Germany, 2018, Nicole Hoellerer.
113 Fieldnotes, Germany, 2018, Nicole Hoellerer.
114 Fieldnotes, Germany, 2018, Nicole Hoellerer.

> go through all the stuff that they were supposed to, all the welcoming stuff, all that and they would just pay attention more. If there's nobody in the hearing room except for you and your client and the government representative and a dozing usher, it's a recipe for injustice. [115]

Limitations

In light of all that we have discussed in this chapter it should be clear that our research embodies a series of limitations, such as the limited access we had to 'behind the scenes' at the courts, to judicial opinions, and to case outcomes. We want to highlight three further limitations of our research.

First, the research team commanded French, German, English, Italian and Flemish. While useful for understanding some appellants at court in their own languages, and interviewing others, these languages are clearly limited. We have already outlined why we did not employ interpreters for the interviews, but it is appropriate to reflect a little more on the implications of our limited linguistic abilities. For instance, in most cases at court we relied upon the interpreter (as did the rest of the court). As we shall hear in Chapter 9 ('Mistakes and Incompetence'), there were occasions when interpreters make mistakes, including mistranslations. Moreover, the languages we command are the languages of European colonisers of the past few hundred years. The selective inclusion of appellants who share these languages is therefore shaped by colonialism and risks re-inscribing its exclusions.

Second, the way we were able to assess the influence of race in the research was also constrained. Although our ethnographic data contains observations on race and racial stereotypes (as discussed in Part IV) we often felt unable to make definitive survey observations about the racial characteristics of those we observed. For example, when noting down judges' characteristics, we felt it inappropriate to infer race from appearance (unlike other markers such as gender and an estimate of age, which we did feel able to record – see the conclusion to Chapter 10, 'Judicial Questioning'). Similarly with appellants, while we noted down countries of origin, we often felt uncomfortable inferring race from what we could observe, unless it was explicitly discussed. The inference of race from appearance, we felt, opened the door to our own stereotypes and prejudices. Social scientists writing about race in research point out that 'as researchers do research, they are also actively engaged in doing race'.[116] In particular, we were mindful that as 'white' researchers (we all self-identify as

115 Interview, legal representative, UK, 2014, Andrew Burridge.

116 Best, Amy L (2003) Doing race in the context of feminist interviewing: Constructing whiteness through talk. *Qualitative Inquiry* 9 (6): 895–914: page 895.

white) we always saw the world in a particular way which inevitably has formed our research approach and findings.[117]

Another challenge concerns the risk of secondary trauma of the research team.[118] The stories recounted at asylum appeals often include gruesome and disturbing details of rape, murder and torture, and although researchers had access to staff welfare support at the University of Exeter we learnt that a more proactive approach was appropriate. We prepared an approach that involved discussing with all the researchers in advance of fieldwork what the risks of secondary trauma were, as well as the symptoms.[119] We encouraged researchers to discuss particularly difficult hearings and their responses to them amongst the research team such as with Nick, the project leader, and each other, emphasising that researchers can take a break from the research if necessary. Writing up days usefully doubled-up as a break from the emotionality of the observations.

Despite these measures though, on reflection after the fieldwork the researchers confirmed that they had experienced an 'emotional toll' and that at least one of us is still affected as a result of the content of cases. Nicole, for example, reported that one particular case in Germany, where an appellant described how she attempted suicide in her country of origin, led to nightmares for weeks after the hearing, and is still on her mind at the time of writing. The difficulties some of the researchers have experienced with trauma is Nick's biggest regret in relation to this work. We also noticed that the emotional burden of dealing with traumatic cases was not confined to the researcher who carried out the original observation. One case in Paris that Nick read about in Jessica's notes still haunts him and can make him feel sick or move him to tears if he thinks too long about it. Various former researchers were still working through their emotional experiences of the research at the time of writing this book. Given the emotional intensity of the work, it would be a useful area to publish about in the future to give researchers considering similar topics the benefit of our insights. If we were to run the project again, for example, we would aim to involve an employee assistance scheme more closely and write the cost of individual and/or group coaching or counselling into the grant from the outset.

117 Frankenburg, Ruth (1993) *White women, race matters: The social construction of whiteness.* London: Routledge. Also see Picozza, Fiorenza (2021) *The coloniality of asylum: Mobility, autonomy and solidarity in the wake of Europe's refugee crisis.* Lanham, MD: Rowman & Littlefield Publishers.

118 Maillet et al. (2016) discuss the impact of the emotional labour and vicarious trauma that can be experienced during fieldwork on migration and border enforcement (Maillet, Pauline, Alison Mountz and Keegan Williams (2017) Researching migration and enforcement in obscured places: Practical, ethical and methodological challenges to fieldwork. *Social and Cultural Geography* 18 (7): 927–950).

119 The symptoms of secondary trauma are listed on https://www.ptsduk.org/secondary-trauma/ [accessed 15 November 2022].

Conclusion

Although 'it takes a brave soul to give a genuine "warts and all" account of the mistakes that are made along the way or of other infelicities in the research process',[120] we believe that reflecting on the challenges, complexities and limitations of research is an important way to improve its transparency and rigour. Previous qualitative researchers may have displayed 'unwillingness … to articulate in full the methods adopted',[121] which can limit the inter-disciplinary appeal and credibility of the work. The best response, in our view, is to ensure that 'detail about methods should be described in as much detail as is practically possible'[122] and this chapter reflects our attempt to do this.

Our study probably cannot be replicated. Even if a research team had the desire to do so, the political context has irrevocably already changed following Brexit, the COVID-19 pandemic, technological developments, different crises that have given rise to forced displacement to Europe since our fieldwork, and other socio-political changes. We hope that our analysis here, however, still resonates with the dilemmas and challenges of research design in the future, and that the lessons we learnt as we conducted our research will be of some interest and use to researchers in future years.

120 Schmidt and Halliday, 2009: 2.

121 Gillespie 2019: 22, citing Baxter, Jamie and John Eyles (1997) Evaluating qualitative research in social geography: Establishing 'rigour' in interview analysis. *Transactions of the Institute of British Geographers* 22 (4): 505–525.

122 Gillespie continues (2019: 22): '[C]onsideration should be given to, inter alia, expressing the history of the research, data collection and analysis techniques, sampling strategies, the significance of the way in which results are presented and the transferability of findings'. See also Stratford and Bradshaw (2016): 'At the final stage of reporting research, we should also attempt to acknowledge limits to the transferability of our research due to particularities of the research topic, the research methods used and the researcher. Stratford, Elaine and Matt Bradshaw (2016) 'Qualitative research design and rigour.' In Hay, Iain (ed) *Qualitative research methods in human geography*. Oxford: Oxford University Press, 117–129, page 127.

Part II

Accessing Protection in Asylum Appeals

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4 Before the Hearing

Waiting, Preparation and Anticipation

We begin with the period of waiting for one's asylum appeal hearing to come around. Scholars of migration have underscored the significance of waiting to migrant experiences for numerous reasons.[1] The power that is evident when one group or community forces another to wait is an example of the temporal governance of migration that scholars have suggested is as important as the spatial governance of borders in controlling migratory movements.[2] The burdens of uncertainty and lack of progress with one's life that waiting in refugee camps or for bureaucratic processes to run their course produce can also constitute painful and frustrating conditions for migrants.[3]

Appellants often wait many months and sometimes years for their appeal hearings, which can come on top of waiting from arrival to their government interviews, and from the government interview to the initial decision. In 2016 the European Council on Refugees and Exiles (ECRE) reported on the deadlines that limit the time between lodging an asylum appeal and when the appeal

1 There is a large existing literature that examines migrant waiting. See for example Conlon, Deirdre (2011) Waiting: Feminist perspectives on the spacings/timings of migrant (im)mobility. *Gender, Place and Culture* 18 (3): 353–360. Rotter, Rebecca (2016) Waiting in the asylum determination process: Just an empty interlude? *Time and Society* 25 (1): 80–101. Tazzioli, Martina (2018) The temporal borders of asylum: Temporality of control in the EU border regime. *Political Geography* 64: 13–22. Mountz, Alison (2011) Where asylum-seekers wait: Feminist counter-topographies of sites between states. *Gender, Place and Culture* 18 (3): 381–399. Hyndman, Jennifer and Wenona Giles (2011) Waiting for what? The feminization of asylum in protracted situations. *Gender, Place and Culture* 18 (3): 361–379. Griffiths, Melanie, BE (2014) Out of time: The temporal uncertainties of refused asylum seekers and immigration detainees. *Journal of Ethnic and Migration Studies* 40 (12): 1991–2009. McNevin, Anne and Antje Missbach (2018) Luxury limbo: Temporal techniques of border control and the humanitarianisation of waiting. *International Journal of Migration and Border Studies* 4 (1–2): 12–34. Vianelli, Lorenzo; Gill, Nick and Hoellerer, Nicole (2021) Waiting as probation: Selecting self-disciplining asylum seekers. *Journal of Ethnic and Migration Studies* 48 (5): 1013–1032.

2 Tazzioli, 2018. Mezzadra, Sandro and Brett Neilson (2013) *Border as Method, or, the Multiplication of Labor*. Durham and London: Duke University Press.

3 Chatty, Dawn (2010) *Dispossession and forced migration in the Middle East*. Cambridge: Cambridge University Press.

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should be determined in different European countries.[4] Although some were as short as a month in the regular procedure and even shorter in fast-tracked processes, the time limit was five months in France, six in Greece and Italy and fifteen in Austria, generally far in excess of the time limits asylum appellants are themselves subject to for lodging asylum appeals in the first place.[5] Furthermore, in practice, ECRE reported even longer processing times, such as eighteen months in Italy, one or two years in Spain[6] and two years in Cyprus, suggesting that compliance with the deadlines for determining asylum appeals is highly variable. What is more, numerous countries have no limit on the length of time that can be taken to determine an appeal.[7]

In this chapter we examine the influence that waiting can have over appellants' abilities to access and effectively engage in the appeal process. Sometimes, waiting times can be productive from the perspective of preparing for a case, and we begin by examining some of these advantages. Nevertheless, the majority of our interviewees underscored the challenges and frustrations of waiting. We discuss the mental health challenges, including high levels of anxiety about the hearing itself. We also outline how changes in legal and factual circumstances that can occur whilst waiting can undermine appellants' cases, and highlight the deleterious effect that the passage of time can have on the clarity of appellants' memories of key aspects of their narratives. We also reflect on how asylum seekers' housing situations and access to advice (or lack of it) during the period of waiting for the appeal can impact upon their preparations.

By drawing attention to these influences of the period of waiting for the appeal over the appeal process itself, the findings have a variety of implications. Practically, it becomes clear that by the time asylum seekers reach the date of their appeal their likelihood of success has often already been significantly influenced by their success in navigating these challenges. Conceptually, the chapter highlights how important it is to see asylum appeals within the socio-economic context of appellants' lives. Legal discourse and architecture can give the impression that the law is above or outside social-economic influences and that a meaningful boundary separates the sphere of law from other spheres of human existence and interaction. By demonstrating the ways that appellants' highly differentiated experiences of waiting can influence the appeal however, our chapter begins to chart the fragility that characterises refugee

4 European Council on Refugees and Exiles (2016*) The length of asylum procedures in Europe AIDA Asylum Information Database, Brussels.* Available at: https://www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf [accessed 26 April 2024].

5 See the time frames for filing asylum appeals in Chapter 2 ('What are Asylum Appeals?').

6 The temporal politics of waiting are particularly clear in Spain, where asylum claims made in the border enclaves of Ceuta and Melilla regularly take two to five years before initial decisions are made. Moreover, in 2015 it was reported that 57% of asylum claims in Melilla had taken over seven years to receive an initial decision. Fisher, Daniel X. (2018) *Border enacted: Unpacking the everyday performances of border control and resistance.* PhD Thesis, University of Edinburgh.

7 ECRE (2016).

law by illustrating the porosity and permeability of the interface between law and the social worlds that asylum seekers inhabit.

Enduring Waiting

Waiting periods can sometimes be useful for asylum seekers before their appeals. We came across interviewees who had been able to use the period of waiting for training and language learning for example. 'The long time is not the problem,' one appellant told us, 'I'm not sitting, I'm walking, you understand?'[8] He went on to tell us about how he was accessing education while he waited, not only taking language classes but also vocational qualifications. Some appellants also discussed how productive the waiting period had been in overcoming injury and trauma, occasionally meaning that they had been able to disclose and talk about their experiences more easily. The waiting period was also sometimes an opportunity for appellants to collect more evidence in support of their claim and to understand asylum, and the legal processes surrounding it, more clearly. Appellants also sometimes developed social networks and re-started their lives during the period of waiting, including getting married and starting families (which, in some instances, could make it less likely that they faced deportation).

The clear emphasis from our interviewees, however, was that waiting was an imposition that they found frustrating and demoralising. One appellant in Italy had been waiting for over a year for his appeal. 'How do you feel now?' we asked him. 'Complex, hard, hard, hard, hard, hard,' he replied.[9] 'We miss a lot of things,' another appellant in Italy explained who was struggling to find a way to support himself:

> to get assessed for a job, they ask you for documents. If you don't have documents, they don't give you a contract because they don't know: maybe tomorrow you will leave the country. It's really affecting me. There are many social things I just wanted to get myself into, but without a document I cannot go there. It becomes a problem. We are human. As the days go, you are getting older, you're not getting any younger. You don't concentrate because you will be thinking, maybe they will give me positive or they will give me negative.[10]

Some appellants also struggled with the social isolation of waiting, which can occur when appellants are unable to take on paid employment or get on with their lives in countless other ways without the stability legal status brings. 'You just have to stay home,' an appellant in the UK said. 'I've got no friends here,

8 Interview, appellant, Italy, 2019, Lorenzo Vianelli.
9 Interview, appellant, Italy, 2019, Lorenzo Vianelli.
10 Interview, appellant, Italy, 2019, Lorenzo Vianelli.

I don't know anyone.'[11] Lawyers we spoke to were also concerned that a long waiting period made it more difficult for appellants to deal with the social challenges of being returned to their countries of origin if their application was refused. 'So you live here for two years,' one German legal representative remarked, 'then you are rejected by court too – how do you go back after such a long time? You build a life here.'[12]

A recurring theme when we spoke with appellants about waiting was the challenge that it posed to their mental health. Asylum seekers experience high rates of depression, anxiety, post-traumatic stress disorder and other mental health conditions .[13] Mental ill health is not confined to the first few months after arrival but often persists for years and can be exacerbated by social exclusion, economic hardship and barriers to accessing mental health services in receiving countries on and after arrival.[14] Suffering from more than one chronic condition at the same time is common.[15] What is more, there are long-standing concerns that policies of deterrence aimed at asylum seekers, including confinement in immigration detention centres, mandatory dispersal within host communities, demanding refugee determination procedures and temporary forms of protection, contribute to worsening mental health.[16] This is not helped by the difficulties that asylum seekers face in accessing work, education, housing, welfare and, sometimes, basic health care in receiving countries.[17] Treating the mental health needs of asylum seekers and refugees can be complex and challenging, and may require clinicians to operate not only as medical experts but also as therapists and advocates.[18]

11 Interview, appellant, UK, 2014, Andrew Burridge.

12 Fieldnotes, Germany, 2018, Nicole Hoellerer.

13 Silove, Derrick, Ingrid Sinnerbrink, Annette Field, Vijaya Manicavasagar and Zachary Steel (1997) Anxiety, depression and PTSD in asylum-seekers: Associations with pre-migration trauma and post-migration stressors. *The British Journal of Psychiatry* 170: 351–357. Priebe, Stefan, Domenico Giacco and Rawda El-Nagib (2016) *Public health aspects of mental health among migrants and refugees: a review of the evidence on mental health care for refugees, asylum seekers and irregular migrants in the WHO European Region*. Health Evidence Network (HEN) Synthesis Report 47. Copenhagen: WHO Regional Office for Europe.

14 Heeren, Martina, Julia Mueller, Ulrike Ehlert, Ulrich Schnyder, Nadia Copiery and Thomas Maier (2012) Mental health of asylum seekers: A cross-sectional study of psychiatric disorders. *BMC Psychiatry* 12 (1): 1–8.

15 Gerritsen, Annette AM, Inge Bramsen, Walter Devillé, Loes HM van Willigen, Johannes E Hovens and Henk M Van Der Ploeg (2006) Physical and mental health of Afghan, Iranian and Somali asylum seekers and refugees living in the Netherlands. *Social Psychiatry and Psychiatric Epidemiology* 41 (1): 18–26.

16 Silove, Derrick, Zachary Steel and Charles Watters (2000) Policies of deterrence and the mental health of asylum seekers. *Jama* 284 (5): 604–611.

17 ibid.

18 Tribe, Rachel (2002) Mental health of refugees and asylum-seekers. *Advances in Psychiatric Treatment* 8 (4): 240–247.

Our interviewees reported feeling 'very, very sad' during protracted periods of waiting, as well as frustrated that they had 'wasted enough time'.[19] Others suffered from anxiety. 'I'm waiting but scared,' one interviewee in Italy told us. 'I tell you truly. I sleep … I think, I think, I think. I sleep, I think.'[20] 'You can lose your mind,' another interviewee in Italy explained. 'The documents – you don't know when they will arrive. The job – you don't know when. So all you can do is think.'[21]

The prospect of the hearing can exacerbate mental health challenges because of the stress, the uncertainty about what will happen, and the intensity of having little else to do but wait.

> They destroyed my health in my situation, in my country believe me never would I take the pressure. Now, every day … I don't have a clear mind, I lost my confidence, lost my concentration.[22]

Some appellants obsess about their hearings and dread their hearing dates. 'My God, I couldn't stop crying,' one appellant recalled looking back on the run-up to her appeal. 'I was exhausted, I was beyond imagination.'[23] 'You think they will say "no",' another appellant explained, whose account of the waiting illustrates the associations that appellants sometimes draw between their experiences of violence in their origin countries or en route and their experiences of border control on arrival.

> You think they will put you in a van, they will beat you, they will take you somewhere you don't know. The last accommodation where we lived we had trucks coming at night taking people just like that. So it's trauma over trauma, torture over torture. You are cooking with someone tonight, you eat dinner tonight, in the morning his room was broken, he is gone. What? I don't know. So it's something like that. So you know when you are going to court that these are your days now, it's coming, it's coming and you are waiting for something good, bad, you don't know. But since you have nothing to do, it's not your country; you have no one to run to. You just sit and wait, if it happens, it happens.[24]

19 Interview, appellant, Italy, 2019, Lorenzo Vianelli.
20 Interview, appellant, Italy, 2019, Lorenzo Vianelli.
21 Interview, appellant, Italy, 2019, Lorenzo Vianelli.
22 Interview, appellant, UK, 2015, Natalia Paszkiewicz.
23 Interview, appellant, UK, 2015, Natalia Paszkiewicz.
24 Interview, appellant, UK, 2015, Natalia Paszkiewicz.

Legal Changes

The passing of time can also affect asylum cases because the facts of the case or the law can change over time.[25] This can render claims unsuccessful that might otherwise have succeeded if they had been heard promptly. A common way that cases changed for appellants was that they came of age (i.e. passed the age of 18) whilst waiting for a decision or appealing. If they were accompanied by their parents, they may not have had an individual initial interview when they were still a child. Yet, following their 18th birthday, their claim would in most cases need to be considered separately from that of their parents, and there was no guarantee that the adult children of refugees would receive a similar outcome.

Depending on the political circumstances, authorities can also change their assessment of the safety of certain countries of origin, or regions within countries of origin. The question of the safety of Northern Iraq, for example, was raised in multiple hearings in Germany. Various courts we visited held that the so-called Islamic State (IS) of Iraq and the Levant had been forced out of Northern Iraq by late 2017.[26] Numerous claims submitted before 2017 in Germany therefore might have been successful had they not been delayed, but because their appeals were heard after late 2017 they were much less likely to be upheld. In one case in Düsseldorf, for instance, the judge explained that developments in Iraq had severely weakened the appellant's case:

> Our court has decided that at *this* point, North Iraq is no longer in danger … I have to emphasise that according to §77 AsylG,[27] the court has to assess the situation [in the country of origin] at the time of the oral hearing … not at the time of departure …[28]

The Challenge of Recall

A further common effect of waiting is that, as time goes by, appellants may begin to forget the details of their experiences. Psychologists have established the corrosive effect that trauma can have over memory, and critiqued the commonly held, but erroneous, view that memory should be seen as a sort of

25 See Shuman, Amy and Carol Bohmer (2004) Representing trauma: Political asylum narrative. *Journal of American Folklore* 117 (466): 394–414 for a discussion of the same problem in the American context.

26 See e.g. Wilson Centre (2019) *Timeline: The rise, spread, and fall of the Islamic State*. Available at: https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state [accessed 14 September 2022].

27 German Asylum Act, Section 77 (1): 'In disputes resulting from this Act, the court shall base its decision on the factual and legal situation at the time of the last oral proceedings; if the decision is taken without oral proceedings, it shall be based on the situation at the time the decision is taken.'

28 Judge's emphasis, fieldnotes, Germany, 2019, Nicole Hoellerer.

video or recording that can be replayed at will.[29] On the contrary, traumatic memories may be difficult to recall and may be suppressed if a long period of time has gone by. What is more, peripheral details in memories are difficult to accurately recall at the best of times, but, when the recollections are traumatic ones, these details can be particularly unreliable. This poses a distinct problem when styles of questioning and investigation are employed that seek out inconsistencies between accounts (see Chapter 10, 'Judicial Questioning', and Chapter 11, 'Judicial Styles'). The assumption that violence and torture are so significant that they will be remembered clearly over a long period of time is understandable, but disputed by science.[30]

It is also important to bear in mind that, even if asylum appellants are able to recall traumatic episodes in their lives, they may find doing so painful and potentially re-traumatising.[31] Appellants may have been required to recall the same event at police stations, during initial government interviews and with their legal representatives, possibly on multiple occasions, producing a real risk of recall fatigue.[32]

During their hearings, appellants frequently said that they did not remember details about their experiences. Dates were a common source of confusion and appellants would often struggle to recall when events had occurred. In response, judges would utilise various strategies, sometimes asking them to simply recall the season in which an event happened, or even just the year,[33] or perhaps asking for a chronology of events so as to get the order straight without insisting on specific dates.[34] Even then, many appellants appeared to struggle to remember important aspects of their cases, such as the names of key figures in their narratives. The risk facing appellants experiencing these challenges of recall is that judges will not be able to accept that this degree of memory loss is genuine and will instead attribute it to a weakness in their narrative and ultimately perceive it as a lack of credibility.

29 Herlihy, Jane, Peter Scragg and Stuart Turner (2002) Discrepancies in autobiographical memories – Implications for the assessment of asylum seekers: Repeated interviews study. *British Medical Journal* 324: 324–327.

30 Herlihy, Jane and Stuart W Turner (2007) Asylum claims and memory of trauma: Sharing our knowledge. *The British Journal of Psychiatry* 191 (1): 3–4.

31 Appellants may want to get the hearing over with as quickly as possible as a result, and judges have the difficult job of balancing between the pain of recall and the need for detail in deciding cases.

32 Gurer, Cuneyt (2019) Refugee perspectives on integration in Germany. *American Journal of Qualitative Research* 3 (2): 52–70.

33 There was sometimes also confusion over dates because some appellants were not used to the Gregorian calendar.

34 Some judges, keen to be able to proceed with a particular line of questioning, encouraged appellants to give accounts that were 'more or less' correct. These sort of accommodations by judges, while well-meaning, were sometimes hard for appellants to understand. What is 'more or less' and how much variation does it accommodate?

Government representatives will often seek to discredit appellants based on their inaccurate recollection of dates in which events occurred, even if the events took place several years previously. Knowing the importance of the hearings and the gravity of the events that are discussed there, some appellants felt ashamed that their recollections were not more accurate and vivid. Appellants would frequently apologise to judges when they could not recall particular facts. What is more, the anticipation of a detailed memory test was sometimes enough to fill appellants with a sense of foreboding about memory lapses.

> I was afraid also because I was trying to remember the things I said [at the initial stage of claiming asylum] because it had been one year ago. I was also afraid not to add something or reduce something because of what my lawyer told me. I wasn't confident.[35]

Weak memories and seemingly poor cognitive function, possibly owing to mental ill health, could render judges' jobs virtually impossible. In several cases, appellants forgot the question they had been asked whilst giving their response. At other times, appellants struggled to recall even very recent experiences. One case involved an appellant who was fleeing violence in Iraq.

Judge: You have been in Germany for a while. Tell me how you spend your days here. Tell me about your everyday life. What did you do yesterday?

Fieldnotes: The appellant says he can't answer the question, as he can't remember. He says he forgets a lot. He says he cannot remember the BAMF[36] interview.

Judge: You said you forget a lot, but I asked you about yesterday, not four years ago. What did you do yesterday?

Fieldnotes: The appellant insists that he cannot remember.[37]

How judges decide to deal with memory is sometimes crucial to the form, atmosphere and direction of hearings. Some judges were highly empathetic and apparently accepting of appellants' struggles around memory. We noted on several occasions that judges told the appellant that they understood that it was difficult to recall the episodes and events in question and that they would not ask more than they had to. Some judges also reminded appellants not to guess or make anything up, which we felt to be important when appellants are under pressure to remember facts and events and may feel embarrassed at the lack of clarity of their memories.

Not all judges that we observed were as accommodating though. In one German hearing, the appellant brought notes with them with certain dates and

35 Interview, appellant, Italy, 2019, Lorenzo Vianelli.

36 Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees).

37 Fieldnotes, Germany, 2019, Nicole Hoellerer.

key events written down to support them during the giving of evidence. The judge raised his eyebrows, made a dismissive hand gesture and interrupted the appellant: 'Doesn't he remember? Can't he do it without his notes?'[38]

In some cases, judges snapped when faced with memory-related barriers and challenges. One appellant in Berlin was struggling to recall the sequence of events that led them to flee to Germany. 'You went to school for 12 years. When did you finish school?' the judge asked.

Appellant: I cannot remember

Judge: Why? Was it one year before you went to Germany, or maybe two? [abruptly] How can it be that you don't remember? You went to school for 12 years![39]

At times, judges were desperate for more details about the events described in appellants' narratives, so that they could form a clearer picture of them in their own minds and on rare occasions lack of memory was enough to trigger strong feelings of anger in judges. One judge was questioning an appellant who described receiving death threats from the Taliban and whose father was reportedly killed. The judge was asking him details about his father's death.

Fieldnotes: The judge asks in an insistent and frustrated tone: 'Where did they find him? What happened? … They don't just say "The Taliban killed him, tomorrow is the funeral" … surely you remember when your father died?' The appellant says he simply does not remember. The judge seems to take this very personally, as if it was a direct insult to him. He gets up from his seat and sits back down in an angry gesture, and starts yelling almost at the top of his voice.

Judge: It's [several] years ago that my father died, and I remember everything exactly, every detail! This is complete nonsense, absolute nonsense!

Fieldnotes: The judge's sudden outburst almost makes me jump out of my chair … The atmosphere in the room feels like a lightning strike has been discharged, and thunder roared through the room.[40]

Some appellants lie during their asylum appeals[41] and it is the judge's job to distinguish truth from fabrications. Memory loss around important and prominent aspects of appellants' narratives could be seen as suspicious. A particularly suspicious time to claim to remember details about a case is near the end

38 Fieldnotes, Germany, 2018, Nicole Hoellerer.

39 Fieldnotes, Germany, 2018, Nicole Hoellerer.

40 Fieldnotes, Germany, 2018, Nicole Hoellerer.

41 While this can be to further a false claim, it is also the case that appellants with a genuine fear of persecution might have lied for understandable reasons, see Bohmer, Carol and Amy Shuman (2017) *Political asylum deceptions: The culture of suspicion*. Cham: Palgrave Macmillan.

of a hearing that has gone badly for the appellant. That said, to claim not to be able to remember anything can be a poor lying technique if deception is the intention. One appellant in Berlin said that he had 'forgotten everything' since he left Afghanistan,[42] which is hardly a convincing way to deceive a judge.

Although an ability to recall details about their case is usually advantageous to appellants, one irony that we also noticed was that a watertight memory does not always work in an appellant's favour. In some instances the clarity and precision of appellants' memories can sound strange and unnatural. 'How come you can remember the exact dates of these demonstrations?' one judge in Berlin asked suspiciously when an appellant gave a prompt and very full answer to his question.[43] In another case, an appellant from Iraq was questioned by the judge in Berlin about when he arrived in Germany:

Fieldnotes: The appellant provides the exact date and time he arrived in Germany via Austria.

Judge: That is exceptionally detailed! How come you know this in so much detail?

Fieldnotes: The appellant remarks that he wrote down everything about his journey. Over-remembering![44]

Concerningly, such 'over-remembering' could damage cases. Appellants who added a lot more detail to their accounts in their hearings were sometimes challenged to explain why they did not mention such details during the first interview and very high levels of precision can give the impression of an over-rehearsed and pre-prepared narrative.

Housing

Aside from the direct influence of waiting over the ability of appellants to engage in the legal process, the period of waiting can also be an important time to prepare for one's hearing. The degree to which appellants can make the most of this preparation time, however, is highly dependent on their circumstances during the waiting period. Appellants' child-care commitments, health, language skills and understanding of the requirements of European legal systems each affect their ability to prepare cases effectively.[45] Recognising this contingency, in the remainder of this chapter we draw attention to two additional factors that affected the ability of appellants to prepare effectively for their hearings while they waited: housing and legal advice.

42 To which the judge simply sighed and frowned (fieldnotes, Germany, 2018, Nicole Hoellerer).

43 Fieldnotes, Germany, 2018, Nicole Hoellerer.

44 Fieldnotes, Germany, 2018, Nicole Hoellerer.

45 Also see Shuman and Bohmer (2004) for a discussion.

In terms of housing, asylum seekers' accommodation varies widely. Although we did not become aware of any appellants we observed attending their appeals whilst homeless, some had experienced homelessness recently. This, combined with the destitution that many asylum seekers face, can form a chaotic backdrop that is counterproductive to orderly paperwork and the sort of clear-headedness that is required during hearings. What is more, people seeking asylum are often reliant on government-funded accommodation and can be asked to move frequently and at short notice. Appellants can be dispersed away from their networks of support, including their lawyers and any social networks they have that could provide advice and emotional support through the appeal process. Government-funded accommodation itself can be substandard and located in poor areas of cities where racism and racial tensions are endemic.

The pressures these challenges create on the personal resilience that people seeking asylum command are significant. 'Now I cannot eat or sleep … By the end of the week you are out of food. I walk everywhere. This asylum case is the end of your life,' said one appellant when reflecting on their experience of relying on government provided housing in the UK. In particular, he struggled to find privacy, both to prepare his case for asylum and more generally, in his accommodation.

> They put me in a room with another person. So, you don't have a private life. They said, 'It is a big room, so you can sleep two people in here.' But you need a private life! And this can go on for months and months. I've been dealing with this stress …[46]

Asylum seekers' choice of legal representation can be constrained in government-funded accommodation too. In Italy, numerous interviewees expressed frustration that they were only offered a limited list of legal representatives to choose from in their accommodation centres. We learnt that the lists they were offered were often curated by the accommodation centres to which they were assigned. Some centres have agreements with lawyers and directed their residents towards them. One lawyer working in Italy reflected on the injustice of this arrangement:

> I don't collaborate with the reception centres like many of my colleagues who are registered on the centre's list do. I don't consider this right because sometimes it happens that the young people there are coerced, that the offering of accommodation depends on the lawyer they choose because the centre wants to have everything under control as they have to constantly tell the [local government authority] how the appeal is going … When they give a written list, it becomes a pressure, doesn't it?

46 Interview, appellant, UK, 2014, Andrew Burridge.

> They call it 'camp lawyer', and this is not nice. In general, these camp lawyers are numerous.[47]

In Germany, some lawyers argued that some refugee accommodation (especially ANKER centres[48]) are 'spaces devoid of law/justice' [*rechtsfreie Räume*],[49] and volunteer legal advisors complained that some lists of lawyers provided to asylum seekers at German refugee accommodation are made up of tax lawyers, rather than asylum lawyers.

Access to legal advice in immigration detention is often particularly curtailed. Appellants may be in 'fast-track' processes that afford them a much smaller window of time to register and prepare an appeal than in the regular procedure. What is more, lawyers either have to travel to see appellants in detention centres, which are often remote,[50] or they must rely on telephone or video-conferencing to consult with their clients, yet such technologies can be highly limited in carceral settings.

One interviewee in the UK explained that, at times during his detention, other detainees had come to him for help in understanding legal documents and paperwork because they did not have access to legal advice and he could read English:

> There was one guy when I was detained in 2010 he brought out about 200 pages of decision. He cannot speak English. When he bought it to me he says, 'What is this? I am going back to my country but I claimed asylum?' With 200 pages of decision, he cannot speak English. He cannot read it. He gave up. We don't know what has happened to him now.[51]

Former detainees also talked about their lack of preparation for legal hearings when they were detained: 'they just wake you up for a hearing, and you

47 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.

48 ANKER centres (*Ankunft, Entscheidung und kommunale Verteilung oder Rückführung* – Arrival, decision and municipal distribution or return) are locations that centralise all relevant authorities in one reception centre, where asylum seekers may stay up to 24 months after arrival in Germany. Such centres were rolled out in three federal states (Bavaria, Saxony, Saarland) in 2018, with the aim of accelerating procedures. For a detailed analysis of ANKER centres, see ECRE and AIDA (2019) *The AnkER centres: Implications for asylum procedures, reception and return*. Available at: https://asylumineurope.org/wp-content/uploads/2020/11/anker_centres_report.pdf [accessed: 25 April 2024].

49 From: https://anwaltsblatt.anwaltverein.de/de/anwaeltinnen-anwaelte/vereinsarbeit/warum-der-rechtsstaat-in-den-ankerzentren-draussen-bleibt [accessed 13 July 2021].

50 For a discussion of remoteness and detention from a global perspective see for example Mountz, Alison (2012) Mapping remote detention. In Loyd, Jenna M., Matt Mitchelson and Andrew Burridge (eds) *Beyond walls and cages: Prisons, borders, and global crisis*. Athens and London: University of Georgia Press, 91–104.

51 Interview, appellant, UK, 2015, Natalia Paszkiewicz.

go – no information, no preparation, no nothing … there is no support, you are on your own.'[52] 'If I was outside,' another former detainee reflected when discussing the limited preparations they made before their appeal hearing, 'I might have somebody to tell me that you should have an interpreter before you go to court, you can have a lawyer for free … but because they detained me … I don't know all those things; I don't know all my rights.'[53]

Lawyers too recounted how much of a disadvantage appellants were at if they were preparing for their cases from detention. 'Lots of times I'll say to clients, "Do you have this, do you have that?",' one lawyer told us in the UK.

> And they'll say 'Oh, it's back home in some drawer, I think I probably do have that.' But they've got no one to go and start searching through all their papers and identify what they're looking for and they can't do it while they're in custody … Oftentimes people would be able to present a much more cogent case if they weren't in detention and if they had better access to representatives, to information, to the outside world: to be able to go and make some of these enquiries themselves.[54]

Legal Advice

An additional challenge of the period before the appeal hearing concerns finding legal advice.[55] The provision of legal advice in many countries is in short supply (discussed further in Chapter 6, 'Assembling Appeals'). In the UK, for example, government cuts and changes to legal aid spending have had a dire effect on the provision of legal aid for asylum seekers, leaving many parts of the UK facing legal deserts and droughts. Poor rates of remuneration for lawyers working on government-funded legal aid cases has combined with increasingly stringent merit tests applied to appellants.[56]

52 Interview, former detainee, UK, 2015, Natalia Paszkiewicz.
53 Interview, former detainee, UK, 2015, Natalia Paszkiewicz.
54 Interview, legal representative, UK, 2014, Andrew Burridge.
55 See, for example, Flynn, Asher and Jacqueline Hodgson (eds) (2017) *Access to justice and legal aid: Comparative perspectives on unmet legal need.* Oxford: Bloomsbury Publishing. In the United States for example, Rhode writes 'Given the enormous costs of error for asylum seekers whose lives may be at risk following deportation, the refusal to ensure legal aid underscores a shameful gap between American principles and practices' and discusses the 'starvation funding' model that is effectively constricting legal aid. She concludes that equal justice under the law 'is a principle widely embraced and routinely violated. Although the United States has the world's highest concentration of lawyers, it fails miserably at making their assistance accessible to those who need it most' (Rhode, Deborah L. (2009) Whatever happened to access to justice? *Loyola of Los Angeles Law Review* 42 (4): 869–912, page 869).
56 Wilding, Jo (2019) *Droughts and deserts: A report on the immigration legal aid market.* Available at: https://www.researchgate.net/publication/333718995_Droughts_and_Deserts_A_report_on_the_immigration_legal_aid_market [accessed 26 April 2024].

Legal advice is also highly regulated in many European countries. While it is desirable that advice is properly regulated so that asylum seekers are not misinformed, the tightness of the restrictions can mean that simple information about which form to file are withheld by people who are familiar with the system but who are not qualified to assist the appellant in this way.[57] It can also be prohibitively expensive to go through the relevant qualification procedures.

These shortages mean that asylum seekers can often struggle to access good advice in the run-up to their hearings. This can be especially true for asylum seekers in rural or remote areas, where legal advice is often in even shorter supply.[58] Asylum seekers often have no choice about where they live within the country in which they claim asylum, despite the fact that their location may very well affect their likelihood of finding legal support.

Even if a legal advisor for an appellant is found, a host of further challenges have to be faced. Although some interviewees told us how impressed they had been with their lawyers,[59] advisors do not automatically command the respect and confidence of their clients, and trauma, language barriers and cultural differences can all undermine their relationship.[60] In the context of sexual violence, culturally mediated gender dynamics between the advisor and appellant can play an important part. For disclosure to take place, a series of cultural, emotional and linguistic barriers must be overcome,[61] and asylum seekers are profoundly differently positioned to address these.

Some appellants are so unfamiliar with legal processes in a European context that they refuse sources of help and advice. One appellant told us that she had refused a free lawyer because, in her culture, there was a strong association

57 With respect to the American case Rhode (2009: 884) expresses concerns that 'many parties with valid claims are unable to advance them' because of the tightness of the way they are regulated. 'Neither court clerks nor pro se facilitators are generally allowed to give legal advice because that would violate state prohibitions on the unauthorized practice of law. Only general information is permissible, not correction of errors or specific assistance concerning which forms to file' (ibid.: 884).

58 Burridge, Andrew and Nick Gill (2017) Conveyor-belt justice: Precarity, access to justice, and uneven geographies of legal aid in UK asylum appeals. *Antipode* 49 (1): 23–42. Wilding, Jo (2021) *The legal aid market: Challenges for publicly funded immigration and asylum legal representation*. Bristol: Policy Press.

59 'She did so much research, my God,' one appellant recalled in describing her representative, describing positively how they had been 'grilled' by the representative as preparation for the hearing itself (interview, appellant, UK, 2015, Natalia Paszkiewicz).

60 Ardalan, Sabrineh (2015) Access to justice for asylum seekers: Developing an effective model of holistic asylum representation. *University of Michigan Journal of Law Reform* 48 (4): 1001–1038. For reform recommendations for the European Union, see: McBride, Jeremy (2009) *Access to justice for migrants and asylum-seekers in Europe*. Strasbourg: European Committee on Legal Co-Operation. Available at: https://rm.coe.int/1680597b1a [accessed 26 April 2024].

61 Baillot, Helen, Sharon Cowan and Vanessa E. Munro (2012) 'Hearing the Right Gaps': Enabling and responding to disclosures of sexual violence within the UK asylum process. *Social and Legal Studies* 21 (3): 269–296, page 269.

between needing a lawyer and being a criminal. 'In Africa, I never had anything to do with the police,' she told us.

> I had problems with my husband, but I didn't have a solicitor. Back home, you have a solicitor only if you have some problems with the law, if you are a criminal. When they asked me here, 'do you need a solicitor?', I said, 'no, I haven't done anything wrong'. Then they explained to me that I have a right to a solicitor. I was scared. I thought, 'they are giving me a solicitor, are they going to take me to prison?'[62]

It was common for appellants that we interviewed to be confused about how legal preparations were supposed to be conducted and the lack of clear, practical information about asylum appeals in many European countries perpetuates this disorientation. In describing what it was like to experience a shortage of advice within the Italian asylum appeal system, one of our interviewees said: 'we just feel like we are inside darkness, we don't know what is going on.'[63] 'I didn't have any idea about how it's supposed to go,' another interviewee told us. 'I was just nervous … I didn't have any knowledge of what things should be or how it should be, whether I need a solicitor or anything like that.'[64]

Compounding these difficulties, many asylum seekers do not trust their lawyers. There are various ways lawyers sometimes exploit asylum seekers (which we discuss in more detail in Chapter 6, 'Assembling Appeals') but often they themselves are overstretched due to the poor pay.[65] One appellant described with indignation how her lawyer 'couldn't even remember my name. In my country, your lawyer would be like, "hello, how are you today?" Here, it's like, "what's your reference number, no, I didn't hear from the Home Office, bye".'[66] In Italy, there were concerns about lawyers who seemed more interested in phoning their accommodation provider about their case instead of phoning them.

> I didn't trust him, I didn't trust [my lawyer] … When I get a lawyer and he has to appeal for you or has to do a job for you, before that he has to at least sit down and talk about things … But when [my] lawyer had some doubts he didn't sit with me, he preferred to talk to the centre where I live, he only talked with the centre and that's it.[67]

62 Interview, appellant, UK, 2015, Natalia Paszkiewicz.
63 Interview, appellant, Italy, 2019, Lorenzo Vianelli.
64 Interview, appellant, UK, 2015, Natalia Paszkiewicz.
65 See Wilding, 2021.
66 Interview, appellant, UK, 2015, Natalia Paszkiewicz.
67 Interview, appellant, Italy, 2019, Lorenzo Vianelli.

Often the relationship between appellants and their lawyers became more strained because of the waiting time for hearings. Some lawyers felt that their clients blamed them for delays that were outside their control. One legal representative in Italy recounted how rival lawyers would seek to attract business away from other lawyers on the basis of delays, by nurturing in the minds of appellants the idea that the delays in cases were the fault of their lawyers.

> We have some cases … of let's say 'street lawyers', who say that the other lawyers are not good enough nor quick enough, and it is their fault. They persuade immigrants … to change lawyers, exploiting the considerable waiting time that the procedure takes as they are suffering in a considerable way.[68]

When appellants either could not find a lawyer or were dissatisfied with them, they sometimes turned to their social networks for informal legal advice. 'No one explained to me about the process,' one former appellant told us, 'you just hear from other colleagues … and your roommates and always, we try to support each other. I don't know them, but just because we share the same home and we are in the same situation, we discuss things.'[69] This exchange of information can doubtless be helpful for appellants, but it also comes with the risk of misinformation.[70]

Effects of Under-Preparation in Court

We observed plenty of under-prepared legal representatives in court, including ones getting basic facts about the appellants' story wrong during the discussions (such as the gender or countries of origin of key figures in the account, like appellants' relatives). Some were inexperienced in asylum cases.[71] We heard one legal representative, who had been ineffective in the hearing,[72] sitting outside the courtroom at the end of the hearing, saying 'I really did not expect that the judge would ask that many detailed questions, and ask him again about all the things. I didn't expect this kind of questioning at all.'[73]

68 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.

69 Interview, appellant, UK, 2015, Natalia Paszkiewicz.

70 Whyte, Zachary (2011) Enter the myopticon: Uncertain surveillance in the Danish asylum system. *Anthropology Today* 27 (3): 18–21 for a discussion of the risks of misinformation in asylum seekers' networks.

71 This was an issue in Germany because asylum law is not the same as immigration law. A lawyer can be trained in immigration law but may not have experience and skills in dealing with asylum law cases.

72 To the point that Nicole noted that his ineptitude 'probably cost [the appellant] his status' (fieldnotes, Germany, 2018, Nicole Hoellerer).

73 Fieldnotes, Germany, 2018, Nicole Hoellerer.

In some instances, it was clear that the legal representative and the appellant had not had time to get to know each other or that the legal representative should have become more familiar with the case in advance. One appellant that we saw had been in Germany since 2015 and had received a rejection from BAMF a year prior to when we observed their appeal hearing in 2018. At the start of the hearing, when the interpreter was out of the room, a heated exchange took place.

> The legal representative … starts to talk with the appellant in a very loud voice, so everyone can hear. Her tone is not particularly friendly, and she is very direct: 'Any documents?' The appellant hands her a few documents, she looks at them, but flings them back in front of the appellant, and says in an unnecessarily loud voice, and slightly rudely: 'I don't need any of this! It's only about why you can't return to Iraq! Are you married?' – appellant says 'No' – 'Do you still get money from social services?' – The appellant tries to explain something to her in a hushed tone [maybe he feels a bit embarrassed], but the legal representative has none of it, saying: 'What is this?' waving at a document the appellant passed over to her…. The judge just sits there, grinning at them, and lets them talk, as the interpreter has not returned yet. Has the legal representative never met the appellant? [74]

These difficulties of finding, trusting and maintaining effective communication with legal advisors illustrate how some appellants struggle during the period of preparing for an appeal. Appellants who have money to pay for legal advice privately, or who have a professional background that equips them with the skills to understand bureaucracies and manage the relationship with their lawyer, may be more resilient to the challenges faced. But other appellants, such as those facing poverty and destitution, and the poorly educated, can find the period extremely difficult and disorientating and be exposed to exploitative or poor-quality legal advisors. By the time appellants arrive at court, their chances of success have often been significantly shaped by the advice they have received and preparation they and their lawyers have undertaken.

Conclusion

In general, our findings underscore the challenges of the period of waiting for the asylum appeal date to arrive from various perspectives. The frustrating sense of one's life being on hold can be extremely difficult, and those with mental health concerns can find the 'paralytic'[75] nature of waiting especially

74 Fieldnotes, Germany, 2019, Nicole Hoellerer.

75 Crapanzano, Vincent (1985) *Waiting: The Whites of South Africa*. New York: Random House, page 43.

hard. The circumstances of cases can change during waiting periods too, and the clarity of recollections can be affected. These influences on memory make it particularly difficult for judges to distinguish truth from fabrications, which is ultimately not at all helpful to truth-telling asylum seekers. Preparation for the case can also be a challenge that appellants are very differently positioned to meet. While some appellants might find waiting productive or helpful, most that we interviewed pointed towards the difficulties it entailed.

The evidence we have presented in this chapter points towards the importance of viewing notions of a distinct, clean dissociation between law and the social conditions of litigants critically. Legal processes sometimes make the implicit claim that they occupy a sphere that is separate from other social realms such as economy and politics. This is evident in the legal principles of independence and impartiality that sit at the epicentre of established notions of good judicial practice.[76] Judges, as well as lawyers and other legal professionals, hold themselves to high standards of autonomy from monetary and social influence, and rightly so. Indeed, the boundary between the 'legal' and the 'non-legal' is usually clearly symbolised in hearings, courts and trials, to the extent that legal geographers have suggested that one of the defining characteristics of legal work is the production of a boundary or 'edge' between 'law' and 'non-law'.[77] Courts have distinctive architecture, for example, which is often designed to make them appear separate from mainstream society[78] and some have elaborate thresholds that symbolise the marking-off of a particular, legal space. The formalism of courts, conveyed via specialised modes of address, language, comportment and symbolism, has a similar effect of singling out legal sites from the rest of society.

The evidence we have presented in this chapter, however, underscores the social entanglements of refugee law. The happenings that precede asylum appeal hearings have an important influence over what happens during them. We are not referring to the facts of the case here, which obviously should have an influence over what happens during hearings. Rather, we are referring to the often unique challenges in asylum appellants' lives in their destination countries, the level of preparation they and their advisors are able to complete, and psychological and governmental challenges that appellants can face. All of these can cast an extremely long shadow over how asylum appeal hearings are approached and how they play out. In other words, we found asylum appeal hearings to be enmeshed within the socio-political worlds of the appellants as well as the bureaucratic histories of their cases.

76 See for example *The Bangalore principles of judicial conduct* (2002). Available at: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf [accessed 24 April 2024].

77 Jeffrey, Alex (2019) *The edge of law: Legal geographies of a war crimes court*. Cambridge: Cambridge University Press.

78 Mulcahy, Linda, and Emma Rowden (2019) *The democratic courthouse: A modern history of design, due process and dignity*. London: Routledge. Mulcahy, Linda (2010) *Legal architecture: Justice, due process and the place of law*. London: Routledge.

5 Arriving at Court

First Impressions, Orientation and the Fragility of Trust

Introduction

At the end of the last chapter we discussed the difficulties appellants sometimes have in trusting their legal representatives. This is one aspect of the broader issue of the extent to which appellants place trust in the system in general. A wide range of factors influence the likelihood that asylum seekers will trust[1] authorities, and we begin this chapter with a brief review of the scholarly literature that has explored these. We then focus on a particular point in the legal process – namely, arriving at court – as a way to illustrate both the importance and the fragility of appellants' trust. After waiting for their appeal, as detailed in the previous chapter, appellants are often nervous and apprehensive about their day in court. Under these conditions, first impressions can play an important role in setting the tone of the hearing. We explore the influence of appellants' first impressions by examining the processes of getting to hearings, arriving at court, waiting within the court centre, and entering the hearing room.

The Challenge of Establishing Trust

Work in legal psychology suggests that confidence in authorities is lower among Black, Asian and minority ethnic populations in rich countries,[2] and that distrust easily and regularly leads to non-cooperation.[3] Research with undocumented migrants in America also demonstrates that fear of authorities

1 Lyytinen defines trust as 'a positive feeling about or evaluation of the intentions or behaviour of another' and conceptualises it as 'a discursively created emotion and practice which is based on the relations between the "trustor" and the "trustee"'. Lyytinen, Eveliina (2017) Refugees' 'journeys of trust': Creating an analytical framework to examine refugees' exilic journeys with a focus on trust. *Journal of Refugee Studies* 30, (4): 489–510, page 489.

2 Tyler, Tom R (2005) Policing in black and white: Ethnic group differences in trust and confidence in the police. *Police Quarterly* 8 (3): 322–342.

3 De Cremer, David, and Tom R Tyler (2007) The effects of trust in authority and procedural fairness on cooperation. *Journal of Applied Psychology* 92 (3): 639–649.

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and stigma reduce the propensity to turn to justice systems for protection among precarious migrant groups.[4]

While not focussed on the legal system, existing research with refugees underscores how difficult it can be for them to build and maintain trust in authorities in their countries of refuge. Refugees commonly do not trust their doctors in receiving countries, for example, and may not disclose important aspects of their medical histories to them.[5] This distrustfulness is understandable when we consider some of their past experiences fleeing conflict and persecution, although past experiences are not the only reasons for distrust among asylum seeking populations. Research has highlighted how being mistrusted and stigmatised by dominant groups in host countries can heighten mistrust among asylum seekers too.[6] Government policies that force asylum seekers into unemployment, poor neighbourhoods and sub-standard housing, for example, can further erode the prospect of building trust between asylum populations and state institutions.[7] Government policies or legal systems that do not make reasonable adjustments to accommodate asylum seekers with disabilities can contribute further to their alienation.[8]

Socio-legal scholars have spent a good deal of time understanding how potential litigants relate to, and make sense of, legal systems. Their work has identified the importance of legal consciousness, understood as not only knowing about the law but also the complex socio-cultural factors that promote or

4 Although these effects may vary significantly by the age of the cohort and length of time they have been in the United States, see Abrego, Leisy J (2011) Legal consciousness of undocumented Latinos: Fear and stigma as barriers to claims-making for first-and 1.5-generation immigrants. *Law and Society Review* 45 (2): 337–370.

5 Feldmann, C Titia, Jozien M Bensing, Arie De Ruijter and Hennie R Boeije (2007) Afghan refugees and their general practitioners in The Netherlands: To trust or not to trust? *Sociology of Health and Illness* 29 (4): 515–535.

6 Ní Raghallaigh, Muireann (2014) The causes of mistrust amongst asylum seekers and refugees: Insights from research with unaccompanied asylum-seeking minors living in the Republic of Ireland. *Journal of Refugee Studies* 27 (1): 82–100. da Silva Rebelo et al find that 'host societies' mistrust, hostility, and discrimination expressed in overt or subtle ways toward refugees, asylum seekers, and immigrants have a harmful impact on their biopsychosocial well-being, often triggering feelings of helplessness, anger, frustration, and general mistrust' (page 239) and that 'society's discriminatory attitudes and behaviours may lead refugees and asylum seekers to avoid social and health services even when needed, and to transfer their negative feelings onto helping professionals' (da Silva Rebelo, María José, Mercedes Fernández and Joseba Achotegui (2018) Mistrust, anger, and hostility in refugees, asylum seekers, and immigrants: A systematic review. *Canadian Psychology/Psychologie Canadienne* 59 (3): 239–251, page 239).

7 Hynes, Patricia (2009) Contemporary compulsory dispersal and the absence of space for the restoration of trust. *Journal of Refugee Studies* 22 (1): 97–121.

8 Crock, Mary, Laura Smith-Khan, Ron McCallum and Ben Saul (2017) *The legal protection of refugees with disabilities: Forgotten and invisible?* Cheltenham: Edward Elgar Publishing. Rhode, Deborah L (2009) Whatever happened to access to justice? *Loyola of Los Angeles Law Review* 42 (4): 869–912.

reduce the propensity to turn to it.[9] Its corollary is legal alienation – a condition of feeling as though the formal law is of little practical use or application to one's own situation.[10]

Initial work on legal consciousness was conducted with US citizens and revealed high levels of expectation and feelings of entitlement to turn to the law, secure in the knowledge that it could be used to pursue legal protection.[11] Subsequent literature on legal consciousness, however, uncovered its complexity and interrelationships with various cultural and social conditions.

> [C]onsciousness is neither fixed, stable, unitary, nor consistent. Instead, we see legal consciousness as something local, contextual, pluralistic, filled with conflict and contradiction. The ideas, interpretations, actions and ways of operating that collectively represent a person's legal consciousness may vary across time (to reflect learning and experience) or across interactions (to reflect different objects, relationships or purposes). To the extent that consciousness is emergent in social practice and forged in and around situated events and interactions … a person may express, through words or actions, a multi-faceted, contradictory, and variable consciousness.[12]

Little research has been conducted directly into asylum seekers' legal consciousness though.[13] A poor understanding of how asylum seekers perceive and relate to legal systems means that there is a real risk that 'the actual needs of those for whom steps to ensure access to justice are being taken' are overlooked, meaning that 'the efforts being made to assist them may well be misdirected and result in a loss of resources'.[14]

9 Ewick, Patricia and Susan S. Silbey (1991) Conformity, contestation, and resistance: An account of legal consciousness. *New England Law Review* 26 (3): 731–750, page 731.

10 See for example Hertogh, Marc (2018) *Nobody's law: Legal consciousness and legal alienation in everyday life*. London: Palgrave Macmillan.

11 Although citizens were also frequently disappointed. See Merry, Sally Engle (1990) *Getting justice and getting even: Legal consciousness among working-class Americans*. Chicago: University of Chicago Press.

12 Ewick and Sibley, 1991: 742.

13 A rare exception is Sandvik's work, which examines the way legal processes are viewed by urban refugees in Kampala, Uganda. Sandvik, Kristin Bergtora (2009) 'The physicality of legal consciousness: Suffering and the production of credibility in refugee resettlement'. In Wilson, Richard Ashby and Richard D Brown (eds) *Humanitarianism and suffering: The mobilization of empathy*. New York: Cambridge University Press, 223–244.

14 McBride reports upon 'the absence of suitable empirical studies' which results in a situation in which 'there is often no choice but to rely upon evidence of a more impressionistic character' (McBride, Jeremy (2009) *Access to justice for migrants and asylum-seekers in Europe*. Strasbourg: European Committee on Legal Co-Operation, page 4. Available at: https://rm.coe.int/1680597b1a [accessed 12 July 2022]).

Even supposing a person can trust the legal system, there may be social, mental or physical barriers to overcome before they can effectively access it. The literature on access to justice emphasises the problematic role that racial inequality, socio-economic disadvantage and gender inequality, as well as other forms of disadvantage, play in inhibiting access to legal processes and systems[15] (we discuss the disadvantages of not have legal representation in the next chapter, 'Assembling Appeals'). The same literature illustrates how legal systems that claim to uphold the rights of marginalised groups can have the effect of doing exactly the opposite. Social class, for example, can operate in legal settings to alienate people in poverty and with low levels of education via the interpersonal dynamics in courtrooms, the forms of speech used and the inabilities of poor and poorly educated people to 'know, express or assert their legal entitlements'.[16] This alienation can result not only in the 'functional voicelessness'[17] of litigants, but may end up sapping their belief in, and ability to participate in, the institutions that are supposed to serve them – an effect that has arrestingly been conceptualised as 'spirit-murder'.[18] The absurdity of attending and participating in an event that claims to be 'unproblematic … essential and eternal'[19] but which is actually 'systematically manipulated to facilitate the appearance of legitimized social control',[20] has rightly attracted critique from socio-legal scholars.[21]

In this chapter we take arrival at court as a window into the problematics of asylum appellants' legal consciousness and access to justice. We set out the various challenges that confront arriving appellants, including difficulties relating to disorientation, out-of-placeness and the social power dynamics they share with a range of professionals at their appeals. In doing so, we show that asylum seekers' trust in legal processes is fragile and contingent and therefore needs close attention if the legal provisions that appeals entail are to be meaningful and effective.

Getting There

Appellants were often worried about finding the court and arriving on time. 'I was a little bit worried about how I could get there,' one appellant in the UK

15 Sandefur, Rebecca L (2008) Access to civil justice and race, class, and gender inequality. *Annual Review of Sociology* 34: 339–358. Francioni, Francesco (ed) (2007) *Access to justice as a human right*. Oxford: Oxford University Press. Rhode, Deborah L (2004) *Access to justice*. Oxford, New York: Oxford University Press.

16 Bezdek, Barbara (1991) Silence in the court: Participation and subordination of poor tenants' voices in legal process. *Hofstra Law Review* 20 (3): 533–608.

17 ibid.: 535.

18 ibid.: 541.

19 Carlen, Pat (1976) *Magistrates' justice*. London: Martin Robertson, page 128.

20 ibid.: 128.

21 ibid.

told us. 'I went on the internet to try to find a way, but there was not any clear way.'[22] Sometimes they made a separate trip to the court a few days or weeks before their hearing date to locate it and become familiar with it. Appellants also tended to allow a lot of time for travel on the day of the hearing itself, which often meant that they arrived early and were hanging around outside the court before it opened, or were in the waiting areas for hours before their hearing took place. One clerk in the UK was concerned about the effect that this waiting had on appellants' abilities to engage effectively in their hearings.

> Sometimes they're under quite intense questioning from the Home Office. Especially asylum cases, they're trying to trip them up, that's their job, to find the discrepancies. If you haven't eaten, or you've been waiting for three hours or you've been up since 5am because you've had to travel a long distance, you're going to, even if you're telling the truth, you're going to get mixed up somewhere along the line.[23]

Entering

In terms of the process of entering the courts, the courts we visited differed considerably. Most had plain and functional-looking entrances (the ones we visited in the UK especially so, see Figure 2.9 in Chapter 2, 'What are Asylum Appeals?'), but some were housed in old, regal buildings that made an imposing impression, as we discussed in Chapter 2 (see, for example, Figure 2.10). The Belgian court was different again: modern, metallic and mostly functional, but with 'a brightly coloured glass structure connecting the two sides of the building' which served to counteract its utilitarian feel.[24] Some foyers were busy (Jessica wrote that the Cour nationale du droit d'asile (CNDA) [National Court of Asylum] in France, for instance, was usually 'super crowded, noisy, many people, corridors full, lots of families, children crying and shouting'[25]) while many courts were far quieter, especially those serving smaller and more remote areas.

Most appellants seemed to prefer understated, modest court centres, which many felt were less criminalising than grand buildings.[26] 'That alone [going

22 Interview, appellant, UK, 2014, Andrew Burridge.
23 Interview, clerk, UK, 2014, Andrew Burridge.
24 Fieldnotes, Belgium, 2018, Dan Fisher.
25 Fieldnotes, France, 2018, Jessica Hambly.
26 Given the risks of criminalising asylum appellants, mixing asylum appeals with criminal cases was particularly counterproductive. The court complex at the CNDA was too small to accommodate all of the cases at one point during the time of our research and some cases were heard at the Palais de Justice, an old, majestic court complex in the centre of Paris. At this location there were 'criminal cases still happening there so people in handcuffs pass asylum appellants waiting,' one lawyer told us. This, she felt, was 'totally inappropriate' (fieldnotes, France, 2019, Jessica Hambly).

to court] makes people lose their case,' one appellant in the UK remarked, 'because they're thinking they have done a horrible crime and that's why they are going to court.'[27] One female appellant in the UK was particularly outspoken on this point: 'I would feel more comfortable in a different place, more informal than the court,' she told us,

> because I'm not a criminal, so why in the court? I'm just a person who is looking for a better life for my child. Those things should be discussed in a small place, no need for something big like the court. And I think it's also more expensive. And it's not necessary. I would feel more comfortable in a different place, and I would have more trust in the system then.[28]

Appellants nevertheless occasionally seemed surprised and nonplussed when their hearings were in modest locations. 'Where is the court for asylum? Is this it? What is this place?' one man, who was clearly not impressed by the surroundings, exclaimed with surprise to Jessica during one of her visits to the CNDA.[29]

The Italian system offered an interesting perspective on the formality of court architecture because hearings were held not in courtrooms but in judges' offices. Although lawyers that we interviewed suggested that it could make people more comfortable having their appeal hearing in a simple room with a desk and some files and that lacked an elevated dais for the judge, others were concerned that such a stage gave the impression that 'we are talking about things of little importance'.[30]

Despite all the differences in courts, there were some commonalities. The following is an extract from Jessica's research diary detailing her first impressions of the CNDA in early 2018 that serves to illustrate these:

> To get to the court from central Paris on foot you cross over the *peripherique*[31] and out into the suburb of Montreuil. Big, wide, open boulevards give way to lower-rise concrete blocks and smaller, narrower streets. Mostly residential area, no shops; few cafes. The court itself is in a block with other public and private organisations (e.g. some other government agencies, bank offices), like a gated community. Modern buildings – wouldn't know it was a court except for the signs. Front door for appellants and supporters is quite small. Other organisations enter from a separate main entrance with revolving doors. This is also where the agents of the court enter.

27 Interview, appellant, UK, 2015, Natalia Paszkiewicz.
28 Interview, appellant, UK, 2015, Natalia Paszkiewicz.
29 Fieldnotes, France, 2018, Jessica Hambly.
30 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.
31 Paris' large dual-carriage ring road.

> For appellants and supporters, the doors are marked by French and EU flags, and a pillar/sign with key information about the court in French and English. … Very quiet around the building. … You go through sliding doors, and there is a security check immediately on entry. Apart from through the sliding doors, you can't see anything else inside from the outside (windows are reflective/ blocked out on the ground floor).
>
> The court opens at 08:30am and hearings are listed for 9:00am. I arrived around 8:45am. There was a small queue outside (3–4 people). Only appellants and members of the public queue to go through security (situated just inside the sliding doors). Around 3–4 security guards at this entrance, and others stationed around the building. People who were known to them (probably lawyers, interpreters, other workers at the court) can bypass the queue and go straight in. No water allowed in (there are water fountains in the waiting rooms). Appellants report to the reception desk just on the right after the entrance and are told where to go for their hearing.[32]

Soon afterwards she records the uniform of the security guards ('Dark blue, combat style trousers and a fleece top (same for men and women) with big black boots'[33]). Later she notices a sign outside one of the hearing rooms 'with a picture of lady Justice and "the French Republic is an open-face society" (reminding people of the prohibition on head scarf/face coverings in public spaces)'.[34]

Jessica's account highlights numerous features of arriving at court that were fairly consistent across our ethnographic notes as well as the accounts given by our interviewees. First, arrival at court brings home the reality that appellants and any other unfamiliar visitors must enter into a logistical procedure which treats them as part of a flow, a throughput of the court itself. The queue, combined with the literal conveyor belt used to send possessions through scanners in some courts, has the effect of de-individualising and routinising the experience of arriving at court, and some courts had separate entrances and exits turning the court space itself into something akin to a factory or sorting house.

Second, the governance of appropriate behaviour within the court is obvious at the entrance. Signs establishing the prohibition of certain clothing and consumption herald the establishment of a list of rules that appellants must familiarise themselves with before they encounter the judge. By the time they reach the hearing rooms (see section on 'Hearing Rooms' below) this list will extend to 'no phones, no laptops, no talking, no photos, no wireless and no food' (this is the list from the CNDA but it is fairly typical for the courts we observed).

32 Fieldnotes, France, 2018, Jessica Hambly.
33 Fieldnotes, France, 2018, Jessica Hambly.
34 Fieldnotes, France, 2018, Jessica Hambly.

Third, the security procedures, while necessary, indicate that the space of the court is controlled and policed. 'Security will keep things like lighters, perfume and cutlery', Jessica noted. 'I have had to hand in my metal fork'.[35] 'I had to put my bag in a tray', Nicole noted upon first arrival at the court in Berlin,

> pull off my jacket and suit jacket, empty my pockets ('except for tissues'), remove my belt and wrist watch. I walked through a metal detector and collected my items. After the security check, I noticed a poster with several types of knives (images of knives and their names).[36]

It is obvious that the court must be a safe space and we heard about various serious security threats during our research. At the same time though, security staff can wield a high degree of influence in establishing the tone and atmosphere[37] of the hearing that is disproportionate to their legal significance. Some were friendly, encouraging and even playful with children going through the legal checks and scanners. Others were brusque and unfriendly though. 'You're just cattle,' a British clerk told us in describing the attitudes of security staff at his centre.[38] 'It's very bad, a very bad experience,' one African appellant explained. 'Straight away my past came into my mind, when I was detained in prison, I escaped and you feel like you are going in the same place … You feel like you're a criminal because … you see the guard and then you talk to the judge, and they don't believe what you are saying.'[39] Concerningly, this appellant makes a direct connection here between their negative experience of the security staff and relationship of trust with the judge.

These emotions, brought on by past negative experiences, highlight the importance of considering the court infrastructure beyond just the hearing room itself. Although court security is often outsourced to security firms, our findings demonstrate the need to consider the effects that security guards and signs have on appellants.

35 Fieldnotes, France, 2018, Jessica Hambly.

36 Fieldnotes, Germany, 2018, Nicole Hoellerer.

37 For a discussion of atmospheres in court see Bens, Jonas (2018) The courtroom as an affective arrangement: Analysing atmospheres in courtroom ethnography. *The Journal of Legal Pluralism and Unofficial Law* 50 (3): 336–355. For a fuller discussion of our observations of court atmospheres, see Gill, Nick, Jennifer Allsopp, Andrew Burridge, Daniel Fisher, Melanie Griffiths, Natalia Paszkiewicz and Rebecca Rotter (2021) The tribunal atmosphere: On qualitative barriers to access to justice. *Geoforum* 119: 61–71.

38 Interview, clerk, UK, 2014, Andrew Burridge.

39 Interview, appellant, UK, 2015, Natalia Paszkiewicz

Waiting Areas

Having passed through security, appellants generally enter a waiting area, either for the centre as a whole or outside the specific hearing room they have been assigned. In some of the bigger courts there are interpreters' rooms, lawyers' rooms (there are also rapporteurs' offices in the French CNDA) as well as facilities such as a prayer room. In smaller or more compact courts, though, these may not exist.

The various parties in hearings often had to share the public waiting areas. Given their very different and sometimes opposing roles in the hearings, communication was often stilted and interaction awkward as each party tried to work out what role the others in the waiting area might be preparing to play. In the UK and Germany we noticed that government representatives usually displayed a particularly marked aversion to interacting with appellants.

> HOPOs [Home Office Presenting Officers] never hang around the waiting room. Legal representatives for the appellant don't often (preferring either to stand and chat in reception or to consult their clients in the legal consultation rooms) but they will sometimes. HOPOs *never* will.[40]

In the UK, even legal representatives for the appellants sometimes adopted a formal, stuffy air towards appellants (i.e. their clients).

> Lawyers – whether barristers or solicitors – tend to be polite, but rarely overtly friendly or familiar with their clients. Few communicate with their clients once they have taken instructions – even though they may be sitting together in the waiting room – and some actually choose to sit in a separate waiting room from their client, which spatially marks the emotional distance between them.[41]

For their part, judges in the UK and Germany did not wait with the public and in many of the courts, judges' areas were almost entirely separate from the public areas. In these courts, judges often entered both the centres and the hearing rooms themselves via separate doorways.

In France, by contrast, we noticed that there was generally more mixing of legal professionals, appellants and the public in the waiting areas. Jessica, who had conducted research in the UK's asylum appeal hearing centres before working on the ASYFAIR project,[42] noted

40 Fieldnotes, UK, 2013, Melanie Griffiths.

41 Fieldnotes, UK, 2014, Rebecca Rotter.

42 See for instance Hambly, Jessica (2019) 'Interactions and identities in UK asylum appeals: Lawyers and law in a quasi-legal setting.' In Gill, Nick, and Anthony Good (eds) *Asylum determination in Europe: Ethnographic perspectives.* Cham: Palgrave Macmillan, 195–218.

> how France's waiting room contrasts with the tribunals I have been to in the UK. Here, everyone shares the same coffee and snack machines, the same bathrooms, the same stairways and corridors. This means there are often judges, lawyers, secretaries, interpreters, etc. all chatting together in the space with the appellants. Two judges come out of the hearing room corridor and have a very friendly chat before saying goodbye. The secretaries often sit and chat together on the waiting room chairs as the day draws to a close and they have less organising to do. Many of the court staff and judges know the lawyers, so there is always catching up and friendly conversations between them.[43]

Our fieldnotes also convey the contrasts in atmosphere within the same waiting room on different days and even at different times on the same day depending upon their busyness, the number and mood of children present, and the comportment of the ushers and security staff. The CNDA waiting room could be frenetic, for example, but also listless, quiet and dull. 'The people in the waiting room look exasperated', Jessica recorded on one day in the CNDA,

> especially one of the women – she keeps doing long exhalations and seems bored and frustrated. Earlier people were chatting to each other, but now all are silent. Most have their arms folded. Some are yawning, pinching their noses, rubbing their eyes.[44]

Perhaps the most important challenge for appellants during this waiting period was to maintain a calm state of mind. Sometimes the difficulty of waiting was visible in the body language of appellants. We noted several appellants at the CNDA sitting with arms crossed and bodies folded over their knees, their heads down so that their faces cannot be seen, like the brace position in an aircraft.

Ushers

A familiar presence in the waiting areas in the UK and France[45] were ushers (sometimes also called clerks). Ushers' jobs are to ensure the smooth running of the schedule of cases, which includes making sure everyone who is expected and required for a hearing is ready to commence at the start time. They can also help to set the schedule of the day and relay information between the judges and the rest of the court. Even in courts where most actors involved in hearings tended to keep to particular areas (the judge to their chambers, for

43 Fieldnotes, France, 2018, Jessica Hambly.
44 Fieldnotes, France, 2018, Jessica Hambly.
45 There are no ushers in Germany and Austria.

example, and appellants to the waiting areas) ushers could generally go where they pleased.

Ushers can have a high degree of influence over how cases are organised and repeat attendees at asylum hearings were acutely aware of this. 'One of the first things you learn at law school, one of the tricks of the trade, is to get the ushers on side,' one British lawyer explained:

> there are fifty cases and you want to go first, and when you're a fresh, young barrister and no one knows who you are and lots of them are posh guys and they're kind of a bit cocky, the ushers just put them right to the bottom of the list and they sit there until 5.30–6.00pm waiting for their case to come on. Whereas the solicitors that they've known for thirty years, they get all their stuff done really quickly … The key is: get the ushers on side.[46]

Although appellants were generally less conscious of the influence that ushers could have, ushers occasionally used their influence in ways that were helpful to appellants. Some ushers come into hearings part-way through with late evidence, for instance, even though the deadline for submission had passed. Ushers were also sometimes able to help to organise a new date for adjourned hearings there and then, saving appellants from having to wait for a new date to be decided and communicated to them by post.

Before Going into the Hearing

Arriving appellants must find the appropriate hearing room. Usually there are signs in a range of languages, although not in every language spoken by appellants, and it is often still entirely possible to get lost. 'It took us half an hour to find the courtroom,' one lawyer recalled in Italy. 'If you ask me, the ability to orientate oneself in these places in my opinion is really hard … you don't need to be a foreigner to not understand, because also for us it is very complex.'[47]

We had similar experiences. On one day in Berlin, early in her ethnography, Nicole decided to observe a case on the first floor of the building:

> I looked for the staircase to get to the first floor but could only see a sign for the elevators. It struck me that this spatial arrangement is confusing – one has to go through a double glass door that has EXIT (*Ausgang*) written on it in capital letters to get to the elevators. I could not see a sign for the staircase and got annoyed.[48]

46 Interview, legal representative, UK, 2014, Andrew Burridge.
47 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.
48 Fieldnotes, Germany, 2018, Nicole Hoellerer.

Once in the appropriate waiting area, appellants can spend several hours waiting for their cases to begin and may meet their legal representative. In England and Wales they often meet their barristers for the first time in the waiting areas. Although they may have worked with a solicitor to prepare their case, barristers present the case in court. Many appellants are surprised that someone they have not met will be presenting their case and that they are expected to trust them immediately with intimate details of their narratives. 'The lawyer I was expecting didn't come,' one appellant explained, 'so they sent somebody else who didn't know my case very much. I wasn't too confident about her.'[49]

When appellants waited for more than a few hours at court they also often had to find food and drink, the availability of which varied. Some courts had cafeterias, others were close to a range of local shops, but although free drinking water was available at many of the courts we visited (Germany was the exception here[50]), at many it was not clear where the nearest shops or cafés were. Even if appellants were waiting all day, they were often unsure whether they were about to be called into their hearings and therefore were reluctant to go outside the centre even for a few minutes in case they missed the start. Some appellants attended their hearings hungry and thirsty as a result. 'We were just looking around and there was nothing,' one appellant in the UK recalled, 'we tried to find somewhere to buy water and couldn't get it.'[51]

Hearing Rooms

Hearing rooms generally had chairs, tables and a clock, with the judge(s) in a prominent position and the other participants arranged around them. Rooms varied in size though. Some of the biggest were clearly designed to hold many more members of the public and felt spacey and occasionally empty when only the appellant and a few others were in attendance, while the smallest hearing rooms felt rather pokey. Indeed, space was often at a premium in the courts we visited. In certain British courts it was common to see appellants and barristers having huddled pre-hearing meetings in the public areas because of the shortage of consultation rooms, and at the CNDA several courtrooms were divided into two during the period of our research by thin internal walls so that the throughput of cases could be increased.[52] In Berlin we were told that judges were having to share offices. 'We have a lot of problems with space in

49 Interview, appellant, UK, 2015, Natalia Paszkiewicz.

50 Nicole noted that there are no drinks (including water) made available in most German courtrooms. By contrast, there were water jugs and plastic cups on each table in each Austrian courtroom she visited, and judges often made an effort to explain to appellants that they can drink as much water as they want and advised that more water can be provided.

51 Interview, appellant and accompanier, UK, 2015, Abigail Grace.

52 Fieldnotes, France, 2018, Jessica Hambly.

this building,' one of the judges explained, 'the building is bursting out of its seams.'[53]

Many hearing rooms bore some form of symbolism to mark the space as a court, such as a coat of arms (in every tribunal in the UK[54]), or some justice-themed artwork. The chairs also told a story, often reflecting the power and status of the participants in their placement and design. In the CNDA, for example, the chairs evinced a distinct hierarchy: in the public gallery they were fixed and metal, like in an airport or train station; the appellant, lawyer and interpreter each had their own separate metal chair and then the people on the platform, including the judges, had 'posher, twizzly chairs'[55] whilst the President had the biggest chair with the highest back (also see Figure 2.6 in Chapter 2, 'What are Asylum Appeals?'). In Berlin the tables and chairs were typically moveable, which could be useful. Judges would often rearrange the room to suit the number of attendees, creating 'benches' of two or more chairs for children, for example, and pushing tables together to overcome the usual distance between them. This simple act of adjusting the physical environment could be a powerful leveller at the beginning of a hearing, especially when the judge accepted help from others to do the lifting. When it was particularly hot, the opening of windows and doors, even if temporarily, owing to the noise they let in, often provided a practical talking point that also helped to diffuse tension.

The mood of hearings could range from 'respectful', 'chilled', 'friendly' and 'open' to 'threatening and claustrophobic', 'tragic', 'uncomfortable' and 'really, really nasty',[56] depending on the approach of the judge, the other parties and the content of the case (we describe examples of these in the chapters that follow). The atmosphere at the start of hearings, however, was embryonic and it was usually difficult to predict how it would evolve, although tension and awkwardness were common at this stage.

Under these conditions, before the formal part of the hearing got underway, humour could be especially influential in exacerbating or easing the uncomfortableness of appellants.[57] Humour could make people feel excluded if inside jokes were shared, or raise the level of tension in the room.[58] In one case, two

53 Fieldnotes, Germany, 2018, Nicole Hoellerer.

54 UK Courts and Tribunals Judiciary: Traditions of the courts. Available at: https://www.judiciary.uk/about-the-judiciary/the-justice-system/court-traditions/ [accessed 02 August 2022].

55 Fieldnotes, France, 2018, Jessica Hambly.

56 Various fieldnote entries.

57 Roach Anleu and Davis explore the 'multi-layered connections that unite the seriousness of the work of the judiciary on the one hand with the light-heartedness of humour on the other' (Roach Anleu, Sharyn and Jessica Milner Davis (2018) 'Thinking about judges, judging and humour: The intersection of opposites.' In Davis, Jessica M. and Sharyn Roach Anleu (eds) *Judges, judging and humour*. Cham: Palgrave Macmillan, 1–38, page 2).

58 Roach Anleu and Davis emphasise the diverse functions and effects of humour. 'As a tool of human communication and social interaction humour can be used in the court environment,

highly experienced male French lawyers were complaining to a female judge about something that they found objectionable in relation to the scheduling of their client's case. Jessica could not hear all of the details because they had stood up from their seats and were 'leaning forward onto the bench in quite aggressive stances'. The judge, however, who was 'trying to remain as calm as possible', kept saying 'what do you expect me to do?' One of the lawyers

> mocks the judge – doing impressions of her voice (she doesn't have a particularly high voice, but he puts on a squeaky, feeble voice to imitate her). The judge does not respond to his mocking sarcasm.[59]

On the other hand, humour could also help to relieve tension and reassure appellants. When one appellant with a baby who was gurgling loudly entered a hearing room, for example, the judge joked that 'he will have a lot to say during the hearing', putting the appellant at ease.[60] Legal representatives can also use humour to establish a relaxed, even jovial, tone. When one judge in Augsburg asked a legal representative if their client spoke German they replied 'no, and neither do I, only Swabian [a local German dialect from Schwaben in Bavaria]' which made the judge laugh whole-heartedly and established the atmosphere of the hearing as 'friendly and warm' at the outset.[61]

There was no avoiding the fact that appellants often seemed uncomfortable and out of place in the court, however. Often, for example, formal legal terminology was employed by the professionals involved, with which appellants were unfamiliar, such as legal representatives referring to each other in the UK as 'my learned friend'. At other times, cultural differences in the norms of interaction and communication could put appellants on edge. 'In my culture to speak with someone you have to avoid eye contact, otherwise you are rude,' one appellant told us, who felt that by looking away from the judge they had undermined their perceived credibility.[62] Appellants were often more casually dressed than the professionals involved, too. Although appellants' dress varied, it was common to see them wearing trainers, hoodies and tracksuits, while judges were usually very smartly dressed (or wearing gowns, as in Germany and Austria). Legal representatives usually wore formal gowns in France and

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positively and negatively, in kindly or aggressive fashion … Its functions can be to persuade, to control or attack, to defend (oneself or others), to consolidate a sense of group identity (the in-group), to exclude (the out-group), to reduce tension and enhance cheerfulness (positive affect), and to relieve boredom and escape the rules' (Roach Anleu and Davis, 2018: 25).

59 Fieldnotes, France, 2018, Jessica Hambly.

60 Sometimes judicial humour is not intended. Part-way through one hearing in the CNDA the interaction was interrupted by a hiss – 'the President seems to have accidentally lowered his seat. He slowly disappears further behind his computer before pumping himself back up again' (fieldnotes, France, 2018, Jessica Hambly).

61 Fieldnotes, Germany, 2018, Nicole Hoellerer.

62 Interview, appellant, UK,2015, Natalia Paszkiewicz.

Germany and tended to be extremely smartly dressed in the UK. Although interpreters' dress varied, they would often arrive at hearings in smart casual attire.

Appellants were also the most unfamiliar with the rules of etiquette of the court. Although some of the rules, such as the ones listed earlier in this chapter, were displayed on posters on the walls within the hearing rooms, not all of them were, such as standing when the judge enters and leaves and addressing the judge appropriately (e.g. with 'Sir' or 'Ma'am' in the UK). Appellants' unfamiliarity with behavioural norms often weighed heavily on their minds at the outset, and getting these wrong could make them self-conscious.

Although some judges were not particularly insistent on the rules of etiquette being followed, others would be stricter and correct appellants who made mistakes, firmly establishing the power relationship between them in the process. We saw numerous judges manage the way appellants were dressed, even though there was no dress code displayed. 'Please take your hat off,' one judge in Germany asked an appellant in what Nicole recorded as a 'headmaster's tone'; 'this is just common courtesy in Germany, and you are at court after all.'[63] 'Right you – take your hat off, that's how we do it here in Germany. It's disrespectful,' another judge demanded.[64]

For the first hearing of the day, following a break, or when judges changed rooms, judges typically entered the hearing room last, which produced a period of time during which the other participants were gathered together but the hearing had not begun. Sometimes these times were silent and sometimes casual conversation occurred, which could exclude the appellant. Admittedly, in some courts everyone would know each other and it would have been strange and impolite to not chat before the hearing. The appellants' legal representative may also see some initial small talk with the opposing representative as important groundwork to create rapport with the adversary, which may later be helpful for reaching a settlement, or keeping the conversation constructive during the hearing.[65] When conducted in view of the appellant, however, small talk can have the effect of not only excluding them but also raising their suspicions. One appellant told us that she lost confidence in her barrister when she saw her chatting with the legal representative for the government. 'The barrister didn't defend me,' she told us.

> I don't know what her role was that day. I was thinking 'Oh, maybe they are together with the Home Office'. Because even before the court

63 Fieldnotes, Germany, 2018, Nicole Hoellerer.

64 Fieldnotes, Germany, 2018, Nicole Hoellerer.

65 In these cases the legal representative should manage the expectations of the appellant during these periods.

> hearing, I saw them chatting, having a laugh and I think if she's defending me why are they being so friendly.[66]

Appellants also often meet court interpreters for the first time during this period. While this can be helpful to give interpreters and appellants a chance to get used to talking with each other, and in numerous cases we also saw interpreters explain what was happening to appellants and what they could expect, appellants may distrust interpreters for a variety of reasons. If they appear to be from an ethnic background that has tense relations with their own, for example, this can undermine their abilities to have confidence in the interpretation, and appellants may suspect that interpreters could be associated with malevolent forces in their origin countries.[67] Difficulties of trusting interpreters can be especially acute in the case of women disclosing gender-related violence in the presence of men and in cases based on sexual orientation and gender identity (SOGI). 'My interpreter is a man and they ask me about the rape,' one African appellant told Natalia. 'How can they ask him, how can I explain what happened to me when you are with a man? Seriously. So, it was a refusal.'[68]

For some specialised languages, social networks may be very small, meaning that the appellant may fear that the things they discuss via interpreters in their hearings could be relayed to people that they know. 'I have a feeling that sometimes the appellant and the interpreter know each other,' one judge in Augsburg confirmed:

> interpreters work for other institutions – the police, border control … the youth welfare office … – it's sometimes likely that they know about the case already, and that they have met the appellant before in one way or another. What can we do? We only have a small selection of interpreters here [in Augsburg and Bavaria].[69]

During the hearings, there were various instances in which appellants appeared reluctant to trust their interpreters, perhaps owing to these sorts of considerations. 'Will what I say be passed on to someone, because I'm really scared,' one appellant in Düsseldorf asked (to which their lawyer responded 'of course not', but the judge made no response). The unfamiliar surroundings, combined with the gravity of the event, could mean that some appellants clammed up and found it difficult to speak during their hearings. Appellants would

66 Interview, appellant, UK, 2015, Natalia Paszkiewicz.

67 One lawyer in Germany referred to instances in which this had apparently turned out to be the case among interpreters used in the initial stage of the government decision-making (fieldnotes, Germany, 2019, Nicole Hoellerer).

68 Interview, appellant, UK, 2015, Natalia Paszkiewicz.

69 Fieldwork updates, Germany, 2018, Nicole Hoellerer.

sometimes confine their responses to single words, or whisper so quietly that we could hardly hear their replies.

Conclusion

In this chapter we have shown how contingent appellants' trust in the legal system can be on situational and contextual factors. We have shown that, for example, logistical workers in the court space, such as ushers and security staff, can influence appellants' perceptions of justice even though their actual role in the legal process is extremely limited.[70] We have pointed to the roles of architecture, humour and atmosphere in shaping appellants' trust.

Building trust in legal processes can be aided by staging hearings in an appropriate way and making sure that appellants are not alienated upon entry. Admittedly, sometimes appellants are likely to have needs or preferences for hearings that cannot be accommodated and outstretch what can realistically be provided. Nevertheless, our findings imply that serious consideration needs to be given to the setting and the content of interactions in the waiting and entrance areas of courts, because these can set the tone for the rest of the hearing long before the appellant meets the judge. We provide some suggestions in relation to this in the first of our policy and practice compendia at the end of this part.

A key insight from the literature discussed at the start of this chapter is that there must not only be formal means of achieving access to justice on paper, but that there must also be practical, real-life ways for people to access rights of redress. Often the solution to challenges of engagement with legal processes is not 'more laws' or thicker and denser regulations, or even the provision of more legally qualified advisors and representatives, but innovative, socially and culturally informed, ground-level responses that act upon the ways people understand law and imagine themselves in relation to it.[71] There must be a focus not only on legal provision, but the experience, interests and worldviews of people that the law is meant to serve.

70 Scholars studying logistics have therefore emphasised the hidden power that logistical operatives command. See, for example, Neilson, Brett (2012) Five theses on understanding logistics as power. *Distinktion: Scandinavian Journal of Social Theory* 13 (3): 322–339.

71 Sandefur, 2008. Genn, Hazel (1999) *Paths to justice: What people do and think about going to law*. Oxford: Hart Publishing.

6 Assembling Appeals

Material Perspectives on Gathering Evidence and People

Introduction

The challenges of entering the hearing described in the previous chapter illustrate some of the factors that can make it more difficult for people seeking asylum to trust the appeals system. Appellants' arrivals at hearings, however, are only one of a range of different forms of gathering and assembling that need to take place to allow hearings to happen. Inspired by the materialist turn in legal studies,[1] in this chapter we broaden our attention to highlight the difficulties of amassing the required material and participants at hearings.

We give particular attention to the assembling of evidence and people. We show that documentary evidence-gathering, a relatively neglected area in comparison to academic studies of expert evidence for asylum appeals, requires work which falls unequally upon the various actors involved. We then use the frequent phenomenon of no-shows (i.e. absences) of the parties to illustrate how difficult it can be for participants to assemble at the required or expected place and time. This leads us into a discussion of the pros and cons of in-person asylum hearings, and we conclude by assessing the usefulness of the lenses of assembly and materiality to understanding asylum appeals.

Introducing Evidence

People seeking asylum have a legal duty to substantiate their claim by providing statements such as witness testimony and documentary evidence in support

1 Social scientists, including geographers, have developed a keen interest in processes of assembling. See, for example, DeLanda, Manuel (2016) *Assemblage theory.* Edinburgh: Edinburgh University Press; Anderson, Ben and Colin McFarlane (2011) Assemblage and geography. *Area* 43 (2): 124–127. For perspectives in legal studies see, for example, Kang, Hyo Yoon and Sara Kendall (2019) 'Legal materiality.' In Stern, Simon, Maksymilian Del Mar and Bernadette Meyler (eds) *The Oxford handbook of law and humanities.* Oxford: Oxford University Press, 21–38; Graham, Nicole, Margaret Davies, and Lee Godden (2017) Broadening law's context: Materiality in socio-legal research. *Griffith Law Review* 26 (4): 480–510; Latour, Bruno (2010) *The making of law: An ethnography of the Conseil d'Etat.* Cambridge: Polity.

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of their application. The European Union's recast Qualification Directive[2] lists a variety of types of evidence that are required for the substantiation of an asylum application, including all the documentation the applicant can collect regarding their age, background (including that of relevant relatives), identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents, and the reasons for applying for international protection.[3] Regarding the *burden* of proof, European countries expect asylum seekers to be able to substantiate their claims for asylum and will not treat them as genuine without substantiation. The *standard of proof*, however, is relatively low: asylum seekers must show that there is a *reasonable degree of likelihood* of being persecuted or coming to harm if they are returned to their country of origin. This is a lower standard than that which is applied to much of criminal law, such as the *beyond reasonable doubt* standard.[4]

People seeking asylum may also sometimes be excused the duty to provide documentary evidence,[5] under certain conditions. In these circumstances, European law makes provision for the possibility of accepting statements from the applicant. These provisions include that their statements are coherent and plausible, that they do not run counter to available information, that the applicant has applied for international protection at the earliest possible time (unless they can show that they had a good reason for not doing so), and that the general credibility of the applicant has been established.[6] Applicants are also sometimes assisted by the governmental or legal authorities in the country in which they are claiming asylum to obtain evidence.[7]

2 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) – QDII. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095 [accessed 24 April 2024]. Also see Chapter 2 ('What are Asylum Appeals?').

3 QDII Article 4(2).

4 Craig, Sarah and Karin Zwaan (2019) 'Legal overview'. In Gill, Nick and Anthony Good (eds) *Asylum determination in Europe: Ethnographic perspectives*. Cham: Palgrave Macmillan, 27–49, page 38.

5 QDII Article 4(5).

6 QDII Article 4(5). Also see Berlit, Uwe, Harald Doerig and Hugo Storey (2015) Credibility assessment in claims based on persecution for reasons of religious conversion and homosexuality: A practitioners approach. *International Journal of Refugee* Law 27 (4): 649–666. UNHCR (1995) *Interviewing applicants for refugee status* (RLD4). Available at: https://www.refworld.org/docid/3ccea3304.html [accessed 07 October 2021].

7 This is because a state 'may be better placed than an applicant to gain access to certain types of documents' (Berlit, Doerig and Storey, 2015: 651). See QDII Article 4 (1), and UNHCR (2014) *Submission by the Office of the United Nations High Commissioner for Refugees in the case of F.G. v. Sweden* (Application No. 43611/11). Available at: https://www.refworld.org/docid/543e3b9b4.html [accessed 16 September 2022], page 5. We have observed hearings in Germany, for example, in which both BAMF (Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees)) and courts obtained information on asylum seekers, such

Nevertheless, whilst in principle people seeking asylum may be excused the requirement to provide evidence, it was widely recognised among our interviewees and at our research sites that documentary evidence helps to support asylum claims and that, in some cases, asylum claims could fail due to the absence of evidence. Appellants often felt that sources of documentary evidence would support their appeal case despite the formal provisions of the law that waived the requirement for such evidence under certain circumstances. Appellants and their lawyers were therefore invariably engaged in efforts to gather evidence.

Much academic attention has been given to expert evidence.[8] Sometimes, for example, courts will turn to area specialists such as anthropologists with a detailed knowledge of the culture and geography of a region, to shed light on asylum claims. There are challenges of doing so, however. Anthropologists and lawyers think in different ways – lawyers often seek objectivity and certainty whilst anthropologists instinctively represent complexity and point out ambivalence. This can mean that the role of anthropological evidence is limited to helping judges avoid communicative misunderstandings in the conduct of cases, rather than directly impacting on legal decision-making.[9]

Courts will also sometimes consider country-of-origin information (COI) produced by organisations that claim to possess special knowledge or expertise with respect to a certain country, region, issue or conflict. A wide range of organisations produce COI, from individual countries' governments to regional and international humanitarian non-governmental organisations and international intergovernmental organisations such as the United Nations (UN). Although we do not have space for a full treatment of the issues surrounding COI here, the circumstances and degree to which it can be relied upon, the political-economic forces that influence its production, the nature of its claims to knowledge and authority, and the consistency with which it is

as information on UNHCR registration in Palestinian refugee camps in e.g. Lebanon or Syria (to prove that asylum seekers are stateless Palestinians), as asylum applicants were unable to obtain this information on their own (fieldnotes, Germany, 2018, Nicole Hoellerer).

8 See for example Good, Anthony (2007) *Anthropology and expertise in the asylum courts.* London: Routledge-Cavendish.; Good, Anthony (2004) 'Undoubtedly an expert'? Anthropologists in British asylum courts. *Journal of the Royal Anthropological Institute* 10 (1): 113–133; Good, Anthony (2004) Expert evidence in asylum and human rights appeals: An expert's view. *International Journal of Refugee Law* 16 (3): 358–380; Lawrence, Benjamin N and Galya B Ruffer (eds) (2015) *Adjudicating refugee and asylum status: The role of witness, expertise, and testimony.* Cambridge: Cambridge University Press; Campbell, John R (2020) The role of lawyers, judges, country experts and officials in British asylum and immigration law. *International Journal of Law in Context* 16 (1): 1–16. Campbell, John (2013) Language analysis in the United Kingdom's refugee status determination system: Seeing through policy claims about 'expert knowledge' *Ethnic and Racial Studies* 36 (4): 670–690.

9 Holden, Livia (2019) Cultural expertise and socio-legal studies: Introduction. *Cultural Expertise and Socio-Legal Studies: Special Issue Studies in Law, Politics, and Society* 78 (1): 1–9, page 2.

employed by judges and courts have been topics of sustained academic scrutiny and debate.[10]

Medical evidence is also frequently crucial in asylum claims, especially those that allege that torture has occurred. Countries can have highly formalised prescriptions for what should be seen as admissible medical evidence. The German Residence Act,[11] for example, sets out the following expectations of medical certificates, usually written by a medical professional, that are used to prevent deportations:

> As a rule, this medical certificate is to document in particular the factual circumstances on which the professional assessment was based, the method of establishing the facts,[12] the specialist medical assessment of the illness (diagnosis), the severity of the illness, its Latin name or classification according to ICD 10[13] and the medical assessment of the probable consequences of the situation resulting from the illness. Medications

10 Ardalan, Sabrineh (2013) Country condition evidence, human rights experts, and asylum-seekers: Educating U.S. adjudicators on country conditions in asylum cases (August 24, 2013). *Immigration Briefings* 13–09. Feneberg, Valentin, Nick Gill, Nicole IJ Hoellerer and Laura Scheinert (2022) 'It's not what you know, it's how you use it': The application of country of origin information in judicial refugee status determination decisions – A case study of Germany. *International Journal of Refugee Law* 34 (2): 241–267. Foblets, Marie-Claire (2016) Prefatory Comments: Anthropological expertise and legal practice: About false dichotomies, the difficulties of handling objectivity and unique opportunities for the future of a discipline. *International Journal of Law in Context* 12 (3): 231–234, page 232. Rosset, Damian and Tone Maia Liodden (2015) The Eritrea report: Symbolic uses of expert information in asylum politics. *Oxford Monitor of Forced Migration* 5 (1): 26–32. Vogelaar, Femke (2017) The Eligibility Guidelines examined: The use of country of origin information by UNHCR. *International Journal of Refugee Law* 29 (4): 617–640. Vogelaar, Femke (2019) A legal analysis of a crucial element in country guidance determinations: Country of origin information. *International Journal of Refugee Law* 31 (4): 492–515. Vogelaar, Femke (2021) The presumption of safety tested: The use of country of origin information in the national designation of safe countries of origin. *Refugee Survey Quarterly* 40 (1): 106–137.

11 *Aufenthaltsgesetz* (AufenthG) Section 60a (2c). Also see Gibb, Robert and Anthony Good (2013) Do the facts speak for themselves? Country of origin information in French and British refugee status determination procedures. *International Journal of Refugee Law* 25 (2): 291–322.

12 i.e. how was the diagnoses reached, e.g. was an interpreter present, which (specialised medical) methods were used, outline of the psychiatric and psychological testing methods (from https://www.frnrw.de/fileadmin/frnrw/media/downloads/Themen_a-Z/Asylverfahren/Leitfaden_AErztliche_Atteste_im_Migrationsrecht_-_Stand_01-2020.pdf [accessed 12 May 2021].

13 International Statistical Classification of Diseases and Related Health Problems (ICD), which according to the WHO 'defines the universe of diseases, disorders, injuries and other related health conditions, listed in a comprehensive, hierarchical fashion'. From https://www.who.int/standards/classifications/classification-of-diseases [accessed 12 August 2021].

needed to treat the illness must be listed along with their active ingredients under the names used in international practice.[14]

Earlier German legislation,[15] that was still in force at the time of our research, additionally stipulated that medical reports should include information about when and how often the patient had been under medical treatment, previous courses of treatment (both of medication and therapy) and whether the symptoms the patient described were confirmed by the diagnosis.[16] If the patient claims to have post-traumatic stress disorder (PTSD) as a result of experiences in their country of origin, but the symptoms are presented a long time after leaving the home country, an explanation of why the illness has not been presented earlier also needs to be provided.

Submitted medical evidence was often found to fall short of these requirements in German courts, and disagreements about whether medical certificates met the requirements were common. ‘This medical certificate is not very good,’ one judge in Berlin said with a dismissive hand gesture, ‘and it is most certainly not sufficient to meet the legal requirements.’[17] ‘The medical certificate you submitted is below par,’ another judge in Munich explained. ‘It mentions PTSD … but not what triggered it. It also does not say how to treat it, or what treatment would be suggested. This is simply not enough,’ it is ‘horrible and un-usable.’[18]

Furthermore, medical assessments are not above scepticism or rejection by court actors. In his study of expertise in asylum courts, Anthony Good recounts instances in which both legal representatives for the appellant and judges considered that evidence provided by doctors had been overly shaped by what appellants had told them.[19] ‘Adjudicators have even gone so far as to decide that doctors have been hoodwinked,’ Good writes,[20] in spite of the fact that ‘taking patients’ histories is normal medical practice prior to diagnosis’[21] and that doctors are ‘at least as experienced as judges in assessing such

14 The inclusion of the Latin name, as well as the active ingredients of medication and their uses in medical practice, came into force in August 2019, when the new ‘Regulated Return Law’ [authors’ own translation of *Geordnete-Rückkehr-Gesetzes*] came into force, which further expanded the requirements on medical certificates.

15 German Federal Administrative Court judgment from 11 September 2007 – Az. 10 C 8.07. Available (in German) at: https://www.bverwg.de/110907U10C8.07.0 [accessed 16 September 2022].

16 Even if these criteria were fulfilled, deportation might still go ahead if it was deemed possible to treat the health concerns in the country to which the deportation was being carried out (Section 60 subs. 7 of the Residence Act). Sufficient medical care in the destination country was taken to exist even if it was only available in parts of the country.

17 Fieldnotes, Germany, 2018, Nicole Hoellerer.

18 Fieldnotes, Germany, 2018, Nicole Hoellerer.

19 Good, 2007: 203–208.

20 Ibid.: 204.

21 ibid.

information'.[22] Doctors have also been challenged for allegedly over-stepping the boundaries of their professional competence when, for instance, they have offered their opinion that a certain set of events likely gave rise to the physical symptoms displayed by their patient.[23]

The Istanbul Protocol[24] outlines international legal standards and sets out specific guidelines on how to conduct effective legal and medical investigations into allegations of torture and ill-treatment, including guidelines and considerations relevant to conducting interviews with patients as well as assessing both the physical and psychological evidence of torture. Using and making reference to standards like these can help to improve the currency and legal standing of doctors' evidence. This said, some academics have expressed concern that the increasing standardisation of medical authority in refugee-status determination progressively erases the voices of asylum seekers as political subjects, causing a substitution away from their own narratives.[25]

In contrast to the academic attention given to expert anthropological evidence, COI and evidence from medical professionals, the broader range of documentary evidence that can support an asylum claim has been less well scrutinised, even though it featured much more frequently in the cases we observed. Documentary evidence can include state papers and official documents such as passports, travel papers, baptism and marriage certificates, as well as receipts, newspaper clippings, photographs, payslips and employment contracts. It is very common for appellants or their lawyers to include documentary evidence in their written submissions, including somewhat unofficial but still relevant documents, such as written death threats or letters by community or tribal leaders in the country of origin. Indeed, in some instances, judges were surprised and frustrated when little evidence was provided. 'In 15 years as a judge, having tried numerous conversion hearings, I never had so little information on conversion,' one judge remarked crossly in Düsseldorf.[26] 'You brought some documents from Afghanistan, but not your *Tazkira*,' another judge challenged in Berlin. 'Why?'[27]

22 ibid.

23 ibid.

24 UNHCR (1999) *Istanbul Protocol: Manual on effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment*. Geneva: United Nations Publications. Available at: https://phr.org/issues/istanbul-protocol/ [accessed 16 July 2022].

25 Fassin, Didier and Estelle d'Halluin (2005) The truth from the body: Medical certificates as ultimate evidence for asylum seekers. *American Anthropologist* 107 (4): 597–608.

26 Fieldnotes, Germany, 2019, Nicole Hoellerer.

27 Fieldnotes, Germany, 2018, Nicole Hoellerer. Judges dealing with appellants from Afghanistan often asked about the *Tazkira*, an identity document that is widely issued and used in the country.

What forms these various types of documentation should take, however, would be hard to exhaustively specify, and are not well-defined in EU law.[28] A very broad range of phenomena can constitute evidence and, in addition to European rules, individual states and jurisdictions have their own rules governing such evidence. The UNHCR recognises that evidence can include 'anything that asserts, confirms, supports, refutes or otherwise bears on the relevant facts in issue'.[29] The European Union Agency for Asylum (EUAA, formerly EASO) concurs, asserting that 'evidence' is 'a broad term' that can comprise 'any material (including the applicant's statements, documentation or other exhibits), which supports, verifies, or refutes a relevant fact'.[30] Judicial bodies can take into account e-evidence and sources from social media where applicable, for example.[31] Indeed, during our research we observed several instances in which appellants presented video evidence from Facebook or YouTube to demonstrate what was happening in their country of origin, or judges apparently accepted social media posts in religious conversion cases as evidence that the appellant's faith had been publicly displayed and had, or might, come to the attention of potential persecutors in the country of origin. We also saw judges utilising Google Maps and other applications on computers in the courtroom to instantly obtain information on countries of origin in order to test appellants' credibility.

Tensions arose with respect to documentary evidence when judges were obliged to question and scrutinise it, especially when appellants might have found it difficult or even dangerous to collect. An important barrier to gathering documentary evidence relates to the danger of potentially attracting the attention of persecuting governments and/or hostile forces to cases while collecting it. Making enquiries with the wrong offices can raise suspicions, and sending letters or parcels via post exposes them to the risk of being intercepted and checked by authorities.

Judges and government authorities, however, have to refuse to admit evidence if it does not meet the applicable standards or if it is irrelevant to the claim. The European Court of Justice (CJEU) and the European Court of

28 European Union Asylum Agency [EUAA] (2023) *Evidence and credibility assessment in the context of the Common European Asylum System: Judicial Analysis (second edition)*. Available at: https://euaa.europa.eu/sites/default/files/publications/2023-02/Evidence_credibility_judicial_analysis_second_edition.pdf [accessed 25 April 2024].

29 UNHCR (2013) *Beyond proof: Credibility assessment in EU asylum systems*. Brussels: UNHCR, page 28. Available at: https://www.unhcr.org/uk/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html [accessed 25 April 2024].

30 EUAA, 2023: 21. Also see International Association of Refugee Law Judges [IARLJ] (2013) *Assessment of credibility in refugee and subsidiary protection claims under the EU Qualification Directive: Judicial criteria and standards*. Haarlem, Netherlands. Available at: https://www.iarmj.org/iarlj-documents/general/Credo_Paper_March2013-rev1.pdf [accessed 25 April 2024].

31 See IARLJ, 2013: 19.

Human Rights (ECtHR) have come to play significant roles in settling disputes relating to asylum cases including pronouncing on issues relating to: the interpretation and admissibility of evidence, who should produce evidence in particular situations, and which parties should be able to disprove or discredit evidence. When assessing the risk on return, the ECtHR, for example, has

> provided guidance on the kinds of documentation that may be relied upon when considering country conditions, such as reports by the UNHCR and international human rights organisations.[32] It has found reports to be unreliable when the sources of information are unknown and the conclusions inconsistent with other credible reporting.[33]

Alongside the challenge of ensuring that the documentary evidence in support of a case meets the requirements of the law and the judge, there are a range of practical challenges surrounding the process of collecting, sorting, storing and presenting documentary evidence. Bruno Latour emphasises the importance of attending not only to the 'grand talk about Law, Justice and Norms'[34] but also to the drab materiality of files which fatten, age and ripen as the research and preparation for cases progresses. Taking up this practical perspective offers a way to foreground some of the concrete difficulties appellants faced with respect to evidence gathering.

The UK still had a paper-based filing system in 2014 and 2015, for example, and there were instances of documents that were lost, untranslated, not photocopied properly, and with pages missing during hearings. Sorting out these kinds of issues could be laborious: based on the time-use section of our survey, we estimated that 9% of the duration of the hearings observed in the UK[35] during this period was spent deciphering what was missing or included in judges' and lawyers' document bundles.

Documents could also be illegible even if they were successfully gathered. In one instance in Germany, a document from the appellant's village elders that

32 ECtHR, N.A. v. the United Kingdom, No. 25904/07, 17 July 2008, paras. 118–122. Available at: https://www.asylumlawdatabase.eu/en/content/ecthr-na-v-uk-application-no-2590407 [accessed 02 August 2022].

33 ECtHR, Sufi and Elmi v. the United Kingdom, Nos. 8319/07 and 11449/07, 28 June 2011, paras. 230– 234. Available at: https://www.asylumlawdatabase.eu/en/content/ecthr-sufi-and-elmi-v-united-kingdom-application-nos-831907-and-1144907-0 [accessed 02 August 2022]. Also see European Union Agency for Fundamental Rights and Council of Europe (2020) *Handbook on European law relating to asylum, borders and immigration* (3rd edition). Luxembourg: Publications Office of the European Union, page 119.

34 Latour, 2010: 71.

35 Excluding Detained Fast Track hearings. Gill, Nick, Jennifer Allsopp, Andrew Burridge, Dan Fisher, Melanie Griffiths, Jessica Hambly, Nicole Hoellerer, Natalia Paszkiewicz, and Rebecca Rotter. What's missing from legal geography and materialist studies of law? Absence and the assembling of asylum appeal hearings in Europe. *Transactions of the Institute of British Geographers* 45 (4) (2020): 937–951.

apparently confirmed his identity and parts of his story was rejected because the handwriting was too hard to read and the seal was too light.[36] In another instance an interpreter spent some minutes trying to read a document before eventually throwing their hands into the air and exclaiming that they 'do not want to burn their fingers on this'[37] implying that they did not want to take responsibility for translating the document given how hard it was to read.[38]

Some people seeking asylum are in much stronger positions than others to collect evidence in support of their claims owing to their wealth, social status, stability and personal connections. Appellants sometimes told us they relied on social networks in their countries of origin to obtain certificates and other documents, for instance. Many others would not have friends who were willing to engage in risky practices to obtain documentary evidence.

A market for gathering and sending documents can develop when appellants are so reliant on others to gather evidence for them[39] and wealthier appellants may sometimes be at an advantage if they can pay others to act on their behalf. Indeed, passports and other forms of evidence can be forged and the quality of forgeries often varies in proportion to the money expended. One British judge told us of a 'tattoo parlour' that allegedly inscribed gunshot-wound type marks on customers' skin for a fee.[40]

Judges are sometimes suspicious of particular types of documents. In one case, the judge explained his mistrust of certain documents submitted from Afghanistan: 'I must say that in Afghanistan they know about Germany, and I'm sure these kinds of things [fake threatening letters] are offered at every corner.'[41] Judges also sometimes became frustrated at the degree and sophistication of deception involved in document forgery. In another case it transpired during the hearing that the family of an Afghan appellant bribed officials in Afghanistan to fake the date of birth of the appellant on his passport in order to make him appear younger and thus eligible to be considered as an unaccompanied minor in Europe. The judge became angry after this admission and stated in a shrill, raised voice: 'Frankly, I can't work with documents from Afghanistan, if everyone can just fake it, and change it based on lies and bribes.'[42]

36 Fieldnotes, Germany, 2019, Nicole Hoellerer.

37 Fieldnotes, Germany, 2018, Nicole Hoellerer.

38 This does not imply that 'perfect' documents are automatically taken as genuine though. We heard government representatives argue that documents should be dismissed because they were easy to forge (various fieldnotes).

39 See McGuirk, Siobhan and Adrienne Pine (2020) *Asylum for sale: Profit and protest in the migration industry.* Oakland: PM Press for insights into the linkages between neoliberal market logics and refugee protection.

40 Immigration judge, UK, 2013, Nick Gill.

41 Fieldnotes, Germany, 2018, Nicole Hoellerer.

42 Fieldnotes, Germany, 2018, Nicole Hoellerer.

Even outside the realm of fraudulent evidence, a distinct political economy of evidence is discernible given that appellants might pay lawyers to do research, experts to provide testimony and intermediaries or agents in their origin country to collect and send documents[43]. All in all, the gathering of evidence for appeals is not only a fraught and difficult process, but one that can also impose significant costs and risks on appellants and their associates.

Bringing People Together

The task of gathering hearing participants together produces a different set of challenges, which we explore in this section by examining the frequency of no-shows of some of the actors involved, including legal representatives and appellants.[44]

Government Representatives

The absence of government representatives from hearings was common. In France, we very rarely saw a government legal representative attend, and two rapporteurs that we met told us that neither of them had ever seen one. Lawyers joked that it is the only jurisdiction in which the defendant 'never turns up yet always wins'.[45] In Germany, the volume of cases at the time of our observations meant that the Federal Office for Migration and Refugees (BAMF)[46] (the department responsible) supposedly had a 20% attendance target.[47] We observed 11% attendance in 2018-19. 'BAMF rarely comes' one judge in Chemnitz remarked 'I have done hearings for six years, and I only had BAMF [appear] once [in court]'[48].

43 See McGuirk and Pine, 2020. Medical certificates can exemplify this political economy: depending upon the country in question they are not free, doctors are not obliged to provide them, and some appellants we saw cited their cost as a reason for not having them. 'You have to be aware that medical certificates have to be paid for by the appellant's themselves,' one legal representative explained in Berlin, 'and they are often too expensive' (fieldnotes, Germany, 2018, Nicole Hoellerer).

44 Judges' presence was not generally problematic. Apart from being late a few times, hearings were usually only in session when the judge was present, meaning that hearings did not generally proceed without a judge. An exception to this that we encountered were honorary judges employed in the Italian system to act as deputies for the main judges, including conducting appeal hearings. This was a symptom of the pressure on judicial time in the Italian system and the lack of resources, although one judge that we interviewed defended the arrangement by pointing out that the honorary judges are 'trained adequately by us' and introduced a welcome degree of collegiality into the decision-making process (interview, judge, Italy, 2019, Lorenzo Vianelli).

45 Fieldnotes, France, 2018, Jessica Hambly.

46 Bundesamt für Migration und Flüchtlinge.

47 We were told that this was the target in 2018 (fieldnotes, Germany, 2018, Nicole Hoellerer).

48 Fieldnotes, Germany, 2018, Nicole Hoellerer.

Frustration among judges at BAMF's absence was a common theme in Germany. One judge in Berlin expressed concern that the 'hearing character' is lost when BAMF does not attend because there is little dialogue between the parties.[49] 'There is no one here from BAMF, as usual,' another judge grumbled who resented what they perceived as a transfer of responsibility for sorting out difficult cases from BAMF to judges, symbolised by their absence from hearings. 'The media and people often talk about the burden on asylum-seekers,' another judge said, 'and yes, they suffer, mostly because of delays and BAMF failures. But [the fact] that we judges also have a lot of work, and have to deal with [the delays and failures], is often forgotten.'[50] The judge felt that BAMF's absence and consequent transfer of responsibility onto judges' shoulders conveyed a lack of appreciation of how hard judges worked.

One of the disadvantages of government representatives not attending hearings, in Germany and elsewhere, was that the judge was sometimes forced to take on the role of cross-examining the appellant. In the eyes of appellants who are potentially unfamiliar with legal processes in their destination countries and potentially distrustful and suspicious about legal authorities, this can undermine the appearance of fairness and neutrality that judges aim to project. 'If no one from BAMF shows up,' one judge explained, 'it appears as if we are … just another branch of BAMF.'[51]

Another consequence of the absence of the government's legal representative was an impaired ability to reach a settlement.[52] In Germany, the minimum level of protection for appellants is a deportation ban (DB). If the appellant's lawyer thinks their case is too weak to secure refugee or subsidiary status, but the BAMF representative is concerned that the government's case is too weak for the judge to dismiss the claim completely, it could make sense for both parties to settle on DB. This can both spare appellants the stress of a hearing and spare all parties the resources required to conduct it. In the absence of a BAMF representative, however, the opportunity to settle frequently disappeared.

Legal Representatives for the Appellant

Another figure often missing from hearings was a legal representative for the appellant; 15% of appellants were unrepresented in the British appeals observed, and 30% in the German ones,[53] although in France and Belgium

49 Fieldnotes, Germany, 2018, Nicole Hoellerer.

50 Fieldnotes, Germany, 2018, Nicole Hoellerer.

51 Fieldnotes, Germany, 2018, Nicole Hoellerer.

52 Gill, Nick, Jennifer Allsopp, Andrew Burridge, Dan Fisher, Melanie Griffiths, Jessica Hambly, Nicole Hoellerer, Natalia Paszkiewicz and Rebecca Rotter (2020) What's missing from legal geography and materialist studies of law? Absence and the assembling of asylum appeal hearings in Europe. *Transactions of the Institute of British Geographers* 45 (4): 937–951.

53 For the UK, this excludes the Detained Fast Track cases we observed. In both the UK and Germany the rate of representation varied significantly between courts. In the UK, at the

nearly all the appellants we saw were represented by a legal aid lawyer.[54] Legal representation improves asylum seekers' chances of success unless it is of very poor quality.[55] We saw many examples of legal representatives giving passionate speeches, identifying innovative and incisive legal lines of argument, correcting mistakes or misunderstandings by the judge, the government representative and the interpreter, and acting as a source of knowledge about both the law and the countries of origin of their clients. A lack of representation is particularly damaging for asylum seekers who may not possess strong language skills or understanding of law.

The absence of legal representatives for appellants was symptomatic of the pressure on legal aid for asylum seekers in Europe.[56] We take legal aid to refer to help provided by the state to litigants who cannot pay for legal advice, legal representation, or both. There are different models of legal aid provision in Europe linked to the evolution of legal systems and the development of welfare systems in different countries. These give rise to variations in the level of centralisation of legal aid systems, their independence from the state and their relationship to courts.[57] Particular differences in legal aid that we noticed during our fieldwork included the fact that at our research sites in Germany appellants received reimbursement in the form of vouchers or money for (some of) the cost of legal advice and representation. In Austria, on the other hand, while this reimbursement system did not exist, asylum seekers could apply for free legal advice which, if they were successful, was provided directly to

London hearing centre, 6% were unrepresented; at the non-London urban hearing centre, 13% and at the peri-urban hearing centre, 25%. In Germany under 40% of appellants had a representative in rural Augsburg, Bavaria, compared to over 90% in urban Berlin.

54 In 2018 Legal aid was granted in over 96% cases at the Cour nationale du droit d'asile (National Court of Asylum) CNDA in France (same figure for the two years preceding). From CNDA (2018) *Cour Nationale du Droit d'Asile: Rapport d'Activité 2018*, page 19. Available in French at: http://www.cnda.fr/content/download/153729/1556582/version/6/file/RA2018-FINAL-internet.pdf [accessed 16 September 2022].

55 Bail for Immigration Detainees (BID) and Asylum Aid (2005) *Justice denied: Asylum and immigration legal aid—a system in crisis*. London: BID. James, Deborah and Evan Killick (2012) Empathy and expertise: Case workers and immigration/asylum applicants in London. *Law and Social Inquiry* 37 (2): 430–455. Ramji-Nogales, Jaya, Andrew I. Schoenholtz and Philip G Schrag (2011) *Refugee roulette: Disparities in asylum adjudication and proposals for reform*. New York: New York University Press. Schoenholtz, Andrew I and Jonathan Jacobs (2002) The state of asylum representation: Ideas for change. *Georgetown Immigration Law Journal* 16 (4): 739–772. Rhode, Deborah L. (2009) Whatever happened to access to justice? *Loyola of Los Angeles Law Review* 42 (4): 869–912.

56 See, for example, Flynn, Asher and Jacqueline Hodgson (eds) (2017) *Access to justice and legal aid: Comparative perspectives on unmet legal need*. Oxford: Bloomsbury Publishing.

57 Barendrecht, Maurits, Laura Kistemaker, Henk Jan Scholten, Ruby Schrader and Marzena Wrzesinska (2014) *Legal aid in Europe: Nine different ways to guarantee access to justice*. Hague Institute for the Internationalisation of Law (HIIL), WODC. Available at: https://www.hiil.org/wp-content/uploads/2018/09/Legal-Aid-in-Europe-Full-Report.pdf [accessed 23 September 2021].

appellants. These technical differences could matter a great deal because they conceivably affected how easy it was to navigate systems of legal aid.

Furthermore, merits tests were common, in which asylum appellants would have to demonstrate either to the legal representative (in England and Wales[58]) or the judge (in Germany) that their case had a reasonable chance of success before they were awarded legal aid. In England and Wales,[59] to be eligible for future government funded legal aid cases, legal representatives must win a certain percentage of their cases, meaning that legal representatives often strictly assessed the strength of appellants' cases themselves before taking appellants on as clients. Lawyers typically only get paid a fixed fee regardless of the complexity of the work, increasing the incentive to select only the strongest and most straight-forward cases[60] (this has also been identified as a problem in Belgium[61]). Because legally aided representation was sometimes contingent on legal representatives' perceived merit of the case, being unrepresented in court could act as a signal to the judge that this could be a 'refusable' claim.

Appellants also faced other challenges accessing legal aid. There are often strict deadlines for applying for it, for instance. In France, legal aid is available for appeals (if the appeal is not manifestly inadmissible) but only if the legal aid application is submitted within 15 days of receiving the initial government decision.[62]

What is more, there are sometimes shortages of legal aid lawyers, and asylum seekers in rural or more remote areas in the UK and Italy, for example, can consequently find it harder to access legal advice and representation.[63] In

58 In Scotland, 'People who are seeking asylum and are in receipt of asylum support are entitled to legal aid to assist them to prepare their claim for asylum, appeal and prepare further submission. For other matters, asylum seekers and refugees have the same entitlement to legal aid and assistance as any UK national resident in Scotland.' Scottish Refugee Council (2019) Factsheet 8 available at: https://www.scottishrefugeecouncil.org.uk/wp-content/uploads/2019/10/SRC_Factsheets_08.pdf [accessed 8 May 2024].

59 In the UK, government cuts and changes to legal aid spending have had a detrimental effect on the provision of legal aid for asylum seekers, leaving many parts of the UK facing legal deserts. Wilding, Jo (2021) *The legal aid market: Challenges for publicly funded immigration and asylum legal representation*. Bristol: Policy Press. Aliverti, Ana (2017) 'Austerity and justice in the age of migration.' In Flynn, Asher and Jacqueline Hodgson (eds) *Access to justice and legal aid: Comparative perspectives on unmet legal need*. Oxford: Bloomsbury Publishing, 287–303, page 287.

60 In Scotland, legal aid is not merit-tested, and has no fixed rate.

61 AIDA reports that the low, fixed remuneration for lawyers makes asylum law unattractive for many lawyers. AIDA (2020) *AIDA Country Report: Belgium* (2020 Update), pages 39–42. Available at: https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-BE_2020update.pdf [accessed 10 May 2021].

62 AIDA (2020) *AIDA Country Report: France* (2020 Update), page 48. Available at: https://asylumineurope.org/wp-content/uploads/2021/03/AIDA-FR_2020update.pdf [accessed 10 May 2021].

63 AIDA (2020) *AIDA Country Report: Italy* (2020 Update), page 52. Available at: https://asylumineurope.org/wp-content/uploads/2020/05/report-download_aida_it_2019update

2019, only 33% of applications for legal aid were successful in Greece, and even then, few appellants with legal aid will ever meet or even speak to their legal aid lawyer. In the same year (2019), only 37 lawyers across the whole of Greece were registered with the Greek Asylum Service to provide free legal advice. [64]

There was also some concern that states could influence the way legal aid was organised and provided. In 2021 in Austria, for example, government funding to support NGOs and independent legal advisors to provide legal advice and representation to asylum seekers, including appellants, was discontinued. This meant that all advice became controlled by the Ministry of the Interior[65] via a newly established Federal Agency.[66] While aimed at the standardisation of practice, there was understandable concern that the reform meant that the actor responsible for organising and providing the advice (i.e. the Austrian state) was also the opposing party in the appeals (i.e. the Austrian state).

The impact of the squeeze on legal representatives was sometimes palpable in hearings. We heard of one Austrian case in which a lawyer rose from his seat next to the appellant exactly two hours into the hearing, announcing he had not been paid for more hours, and left the appellant to fight the rest of their case alone.[67] In another case in Germany:

> The legal representative arrives in the waiting area and seems generally unhappy to be at court in the first place. He talks with the appellant in English, and immediately asks the appellant to pay him EUR 50. He adds: 'If you don't have the cash on you, there is an ATM around the corner, and you can go there to get the money … I need it before the hearing … there is still time to get the money …' But the appellant has the cash, and hands him the money.[68]

.pdf [accessed 10 May 2021]. For analogous observations in the UK see Burridge, Andrew and Nick Gill (2017) Conveyor-belt justice: Precarity, access to justice, and uneven geographies of legal aid in UK asylum appeals. *Antipode* 49 (1): 23–42. Wilding, Jo (2019) *Droughts and deserts: A report on the immigration legal aid market.* Available at: http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf [accessed 29 April 2021].

64 AIDA (2020) *AIDA Country Report: Greece* (2020 Update), pages 68–70. Available at: https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_gr_2019update.pdf [accessed 10 May 2021].

65 AIDA (2020) *AIDA Country Report: Austria* (2020 Update), pages 33–34. Available at: https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-AT_2020update.pdf [accessed 10 May 2021].

66 Agency for Care and Support Services [*Bundesagentur für Betreuungs – und Unterstützungsleistungen*].

67 Fieldnotes, Austria, 2019, Nicole Hoellerer.

68 Fieldnotes, Germany, 2018, Nicole Hoellerer.

Various appellants in Germany also told the judge that they could not afford a legal representative, and occasionally the judge had the unpleasant task of informing the appellant that the court had been contacted by their legal representative to say that they would not be attending the appeal because they had not been paid.[69]

Occasionally legal representatives lost confidence in cases, which could give rise to them not showing up for the appeal because they did not want to incur a loss on their record. As one appellant in the UK recounted:

> My representative didn't go there to represent me or anyone. They told me before the thing that they're going to be there in the hearing, in the court, but they didn't go … I represent myself. The interpreter, he was there … But even he was very shocked with the no representative for me.[70]

Being 'dropped' at the last minute was particularly damaging to appellants' confidence in their cases.

> My solicitor left my case … it was difficult … because I was still seeing … the solicitor as [the] expert … he was giving a lot of hope to me … [but then] they said … I didn't have over a fifty per cent chance and they left my case. [After that I was] nervous all the time … going to court was not easy.[71]

Appellants

There were also multiple instances in which appellants did not arrive for their appeals. In Germany, we observed 14% of appellants not appearing at their hearing. Reasons for absence might have included disengagement from the legal system as an active choice and an exercise of agency. 'Many appellants from Somalia go underground … and then reappear in France or Italy,' one German judge mused when an appellant had not arrived. 'Many Somalis go to Italy – especially in summer – to work during the harvest.'[72]

In other instances, there was suspected miscommunication, such as when the appellant was known to have moved house and might have missed the summons. We also observed a small number of cases in which the appellant missed their hearing as a result of trivial practical impediments on the day of their hearing. One appellant in France was stuck in traffic and arrived after their

69 Various fieldnotes, Germany, 2018/19, Nicole Hoellerer.
70 Interview, appellant, UK, 2015, Natalia Paszkiewicz.
71 Interview, appellant, UK, 2015, Abigail Grace.
72 Fieldnotes, Germany, 2018, Nicole Hoellerer.

allotted time, and was very frustrated to then be turned away.[73] In Augsburg we saw an appellant who was at the court miss their hearing because they were outside smoking.[74] Judges in Germany normally wait for 15 minutes for missing participants (as an 'unwritten rule') and then proceed without them.

Another reason for nonattendance was trepidation about the hearing. 'I was scared of these people,' one appellant who decided not to attend her appeal hearing in the UK explained,

> I had no solicitor to go represent me. They told me to go and represent myself. I was so scared I can't, so I didn't attend. I wrote to my solicitor who said you have to go by yourself, but no, I didn't, I was very sick, so they refuse me.[75]

Although this interviewee associated her lack of attendance with the refusal of her claim, in principle the appellant's presence is not necessary for the hearing to go ahead and their absence should not automatically count against them. In reality though, we observed a series of consequences of a lack of attendance. Most obviously, appellants did not have the opportunity to address the questions that judges had prepared. 'I would have a lot of questions following the statement of claim,' one judge told the lawyer of an appellant who had not arrived in Munich. 'You [meaning the lawyer] obviously can't answer these questions. As you know, if he [meaning the appellant] won't come, and no one knows why, this will be to his disadvantage.'[76]

Most judges were as understanding as they could be when faced with appellant non-attendance, but we sometimes detected negative moral judgements of appellants who did not arrive. Some judges became annoyed at the waste of resources that unnotified nonattendance brought about in terms of their own preparation. 'The appellants have nothing to lose … it's *our* time that is wasted,' one judge complained.[77] An interpreter might also have been paid to come to the hearing that day.

Sometimes legal representatives for appellants would defend the absence of their clients. When one appellant did not arrive and the judge complained that the non-attendance rate among Nigerians was about 50%,[78] the legal representative explained that many of his Nigerian clients vanish, or 'go underground', mostly for self-protection, especially women who have been trafficked. Another lawyer, in France, delivered a particularly dramatic and

73 Fieldnotes, France, 2018, Jessica Hambly.
74 Fieldnotes, Germany, 2018, Nicole Hoellerer.
75 Interview, appellant, UK, 2015, Natalia Paszkiewicz.
76 Fieldnotes, Germany, 2018, Nicole Hoellerer.
77 Fieldnotes, Germany, 2018, Nicole Hoellerer.
78 Fieldnotes, Germany, 2018, Nicole Hoellerer.

passionate final speech in the absence of his client, apparently attempting to make up for their non-attendance.

> He goes over the chronology again. It seems as though he is trying really hard to convince the panel, despite receiving sceptical looks from them! One judge is smiling as she bites her nails. She raises her eyebrows. Another looks annoyed. The President smiles and sits back in his chair. It feels as though they appreciate his efforts and sympathise with him [the lawyer] – but they are not writing anything down.[79]

At other times, the nonattendance of appellants surprised, annoyed or deflated their legal representatives. 'I've not had any contact with him, so I cannot add anything,' one legal representative said at the end of a hearing that lasted less than five minutes, at which the appellant had not been present in Paris.[80] 'The problem is, we have no proof or documents. So I have nothing to add,' another lawyer explained in a case that took only four minutes in total.[81]

In summary, hearings involve engineering the co-presence of a range of participants. Hearings are most effective when all the people involved are in attendance, and the impact that legal representatives', appellants' and others' absences have illustrates how important the processes of gathering and assembling are.

The Dilemma of In-Person Hearings

The absence of appellants raises an important question regarding asylum appeals: should they be in person (we discuss remote, video-linked hearings in Chapter 8)? Some of the lawyers that we spoke to were concerned that in-person appeals could do more harm than good in terms of re-traumatising appellants by forcing them to relive painful memories. Various legal scholars have questioned the usefulness of in-person hearings too, especially in the light of their relative costliness and the difficulties of organising and orchestrating them.[82] Their concern is that in-person hearings can create the conditions in

79 Fieldnotes, France, 2018, Jessica Hambly.

80 Fieldnotes, France, 2018, Jessica Hambly.

81 Fieldnotes, France, 2018, Jessica Hambly.

82 Spottswood, for example, expresses frustration with the assumption that justice functions most effectively face to face: 'Unfortunately, when judges, lawyers, and rulemakers consider this issue, they are led astray by the widely shared—but false—assumption that a judge can best determine issues of credibility by viewing the demeanour of witnesses while they are testifying. In fact, a large body of scientific evidence indicates that judges are more likely to be deceived by lying or mistaken witnesses when observing live testimony than if the judges were to review a paper transcript. … Live hearings and trials will often, but not always, do more harm than good' (Spottswood, Mark (2011) Live hearings and paper trials. *Florida State University Law Review* 38 (4): 827–882, page 827). See also Venter, Christine M. (2017) The case against oral argument: The effects of confirmation bias on the outcome of selected

which physical attractiveness, gender, race and social status could unduly influence judgement, while text-based forms of communication and deliberation offer an opportunity to abstract from these.[83] What is more, the body language and demeanour of litigants, it has been suggested, are unreliable ways to determine whether someone is telling the truth.[84] 'The belief that most people can reliably detect lies by scrutinizing the body of the speaker', O'Regan writes, 'is quite simply false',[85] and is likely to be even less true in the context of language differences and difficulties, as well as cultural differences.[86] The only reason they are persistently used and defended in legal systems, O'Regan argues, is a result of a relatively unexamined, ancient set of assumptions about the efficacy of oral and bodily communication which actually imposes a series of risks over litigants because they are exposed to vision-based prejudices.[87]

While we did not hear these reservations voiced during our research, legal representatives were sometimes concerned that the intimidating environment could undermine appellants' abilities to give testimony. One legal representative in Italy argued that:

> Sometimes a written case makes up for some shortcomings that a person may have in terms of ability to communicate, ability to tell one's own story, intimidation and shyness in front of a judge, or feeling that you have to say certain things, or do certain things.[88]

More candidly, when asked whether he thought in-person appeals should be mandatory or routine, the same legal representative expressed reservations about bringing their clients to the hearings:

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cases in the Seventh Circuit Court of Appeals. *Legal Communications and Rhetoric: JALWD* 14: 45–80.

83 We could reasonably fear that vision-based prejudices are even more likely in the context of the racial differences between judges and appellants that are common in asylum cases. Spottswood is, however, careful to qualify his overall thesis too: 'live fact finding may help a judge make sense of confusing evidence. In addition, in-court hearings may feel fairer to participants than paper-based decisions, due in large part to the desire to have expressive input in decisions that affect their well-being. And occasionally, a live hearing or trial may be preferable for reasons of cost or practicality' (Spottswood, 2010: 827).

84 O'Regan, Daphne (2017) Eying the body: The impact of classical rules for demeanor credibility, bias, and the need to blind legal decision-makers. *Pace Law Review* 37 (2): 379–454.

85 Ibid.: 379.

86 See Johannesson, L. (2023). Silence and voice in oral hearings: Spatial, temporal, and relational conditions for communication in asylum and compulsory care hearings. *Social & Legal Studies*, 32(3), 399–419 in which Johannesson critically reflects on the utility of oral hearings for asylum cases.

87 O'Regan, 2017.

88 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.

> From my experience in criminal law, the presence of a person may or may not be beneficial … I believe in the influence of human vision so, one can play it, but it is a card that you never know how it is going to end up. Part of the job of a lawyer is to evaluate how much it can really be useful to make a person be listened to, rather than not make them be listened to, on the basis of a story that, if well written, maybe is stronger and more effective. [89]

The legal representative's remarks convey the problematic politics of presenting clients in what is thought to be their best light. One legal representative in Greece told us that she was wary of bringing her clients with her to appeals because the Greek judges were not used to it and could become intimated.[90] Another legal representative in Greece told us that when an appellant had attended one of her appeals in person they had come across as aggressive and had alienated the panel of judges. The lawyer, she argued, has to try to ensure that the appellant makes a 'positive appearance and not a negative appearance'.[91]

There are other arguments that lean more towards staging in-person hearings, however, especially in the case of asylum appellants. Asylum seekers may not fully understand legal procedures and could therefore benefit greatly from the support that ushers and judges can offer. In this light, asylum appellants might stand to benefit more from face-to-face hearings than other types of litigants who are more familiar with legal processes or the host culture. '[T]he inherent value of a "day in court" can be far greater for some claimants … than for others', Lawrence writes. 'Such as corporate entities and … it can be both desirable and feasible to take this variation into account in doling out scarce procedural protections.'[92] What is more, evidence which relies on the communication of a compelling narrative, as asylum-related evidence often does, can also benefit from in-person hearings because particularly complex or confusing evidence can often be explored most effectively in a face-to-face context.

Others argue that the formality of courts provides a procedural safeguard against the sort of prejudice that can thrive in less formal circumstances.[93] According to this line of argument, the architecture, symbolism and rituals of the hearing are as much to signal the gravity of the proceedings to the judge and the other professional repeat players involved as they are for the benefit of the litigant. The gravity of the potential consequences or outcomes in asylum cases should also arguably be considered when deciding upon the degree of

89 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.
90 Interview, legal representative, Greece, 2019, Jessica Hambly.
91 Interview, legal representative, Greece, 2019, Jessica Hambly.
92 Lawrence, Matthew J. B. (2015) Procedural triage. *Fordham Law Review* 84 (1): 79–130, page 79.
93 Delgado, Richard, Chris Dunn, Pamela Brown and Helena Lee (1985) Fairness and formality: Minimizing the risk of prejudice in alternative dispute resolution. *Wisconsin Law Review* 6: 1359–1404.

procedural safeguards that are appropriate.[94] Since detention and removal are potential outcomes of asylum hearings, it could be seen as proportional to maintain a high degree of formal oversight.

For their part, textual forms of communication can be decidedly prone to error[95] because they depend upon a specific array of skills that can be affected by the dynamics and power-relations of the settings in which they are written, as well as the characteristics and predilections of both the writer and reader (see Chapter 9 'Mistakes and Incompetence'). Communicating appellants' experiences in writing also deprives them of a range of performative tools such as body language, eye contact, facial expressions and the pitch and tone of voice that could help them to convey their experiences most effectively.[96] 'It makes sense to explain with your language, with your face, with your cry, with everything,' one Greek lawyer, frustrated with the scarcity of in-person hearings for her clients in Greece, argued.[97] 'It is so important for the judges to see the applicants,' another Greek lawyer said:

> Because when you actually see the person, you can have an idea of how traumatised the person is. Because all the psychiatrists write is the person is suffering from stress disorder. But when you see a client, you can see how traumatised he is. [98]

Seeing an appellant can also impact on the judges' assessments of whether they can or should be deported for other reasons. During our fieldwork in 2018 and 2019 in Germany, for example, some judges voiced the assumption that a young, able-bodied, single man could return to Afghanistan and make a living as a day or manual labourer. In one case we observed, however, a judge dismissed this assumption based on seeing the appellant in front of her. She stated at the end of the hearing, motioning at the young appellant:

> The appellant is so small and skinny [*schmächtig*], I can't imagine him working on a construction site … Because many factors are at play, I can see a 60 (5) [deportation ban] … Normally, healthy, single men don't

94 'The required degree of procedural safeguards varies directly with the importance of the private interest affected', Friendly suggests. 'Deprivation of liberty, even conditional liberty, is the harshest action the state can take against the individual through the administrative process' (ibid.: 1296). It is for this reason that rich countries' legal systems have maintained a tradition of habeas corpus (literally: to 'produce the body') which has been used to protect individuals against arbitrary detention by requiring public officials to deliver an imprisoned person to court and show a valid reason for imprisoning them (Friendly, Henry J (1975) Some kind of hearing. *University of Pennsylvania Law Review* 123 (6): 1267–1317, page 1278)

95 Jacquemet, Marco (2009) Transcribing refugees: The entextualization of asylum seekers' hearings in a transidiomatic environment. *Text and Talk* 29 (5): 525–546.

96 Whilst working in a second (or third, or fourth) language, these non-linguistic forms of communication can be particularly valuable.

97 Interview, legal representative, Greece, 2019, Jessica Hambly.

98 Interview, legal representative, Greece, 2019, Jessica Hambly.

> get it. But with this appellant I cannot see how he could make a living at all.[99]

The UNHCR advises that oral hearings should be the norm in relation to asylum appeals (see Chapter 2 'What are Asylum Appeals?') and various interviewees agreed with this view. 'It's important to meet the judge,' one appellant in Italy told us,

> Because when you are given opportunities to meet someone, you get more opportunities to express yourself the way you can. It may not be presented the way you would like to present it if your lawyer does it. You know your story, you know what happened and you can tell it better than the lawyer.[100]

Other appellants suggested that an in-person hearing was an important element of fairness. 'if you explain it personally it is something fair,' one appellant told us.[101] 'I loved that I was there,' another appellant recalled, 'because it's good to hear [the evidence] from the horse's mouth.'[102] Various judges agreed. 'I have to hear the applicant,' one judge told us, 'if not, how can I evaluate [their appeal]? If you want a serious evaluation and not one that is stereotypical or serial, you inevitably must hear the applicant.'[103]

Conclusion

In this chapter we have focused on how appeal hearings are assembled, which has entailed an examination of how documentary evidence and the participants involved are gathered together. Social scientists have recommended examining phenomena through the lens of the assembling of their components as a way to appreciate the diversity of materials and processes that must be put into motion and coordinated to make things work.[104] This chapter has exposed the range of things that must be assembled for an asylum appeal to function effectively, as well as the fragility of the processes involved in collecting them. The more diverse the material and human components that are required, the more vulnerable appeals are to disruption, impoverishment and failure. Thinking about the assembly of appeals thus reveals their interconnection, their interdependence with human and social systems exterior to the law and, ultimately, their precarity.

99 Fieldnotes, Germany, 2018, Nicole Hoellerer.
100 Interview, appellant, Italy, 2019, Lorenzo Vianelli.
101 Interview, appellant, Italy, 2019, Lorenzo Vianelli.
102 Interview, appellant, Italy, 2019, Lorenzo Vianelli.
103 Interview, judge, Italy, 2019, Lorenzo Vianelli.
104 See for example Marcus, George E. and Erkan Saka (2006) Assemblage. *Theory, Culture and Society* 23 (2–3): 101–106.

Part II
Policy and Practice Compendium

In this section we provide short summaries of our insights about the asylum appeals process so far, as well as ideas for how to address the challenges that these insights reveal, based on some of the practices we observed that helped to ensure that appellants could effectively take part in appeals. These are not recommendations, because we recognise that every country context is different, and that regional and court contexts also differ. Rather, we aim to provide lists, rather like menus, from which in-situ judges, European law and policy-makers, national system-designers, legal representatives (for both appellants and states) and interpreters, as well as other professionals, can choose what they think might work in their own systems.

Waiting for Appeals

Our research highlights the challenge of balancing sufficient time for appeals to be prepared and considered thoroughly, with reducing uncertainty and waiting times for appellants and maximising efficiency for asylum authorities. Significant mental and physical health problems, including additional trauma and anxiety, may arise and/or be exacerbated due to uncertainty and the intensity of long waiting periods for appeals to be heard and determined.

- Keeping appellants better informed about how long they are likely to wait, by either contacting them directly, giving them a point of contact, or publishing waiting times in an accessible format, can help alleviate some of the burdens of waiting.
- As many countries digitise their asylum processes, automatic updates (such as emails or text messages) for appellants may be more feasible than in the past.
- Appellants should have access to employment, language classes, psychosocial support and education while they wait.
- The isolation and marginalisation of appellants during long periods of waiting can be reduced by removing or loosening restrictions on asylum appellants leaving their accommodation.

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Limits on the length of time taken to hear and determine appeals can be effective in promoting fair decision-making and access to justice.

- For countries that have not done so already, the introduction of limits over the length of time that can be taken to i) hear and ii) determine asylum appeals could improve fairness.
- For time limits to function as an effective means for enhancing fair, robust, high-quality asylum procedures, they should:
  - Be realistic and achievable for both parties. Setting time limits should therefore be a collaborative and consultative process, and time-limits may also be adjustable in the light of current demand.
  - Not impede access to quality legal advice and representation. Making sure that legal representatives' associations have ways to feedback to policymakers about any such impediments is important.
  - Not be introduced as a pretext for scaling back, or curtailing, appeal rights.
- When time limits are enforced against the appellant while lenience is shown to the state-party, this undermines the independence and integrity of the appeals process. To enhance fairness and transparency, any enforcement mechanisms around time limits should apply fairly and reasonably to both sides. If anything, time-limit enforcement should recognise the inherent power imbalance between the state-party and the person seeking asylum, and the barriers faced by the latter in accessing legal representation and bringing appeals.

Access to Legal Advice and Representation

Lack of representation on either side can undermine fairness in asylum appeals. For appellants, access to high-quality, free legal representation can be critical to ensuring a fair hearing. Effective access to high-quality legal advice and representation requires an adequately funded and functioning legal aid system.

- A Europe-wide, systematic review of legal representation and legal aid for asylum appellants/asylum appeals, in consultation with legal professionals and researchers, as well as those affected (e.g. former asylum appellants), would be a timely intervention. The review could cover remuneration processes and quality checks of legal representation with a view to sharing practices in different countries and establishing good practice.
- Research has highlighted the problems of using success rates as quality checks and suggested that occasional auditing of work by appropriate legal authorities and/or peer review (e.g. by lawyer's associations) should be encouraged.[1]

1 For research on the UK see Wilding, Jo (2019) *Droughts and deserts: A report on the immigration legal aid market*. http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf [accessed 12 July 2022]; Wilding, Jo (2021) *The legal aid market:*

- Official or centralised lists of qualified asylum representatives, and automatic allocation, can be an effective way to ensure high levels of representation.
- Reporting mechanisms for quality control and oversight of fee charging practices could be put in place, in consultation with legal practitioners and academics, to assist in preventing asylum appellants from being subject to 'rogue' representatives who seek to take advantage of vulnerable or precarious appellants.
- In the light of frequent shortages in legal representatives in this area, fixed rates of remuneration for legal representatives should be avoided, and hourly rates encouraged.
- State provision of adequate and timely financial reimbursements can incentivise legal representatives to hire qualified interpreters to ensure effective communication between legal representatives and their clients.

High-quality and independent legal advice and representation should be available irrespective of accommodation location, including for people residing in non-metropolitan locations, those held in detention centres, and those subject to fast-track and airport procedures.

- Consider increasing the fees available, or providing a supplement, for lawyers working with appellants in remote locations or in other areas/situations in which legal representation is known to be hard to access.
- Ensure that legal representatives can claim back their travel costs, including time lost whilst travelling.
- Solicit regular feedback from legal representatives about the practical challenges of their work. This feedback could be gathered via consultation or research.
- The law and/or regulations could be reviewed to ensure that legal representation is clearly independent of state bodies in countries in which this is not already the case (e.g. Austria at the time of writing).

Legal advice and representation are most effective where adequate space and time are provided (and remunerated via legal aid) to prepare for legal proceedings, including provision for in-person meetings where necessary.

- Provide private spaces in shared refugee accommodation for appellants to meet legal representatives and prepare paperwork for legal proceedings.
- Make safe storage (lockers etc.) available to appellants for sensitive paperwork and documents.
- Give careful thought to how to ensure appellants have access to the internet, and, where required by the legal system, printers and photocopiers.

Challenges for publicly funded immigration and asylum legal representation. Bristol: Policy Press.

Preparing and Arriving for Appeal Hearings

Our research revealed widespread distrust and disorientation among appellants of asylum appeal procedures and persons involved, including their own legal representatives.

- Judges could be made more aware of the high likelihood of appellant distrust in the system in this jurisdiction, as well as its potential consequences (such as non-disclosure of evidence) via training.
- Given the gravity of this area of law, specialist judicial training could be mandatory. This training could include ideas about judicial approaches that are likely to increase trust in the system.

Practices that help ensure that people seeking asylum feel safe and confident that their appeal is being dealt with justly are a positive way to build trust and promote fairness in asylum appeals. Appellants' effective participation in asylum procedures can be enhanced where they have advance knowledge of how appeal hearings (both remote and in person) will run, who will be present, expectations around behaviour and etiquette, and how/when decisions are made and communicated.

- Easy to access videos,[2] infographics and diagrams about what asylum appeals entail could be made available in the languages commonly spoken by appellants. It may be appropriate for a non-governmental or research organisation to produce these resources to increase the likelihood that appellants will trust them. Links to these resources could be disseminated in the summons letter.
- Legal representatives could be encouraged and incentivised to meet their clients before the hearing date, or in good time before the hearing on the day, wherever possible.
- Legal representatives (and judges where appropriate) could assuage appellants of the fact that they are not in criminal proceedings. Summons letters and introductory comments from the judge(s) could include the same assurance.
- Even if hearings are likely to be short, judges could be expected to explain their purpose and who is involved to the appellant at the outset. Senior judges could check with judges themselves, as well as with interpreters, clerks and legal representatives, that this is being done.
- If legal representatives are not going to attend court, appellants should be informed about this well in advance so that they are not surprised that their legal representative is not present on the day of their hearing.

2 See, for example, this introduction produced in English, Farsi, French, Hindi and Arabic https://www.asylumaid.org.uk/node/60 [accessed 26 April 2024].

- Appellants could be advised that it is common for legal representatives and judges to chat to each other before and after the hearing.
- Appellants could be advised that asylum appeals are often held in securitised spaces, and that they will have to go through security checks on arrival. The process of scanning bags and showing ID could be described to them in advance, emphasising that these processes are applied to anyone who visits the hearing centre so that they do not feel singled-out.

It is helpful if appellants are given up-to-date guidance on how to reach the court, where and how to enter (for example, if there will be security screening), what to wear, and what to bring or leave behind. This, as well as informative signage outside the court, can help ensure appellants arrive on time and hearings are not delayed.

- Summons letters can include this information in a language that the appellant understands.
- Courts might want to provide this information and virtual tours on their websites, in a language or format that appellants are likely to understand.
- When appellants do not arrive on time, judges could be expected to wait at least 15 minutes and show reasonable flexibility in case the appellant is delayed.

Appellants are better able to participate when given an opportunity to plan for refreshment and comfort breaks. Lack of food and drink, as well as fatigue and anxiety induced by long waiting times at court, can have a detrimental impact on their ability to participate effectively in appeal hearings.

- Water could be made freely available in hearing rooms and waiting rooms.
- Appellants could be made aware that they might be waiting a long time at court and that they should bring food, drink and any medication they need to the hearing (for example, in the summons letter).
- Courts could have vending machines, or signage directing appellants to the nearest places selling affordable food.

While some emphasis on formality in court environments and procedures can be important to underscore the gravity of the asylum appeal process and seriousness of outcomes, this should not make appellants feel like criminals. In particular, it is important to recognise that people seeking asylum may experience fear of authorities and people in positions of authority, and the presence of security and/or police personnel around courts may have a traumatising effect on appellants.

- Security and other court staff could be (more fully) trained to treat all visitors at court with dignity and respect. They could also be informed about the reasons why asylum appellants might be particularly distrustful

of them, and trained to take into account the possibility of negative perceptions and experiences of security processes and personnel.

Assembling Evidence

Appellants sometimes find hearings re-traumatising, so there is a need to provide a safe environment where appellants feel able to give their best evidence and participate in their appeals as fully as possible. The passage of time can also have a negative effect on the clarity and accuracy of appellants' memories of key aspects of their narratives. Sometimes a long period of time has passed before the appellants' hearing. In addition, people's memories do not always automatically emphasise the legally significant aspects of their past experiences. Instead, memory often foregrounds sensory experiences, rather than the passing of time or names of places.

- Training for judges and representatives on the effect of time and trauma on memory, recollection of facts, and clarity of evidence could be provided (even made mandatory) to improve fairness in decision-making procedures. In addition to training, peer observations can be used in a positive way to ensure that such training is put into practice.
- Appellants can be advised that they can disclose evidence that they find hard to discuss in person in advance of the hearing in writing or via audio/video.
- Appeal procedures could be designed in recognition that disclosure of sensitive information may not be forthcoming in the early stages of a claim.
- Where rules are already in place to allow for provision of late evidence, more steps could be taken to ensure that decision-makers are receptive to this in practice.

Our research highlighted problems with the loss of key documents by some asylum authorities.

- Robust systems ought to be put in place to ensure that, where hard copies of original documents are submitted as evidence in asylum appeals, these are received and stored safely, in accordance with data protection guarantees, and can be returned to appellants when required.
- Digital systems for asylum appeal processes could be introduced with due regard to the safety of data and accessibility of the system for appellants.

We uncovered various challenges surrounding the acquisition of evidence in asylum appeals including the cost and risk of gathering evidence, the poor quality of some evidence and the lateness of submissions which caused adjournments or incomplete bundles.

- For countries not doing so already, medical certificates that can be used in court and that comply with legal requirements can be free, or available for a more affordable, standard fee.
- References to the Istanbul Protocol (also known as the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)[3] can be an effective way to improve the quality and reception of medical evidence and/or medico-legal reports submitted in asylum appeal procedures.
- For countries not doing so already, fixed deadlines before the hearing for the submission of evidence (as in Germany) could improve processes, with appropriate regard for the difficulties appellants could face in meeting deadlines.

Assembling People

Providing trained and qualified interpreters throughout the asylum appeals process can be a critical component of fair and robust procedures.

- Where possible, appellants should be given a choice of interpreter gender or dialect where this may impact ability to participate.
- Opportunities for appellants to talk with their interpreters in advance or at the start of the hearing could be made available, not only to ensure they understand each other, but also to build trust or give the appellant an opportunity to voice any concerns that they have about their interpreter.

In-person oral hearings should be the norm for asylum appeals, given the emphasis on individual credibility assessment. However, the use of technology such as audio-visual recording, or remote participation, can facilitate and encourage disclosure of sensitive information where it is used at the request of the appellant. For example, some appellants may prefer, or be better able, to process and respond to questions of a sensitive nature if they are given the opportunity to participate from a remote setting, or asynchronously, by recording the questions and answers in advance of the hearing.

- In countries in which in-person asylum appeal hearings are not the norm, asylum appellants could be given the choice of in-person, video or 'on paper' procedures through a transparent process. Ideally, appellants would receive independent legal assistance in making this choice.

3 UNHCR (1999) *Istanbul Protocol: Manual on effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment*. Geneva: United Nations Publications. Available at: https://phr.org/issues/istanbul-protocol/ [accessed 26 April 2024].

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Part III

Participating in Asylum Appeals

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7 The Politics of Speed

Adjudication and Participation Under Time Pressure

Interviewer: What would you say to the people who make decisions on asylum claims?

Appellant interviewee: I would tell the people to take their time and understand the stories, don't just assume. Of course, it can be a lie, of course, of course, it can be a lie. But take your time, you are mature, you are qualified to do the job so take the time, examine the things they are telling you … Try and see and understand. It might be a longer process but at least at the end of the day you will go back home and feel comfortable, you won't go back home and have the hate against Indians, Pakistani, Black people. The next time you see an Indian guy you become hard because of the experience you had with a previous one, no. Because if you had a bad experience with someone before it might come again on someone in the future. So try to keep your mind fair …[1]

In 2018 at the asylum court in Brussels Dan observed the following:

> The judge appears through a separate door to the courtroom at about 09:40 at a blistering pace. The room tries to stand up but he waves everyone down to be seated. The first appellant comes to the front and the judge says he has no questions. The lawyer says that she has nothing to add but that the appellant wants to speak. He starts to recount something and the judge interrupts him within about ten seconds: 'Nothing I don't already know, written procedure'. He then closes the hearing.
>
> The second hearing takes place at the same relentless speed and with the same confusion over what can be said. The appellant starts to say something and the judge almost immediately interrupts him gruffly: 'For you and everyone at the back listen up, I will listen to nothing I already know from the files. Written procedure'.
>
> The third Afghani case and two subsequent cases pass even faster. The judge declares he has no questions, the lawyers, appellants and

1 Interview, appellant, UK, 2015, Natalia Paszkiewicz.

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government representatives state they have nothing to add. Then the judge declares the hearings to be over.

During the fourth and fifth cases the three appellants from Afghanistan whose hearings have just finished angrily discuss what happened in the hallway outside the courtroom. As the doors are still open I can barely follow what is happening in the following cases but the judge does not seem bothered.

In case six the judge again says that he has no questions but this time the lawyer says that there is something new. 'This had better blow me away,' the judge says. Unfortunately I cannot hear what the new information is because of the noise from the corridor, but the matter is quickly heard and the judge closes the case.

Case nine (I cannot even work out from my notes what happened in cases seven and eight as everything has happened so fast): this lawyer has prepared a speech and says that she does want to add something. She explains that widespread corruption in Albania means the courts cannot be trusted. Before she gets more than three minutes in, however, the judge stops her and says that she is adding nothing new.

By 09:53 the last case of the day is due to start and it is dealt with just as briskly. Afterwards I talk to the judge. He explains that judges in Belgium used to spend hours on each appeal. However, the law makers changed the system because it was too expensive for taxpayers. Now appellants are only allowed to present new information at their hearings; everything else must be given in their lawyers' statements. He explains that, although he takes the new laws more literally than his judicial colleagues, he is well within his rights to do so.[2]

Introduction

Law commands its own time. Socio-legal scholars have drawn attention to the interweaving of social power and legal schedules, deadlines and time limits,[3] noting how frequently the authority to set timetables and routines

2 Fieldnotes, Belgium, 2018, Dan Fisher.

3 Engel, David M. (1987) Law, time, and community. *Law and Society Review* 21 (4): 605–637. French, Rebecca R. (2001) *Time in the law. University of Colorado Law Review* 72 (3): 663–748. Tur, Richard (2002) Time and law. *Oxford Journal of Legal Studies* 22 (3): 463–488. Khan, Liaquat A. (2009) Temporality of law. *McGeorge Law Review* 40 (1): 55–106. Mawani, Renisa (2015) The times of law. *Law and Social Inquiry* 40 (1): 253–263.

goes uncontested and unquestioned,[4] with highly inequitable social effects.[5] Within administrative law in particular, the power to set the schedule within which parties must submit evidence, raise objections or respond to queries can tip the balance in favour of the state in a contest that is often already highly uneven.

Speed is the corollary of time and resource constraints. Paul Virilio, the famous theorist of speed and social power, suggests that when an object or process is sped up sufficiently, it is then no longer the same thing simply operating at a faster pace.[6] Rather, there is an ontological rupture, a disjuncture, which means that the essence of the thing itself changes as a result of its rapidity. Pace is not to be separated from the nature of things, but to be viewed as a constituent of them.

The risks that accompany the conduct of law in a speedy fashion are clear. Administrative law has two faces: a justification of state power, and a check and balance over it. When it is done too speedily, the possibility that law constitutes a genuine check is compromised. For Bruno Latour, the key characteristic that allows legal deliberation to lead to justice is the temporal quality of *hesitation*.[7] During his ethnography of the well-resourced Council of State [*Conseil d'État*] in Paris (not so far from the National Court of Asylum (CNDA) geographically, and at the apex of the administrative branch of law within which the CNDA exists), he was struck by the slowness and heaviness of the legal processes he observed there.[8]

> [C]ommon sense, with its crude methods, could produce neither this effect of slowness in judgement nor this confidence in certainty: it would reach a conclusion too quickly, too hastily and on the basis of superficial first impressions; all of us depend vitally on these costly and ponderous institutions, which require the complex elaboration of an esoteric vocabulary and the application of procedures that are exasperatingly meticulous, because these are the only means we have to avoid arbitrariness and superficiality.[9]

There is, however, a reified atmosphere at the top of the legal pyramid, in which the Council of State in France and the Supreme Court in the UK,

4 Greenhouse, Carol J. (2018) *A moment's notice: Time politics across cultures*. Ithaca, NY: Cornell University Press. Grabham, Emily (2016) *Brewing legal times: Things, form, and the enactment of law*. Toronto: University of Toronto Press.

5 Grabham, 2016. Beynon-Jones, Siân M and Emily Grabham (eds) (2019) *Law and time*. London: Routledge.

6 Virilio, Paul (1986) *Speed and politics : An essay on Dromology*. New York: Semiotext.

7 Latour, Bruno (2010) *The making of law: An ethnography of the Conseil d'Etat*. Cambridge: Polity.

8 Latour, 2010: 221.

9 ibid.

for instance, function.[10] Only a fraction of legal cases and disagreements ever reach these higher instances. By the time they do, disputes are generally about legal process and points of law rather than the facts (see Chapter 2, 'What are Asylum Appeals?').

The vast majority of legal disputes, including those within the areas of administrative law and immigration and asylum law, are decided in much lower and lowlier courts or tribunals, such as the ones we observed. Here the imperative to 'get through the list'[11] presses against the importance of hesitant deliberation daily, and hourly. Lower courts are much closer to the realities and messiness of real life in many ways, not least because the facts of the cases may be disputed at this level. Litigants themselves often appear within these courts too, and judges must be nimble in the face of this social complexity.[12]

In this chapter we examine the ways that considerations of time, and specifically speed, imbue the legal processes we observed. We demonstrate the depth and pervasiveness of this imbrication: affecting the behaviour of the actors involved, the speech and interaction within the setting, the emotions felt and the forms of reasoning verbalised. In so doing, we argue that time politicises an ostensibly apolitical setting. Far from being processes that are independent from social and economic influences, it is through speed, and the speeding up of court procedures, that the shadow of political-economic considerations reaches to the very heart of what happens in asylum appeals.

First we set out the reasons for the temporal pressures that acted over many of the hearings we observed. Then we explore the influence of these pressures on the form of the hearings, as well as the way that they influence individual actors such as judges and appellants. We then turn to an examination of the measures some judges, appellants and others took to 'slow down' hearings, before exploring the relationship between superficiality and speed in the conclusion.

Drivers of Speed

Popular discourse about asylum processing tends to get louder and shriller when 'backlogs' of applications build up, which increases the pressure that decision-makers are under to prepare for, consider and decide cases at faster and faster rates. One judge we spoke to in Berlin in 2018, when backlogs of asylum appeals were at record levels, complained vehemently about her workload. For every hearing, a judge must read the bundle for the case containing the government's submission and the appellant's submission, she explained,

10 As well as the European Court of Human Rights.

11 Mack, Kathy and Sharyn Roach Anleu (2007) 'Getting through the list': Judgecraft and legitimacy in the lower courts. *Social and Legal Studies* 16 (3): 341–361.

12 Moorhead, Richard and Dave Cowan (2007) Judgecraft: An introduction. *Social and Legal Studies* 16 (3): 315–320. Roach Anleu, Sharyn and Kathy Mack (2017) *Performing judicial authority in the lower courts*. London: Palgrave.

both of which can be very long. Then they must 'engage with the documents and evidence' which can mean calling doctors, liaising with institutions like the Central Foreigner/Aliens Department (ZAB)[13] and making their own investigations online. Due to shortages in clerical staff, judges will themselves sometimes have to type the transcript of the hearing – which they will then use to make and write out their decision.

> Then we have to revise the transcript, make a 'short decision'… and then write a thorough reasoning for the decision, which can be 20–50 pages depending on the case … And this doesn't even factor in the time we have to spend on familiarising ourselves with country of origin information, the basic geography of countries of origin, and some basic facts about them. Country of origin information is updated regularly, so we constantly have to read it again …[14]

Alongside this, judges must also read the leading decisions by higher courts, and sometimes also the EU courts. 'Reading – and understanding – these decisions takes an enormous amount of time,' the judge told us.

The extent to which clerical tasks occupy judges' time was underscored by a judge in Dresden who had worked in administrative law for more than 30 years and who felt that, while the numbers of hearings were often high, 'The real issue is the administrative tasks that have increased for us judges … the filing and transcribing … That's what holds everything up …'[15] Another judge described the impact that his caseload was having on his work–life balance: 'day and night – from 8am to 8pm – working, working, working,' he complained.[16]

Judges were not the only ones under time pressure at the time of our fieldwork. Various legal representatives commented on the reduced likelihood that they would be able to meet their clients in person before the hearings to prepare them and familiarise themselves with the case. 'There are so many hearings at the moment,' one lawyer told us in Berlin. 'I have no time at all for anything else – especially not for meeting with clients.'[17]

13 In comparison to BAMF, the Central Foreigner/Aliens Department [*Zentrale Ausländerbehörde*, ZAB] – in Berlin the Immigration Office [*Landesamt für Einwanderung*, LEA] – is responsible for asylum seekers and those who have received a form of protection to receive ID documents and access to benefits and services. They do not make decisions on asylum claims, and are mostly responsible for 'regular' immigration (e.g. issuing and renewing visas, etc.) and bureaucratic processes concerning immigration (such as issuing documents). However, these immigration departments are responsible for deportations to both the country of origin and other EU countries in Dublin-III cases (rather than BAMF).

14 Fieldnotes, Germany, 2018, Nicole Hoellerer.

15 Fieldnotes, Germany, 2018, Nicole Hoellerer.

16 Fieldnotes, Germany, 2018, Nicole Hoellerer.

17 Fieldnotes, Germany, 2018, Nicole Hoellerer.

Perhaps inevitably, the pervasive logic of speed in asylum appeals sometimes produces a sense of 'conveyor-belt' justice.[18] We heard descriptions of asylum appeals in Italy similar to the blistering pace of the Belgian hearings described above:

Lawyer: They used to ask [appellants] what is going on, what they have been doing in Italy. But recently they just ask you 'Do you confirm the story you said in the Commission?' and you respond, 'Yes'.
Interviewer: And that's it?
Lawyer: If you say, 'Yes', that's it. Normally they just take two minutes, maximum … This was not the case a few years ago. Normally they used to ask 'Are you working?', 'What have you been up to?'.
Interviewer: What's the reason for this change?
Lawyer: Let me say, from what I've got to understand there is a political reason. That is, there is a need to speed everything up, that is why. I think they no longer have time [to ask questions].[19]

While brevity was not ubiquitous,[20] a concern for promptness, efficiency and saving time were common among the field sites and hearings we visited, even those with longer hearings. At the time of our research, various policy changes that were either new or pending had the objective of 'streamlining' procedures. In Italy the removal of an entire level of appeal had been undertaken as a result of recent legislation.[21]

In the UK the focus was on saving judicial time by identifying opportunities to delegate a variety of tasks that took up time but did not necessarily require a judge. Newly conceived tribunal caseworkers undertook functions delegated by the judge in order to determine how best to advance caseloads and remove any barriers to effective and timely case progression, including making initial assessments on incoming cases.[22] In Italy, the involvement

18 See Burridge, Andrew and Nick Gill (2017) Conveyor-belt justice: Precarity, access to justice, and uneven geographies of legal aid in UK asylum appeals. *Antipode* 49 (1): 23–42.

19 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.

20 Indeed, although in general the Belgian hearings were quick in comparison to the other countries we observed, owing to the 'written procedure' law the judge mentioned, we did indeed see other judges in Belgium who were much slower than the brisk judge reported above.

21 This was part of the so-called *Minniti-Orlando Decree* (approved in 2017) that aimed to curtail illegal immigration (also see Chapter 2 'What are Asylum Appeals?'). For a critical discussion see Esposito, Francesca (2017) A critical look at the Italian immigration and asylum policy: Building 'walls of laws'. *Oxford Border Criminologies Blog*. Available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/07/critical-look [accessed 04 August 2022].

22 Tribunal Caseworker Job Description. Available at: https://justicejobs.tal.net/vx/mobile-0/appcentre-1/brand-2/candidate/so/pm/1/pl/3/opp/39887-39887-Tribunal-Caseworker/en-GB [accessed 07 April 2021]. This job description states that 'the tribunal caseworker will undertake initial assessments on a range of incoming tribunals work, including case files,

of 'honorary judges' caused considerable concern among our interviewees. Honorary judges draft decisions that professional judges oversee, and they can also help with conducting hearings. Their pay is inferior to professional judges though, and they have less demanding entry criteria.[23] There were also rumours among our respondents that honorary judges were paid according to the number of hearings or cases they oversaw,[24] which produced an incentive to draft decisions hastily.[25]

In France, a number of new measures introduced around the time of our field work aimed to compress the asylum process in the face of increasing asylum applications and appeals[26] , including reduced time limits on initial asylum applications and applications for legal aid.[27] Reforms introduced in 2015 meant that, instead of being heard by a panel of three decision-makers within five months of registration, appeals might instead be heard by a single judge within five weeks. The reforms also increased the possibilities for decisions taken by '*ordonnance*' – that is, by a single judge with no hearing but via written submission alone.[28]

Impact of the Imperative for Speed on the Hearings

Hearing days were scheduled meticulously from the perspective of the courts. In the UK, judges were expected to hear six 'points' worth' of cases in a day. Asylum cases were usually worth three points, implying that two substantial asylum cases would be heard a day. In France, hearings were based on 40-minute time slots for each matter, grouped into three sessions throughout the day. This tight schedule of cases was doubtlessly on judges' minds throughout the

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applications and correspondence in order to establish the level of authority and expertise needed to address the case and determine the most effective route for case progression. Working to delegated judicial functions and working to directions from the judiciary, the tribunal caseworker will provide ongoing and proactive management of caseloads, identifying any barriers or risks to effective case progression and developing interventions or actions to resolve these, liaising with a range of stakeholders and the public'.

23 As one judge we interviewed admitted, these factors combined are 'not an incentive to make the best ones apply' (interview, judge, Italy, 2019, Lorenzo Vianelli).

24 'They were paid by hearing' (interview, immigration lawyer, Italy, 2019, Lorenzo Vianelli).

25 'They're not paid much' one lawyer told us. 'about EUR 90 during the morning hearing, and another EUR 90 if they had an afternoon hearing. So you can imagine how [decisions are] drawn up … They basically copy and paste' (interview, legal representative, Italy, 2019, Lorenzo Vianelli).

26 See Hambly, Jessica and Nick Gill (2020) Law and speed: Asylum appeals and the techniques and consequences of legal quickening. *Journal of Law and Society* 47 (1): 3–28.

27 Appeals are non-suspensive for some cases under accelerated procedures.

28 The number of decisions taken under the regular procedure by a judicial panel reduced to under 50%, with around a third of decisions taken by *ordonnance* in 2017. Some form of protection was awarded in around 28% of panel decisions, but only 17% of decisions taken by a single judge in the same year. Almost all decisions taken by *ordonnance* were refusals. See Hambly and Gill, 2020.

day of hearings. During the morning, panels would often discuss their workloads and upcoming cases. Working days at the CNDA had a 7pm finish time when the building would be closed,[29] and so every complication and delay drew the judges closer to this deadline.

In Germany, scheduling depended on the country of origin, as some judges told us. Whilst cases concerning Afghan, Iranian and Iraqi appellants were often scheduled to last longer, due to their complexity (according to the judges we spoke to), cases concerning Nigerian appellants were scheduled in shorter timeslots, sometimes only allocating 15 minutes to each case.

Adjournments represent a cost to court processes because the effort and resources required to assemble the participants in one place and time (see Chapter 6, 'Assembling Appeals') go to waste. In the UK the propensity for granting adjournment requests varied markedly between hearing centres.[30] One lawyer said that you would have to be 'bleeding from the eyes' to be granted an adjournment request by one British court.[31] Refusing adjournment requests was seen as a necessary part of efficiency and 'discipline' there.[32] When one request for an adjournment was put to a judge, he jokingly exploded, 'An adjournment? At [this court]?! It's against the law isn't it?!'[33]

Adjournments were generally even rarer in Germany during our observations. As a typical illustration of the judicial attitude, when one legal representative asked for an adjournment because the appellant had not arrived, they were roundly dismissed by the judge. 'There is no reason for an adjournment,' the judge explained, 'the summons was duly done, and the appellant has not been excused. It's your responsibility to get hold of him and, if you can't, you should have made an adjournment request before the hearing today.'[34] In another case in Dresden, a legal representative interrupted the case before his to say that he needed to leave at 3pm and to ask if he could adjourn the hearing (it was already the afternoon). The judge answered in a serious tone:

Judge: No. You can show me a summons for a different case, if you have one … Otherwise, as you well know, per law there is no other reason that would

29 Fieldnotes, France, 2018, Jessica Hambly.

30 The likelihood of the judge granting an in-session adjournment request differed between the three hearing centres where we did most of our observations: 81.8% were granted at the London court, 66.7% were granted at the non-London urban court and just 17.6% were granted at the non-urban court, producing a statistically highly significant difference between them (result significant at the 0.1% level, p value <0.0001). See Gill, Nick, Rebecca Rotter, Andrew Burridge and Jennifer Allsopp (2018) The limits of procedural discretion: Unequal treatment and vulnerability in Britain's asylum appeals. *Social and Legal Studies* 27 (1): 49–78.

31 Fieldnotes, UK, 2014, Andrew Burridge.

32 It is 'exceptional in the extreme for adjournments to be granted in this jurisdiction' one judge said during a hearing (fieldnotes, UK, 2013, Melanie Griffiths).

33 Fieldnotes, UK, 2013, Melanie Griffiths.

34 Fieldnotes, Germany, 2018, Nicole Hoellerer.

oblige the court to adjourn … As you know with these appointments, you always have to factor in and consider delays, and prepare for them.

Field notes: The legal representative looks very angry, and storms out of the door, slamming it behind him. Judge looks nonplussed and starts the hearing.[35]

Feelings often ran high with regard to adjournments. In one hearing in Berlin it became clear that a case would have to be adjourned to a later date because the judge was so far behind on his schedule for that day. 'Could you give me a call tomorrow? Probably towards the end of the working day, so we can discuss a new appointment?' the judge asked. 'But it would probably only be the end of May' (the hearing was originally scheduled for early April).

> The legal representative sighs audibly, and mutters 'But that's a really long waiting time again, and the appellant deserves clarity on his status. This is very inconvenient.' The judge responds in a very annoyed tone: 'Well, *I am sorry*. But I have to attend to various legal tasks, and all of the other appellants want appointments too.'[36]

In another case the legal representative suddenly and without warning threw down her pen in the middle of the hearing. 'I really have to ask you to tell me *now*, how long this is still going to take' (her emphasis). The judge responds that he does not know yet, and smiles.

> All of a sudden, the legal representative just gets up, and unbuttons her robe. She starts shouting that she needs a break *now*, because she has to organise a babysitter to pick up her child from the day-care-centre. She picks up her mobile, and yells at the judge that she wants an adjournment, and that he 'has no respect'. She shouts again that she needs a break, but doesn't even wait for the judge to respond, and just storms out of the door, throwing the door shut behind her. The judge looks bewildered, and everyone else looks embarrassed. I look at the other visitor, who looks at me with raised eyebrows and shrugs. The appellant just looks around the room, and I have a feeling he doesn't know what's going on at all. I have a feeling like the room just exploded, and now the atmosphere is heavy and strange.[37]

Later the judge and the legal representative reach a reconciliation of sorts (the judge apologises that he did not realise she needed to arrange childcare and explains that she should have mentioned this before), but the event illustrates

35 Fieldnotes, Germany, 2018, Nicole Hoellerer.
36 Fieldnotes, Germany, 2018, Nicole Hoellerer.
37 Fieldnotes, Germany, 2018, Nicole Hoellerer.

two things. First, time pressure can build up throughout the day in a gradual manner under the surface, and only show itself in explosive or disruptive ways. Of the cases in Germany during which we completed the survey, 42% started late, with an average delay of 28 minutes, most commonly due to previous cases overrunning. Second, the time pressure that gave rise to the legal representative's outburst can be a complete surprise to the appellant[38] and may have little to do with the substance of the asylum case. The temporal dynamics of hearings may well be outside the purview of the appellant, who is only present for one case and is therefore not in a good position to appreciate and understand scheduling pressures.

Judges too could become intensely stressed and frustrated:

> 11:35am. We are now over time for the next case, which was due to begin at 11:30, the door opens, and the judge looks really annoyed. He says loudly and sternly: 'It's not the turn of [the next appellant] yet' – someone at the door says something I cannot hear – judge replies even more annoyed 'No, not now!', and the door closes.[39]

Even if they kept their tempers, judges could become anxious and agitated when hearings ran on, regularly looking at their watches or the clock on the wall, and we saw innumerable judges giving their apologies and making excuses for the lateness of cases in the afternoons.

In extreme cases judges appeared positively subordinate to temporal concerns. In one case in Munich the hearings were delayed but the interpreter had a commitment at another court.

Interpreter: I really have to leave.
Judge (with a frown and in a desperate, pleading voice): No, please, you can't do that to me! … Is there any way to [postpone the other appointment]?[40]

Temporal power, it seems, can exceed and constrain judicial power within the court space.

Experiences and Consequences of Pace

Even the layout of some courts was calibrated to ensure a smooth and rapid throughput of cases. On an average day, approximately 700 people pass through the doors of the CNDA, for example.[41] Courtrooms, waiting rooms,

38 It was fortunate that the appellant had both an interpreter willing to explain what was happening as well as a supporter with him in the hearing.

39 Fieldnotes, Germany, 2018, Nicole Hoellerer.

40 Fieldnotes, Germany, 2018, Nicole Hoellerer.

41 CNDA (2017) *Cour Nationale du Droit d'Asile: Rapport d'Activité 2017*. Available in French at: http://www.cnda.fr/rapport-annuel-2017/index.html [accessed 04 August 2022].

staircases and back offices are therefore arranged to funnel people and cases through the building. Appellants are not allowed to stand or linger in corridors, on staircases or in the other spaces for the public except the designated waiting areas.[42] CCTV surveillance and security personnel within the building ensure that movement is policed and maintained.

Within the hearings themselves, one occasional consequence of dealing with a succession of quick-fire cases was judicial confusion between cases. We saw numerous judges in France and elsewhere become muddled. Usually these were only minor mistakes and fairly inconsequential, such as stating the wrong country of origin of the appellant for the court record only to be politely corrected by the appellant. These instances could be embarrassing for judges, though. One judge pointedly asked the appellant why he had told the Federal Office for Migration and Refugees (BAMF) about a conflict with the ex-brother-in-law of his wife but had not spoken about it during the hearing. This was followed by an awkward silence.

> The interpreter then asks if the judge can clarify the question. The judge reiterates that it's about the 'brother of his wife's first (now deceased) husband'. The appellant looks confused and says that his wife never had another husband. The judge looks at the bundle and begins to go red in the face. He grins 'You are right, of course! I'm completely wrong [laughs, embarrassed]! My sincerest apologies, this refers to another case – it doesn't happen often, but it does happen. Please just forget about it …' The legal representative and the interpreter both laugh – the judge shrugs and grins again. The legal representative says something to the appellant in their native language and the appellant smiles, looking relieved.[43]

Even if the confusion is easily ironed out, the effect can be to remind the appellant that they are one of a multitude. Some judges asked the appellant which of the cases that day corresponded to them: 'Was it you with the federal volunteer service?' one judge asked. When the appellant looked confused the judged laughed: 'Ah no, not you!'[44] We saw the same technique of using 'defining features' of people to identify cases in the CNDA. In one instance a rapporteur seemed to lose herself when reading the report, becoming unsure if it was the right case she was presenting. 'This one does the music,' the appellant's lawyer interjected.[45]

What is more, there were instances when the confusion between cases could have been more serious. Sometimes judges seemed to forget their introductory

42 Partly to keep noise levels low.
43 Fieldnotes, Germany, 2018, Nicole Hoellerer.
44 Fieldnotes, Germany, 2018, Nicole Hoellerer.
45 Fieldnotes, France, 2018, Jessica Hambly.

comments, for example. During a run of cases at the CNDA, Jessica noted that 'The president gives the same explanation, although not in the last case, case 5, I don't know why'.[46]

We also sometimes wondered if judges adopted a comparative approach to the hearings in their schedule. Rebecca wrote:

> Does the immigration judge perceive an asylum case with 'fresh' eyes when the other cases for that day are similar? When two asylum hearings with the same substantive issues are heard in one day, is the judge likely to (implicitly) compare and contrast the appellants and their claims? I often see two Sri Lankan Tamil cases … in a row and, as an observer, find myself contrasting the two.[47]

The time pressure also meant that judges sometimes got frustrated when hearings slowed down. 'I kindly ask you not to give us a lecture for five hours,' one judge said to an expert witness in Düsseldorf. 'I have a few more cases today, amongst them quite extensive conversion cases. Of course you can talk, but just a little bit more concisely.'[48] Also in Düsseldorf, another judge became frustrated at the attempts of the appellant and their legal representative to recover a case that the judge thought to be irredeemable. 'Once the outstanding cases are in the six-digit range [meaning over 99,999],' the judge explained to the legal representative with a stern tone and a serious facial expression, 'we can't take seven hours for each case … It is simply impossible!'[49]

Sometimes the impatience of judges came across as indifference. In Paris, one appellant who used to work for emergency services recounted a traumatic experience of recovering burned bodies from fire-damaged houses. At the end of the hearing the appellant asked if he could add something.

46 Fieldnotes, France, 2018, Jessica Hambly.

47 Fieldnotes, UK, 2014, Rebecca Rotter.

48 Fieldnotes, Germany, 2019, Nicole Hoellerer.

49 Fieldnotes, Germany, 2019, Nicole Hoellerer. Pending cases (at German administrative courts): by 31 December 2017: 372,443; by 31 December 2018: 312,577; by 31 December 2019: 254,044. 2017 data from http://dipbt.bundestag.de/dip21/btd/19/013/1901371.pdf; 2018 data from https://dip21.bundestag.de/dip21/btd/19/087/1908701.pdf; 2019 data from http://dip21.bundestag.de/dip21/btd/19/184/1918498.pdf [accessed 16 August 2021].

Fieldnotes: The President says 'yes', but looks bored, like he wants to get on.
Appellant: In all my career, the authorities never took care of us. I never, ever saw a psychologist.
President: Noted.
Fieldnotes: This seems like a cold response.[50]

When faced with a progression of harrowing cases, it becomes possible to see trauma as nothing new.[51] 'Everybody who appears in this tribunal has PTSD[52],' one immigration barrister in the UK told us. 'It's almost as though [trauma has] lost any ability to have an impact on the judge because they think that's the norm.'[53]

Abruptness

Hearings also often finished extremely abruptly, perhaps due to impatience and perhaps due to the unwillingness of judges to get involved in issues over which they had no control. In one case in Munich, the hearing was coming to an end when the appellant said that she wanted to add something. The interpreter translated that the appellant did not want to be sent back, that she was illiterate, that she never went to school and that she did not want the same to happen to her children. As she was speaking the lawyer was taking off his robe. When she had finished, the plea was ignored by everyone – the judge simply got up and left to an adjoining room. Eventually the appellant was left alone, her words hanging in the air.[54]

Often appellants were extremely unhappy in these situations, having saved points for the end of the hearing (these may not have been relevant to the asylum claim but were important to the appellants). It was not unusual for appellants to try to continue to talk when hearings were finished, and for

50 Fieldnotes, France, 2018, Jessica Hambly.

51 Compassion fatigue due to increasing workload and long working hours is linked to occupational burnout and secondary traumatic stress (STS), leading to a 'decreased sense of personal and/or professional accomplishment' emotional exhaustion, and depersonalization (e.g. distancing oneself from the job, cynicism and loss of compassion) all of which can potentially affect the outcome for applicants whose fates rest in judges' hands' (Lustig, Stuart L, Niranijan Karnik, Kevin Delucchi, and Lakshika Tennakoon (2008) Inside the judges' chambers: Narrative responses from the national association of immigration judges stress and burnout survey. *Georgetown Immigration Law Journal* 23 (1): 57–84.). Other negative symptoms may include avoidance behaviours, and occupational disinterest, as well as emotional exhaustion, cynicism, depersonalisation, reduced personal accomplishment and numbing (Miller, Monica K and James T Richardson (2006) A model of causes and effects of judicial stress. *Judges' Journal* 45 (4): 20–23. Jaffe, Peter G, Claire V Crooks, Billie Lee Dunford-Jackson and Judge Michael Town (2003) Vicarious trauma in judges: The personal challenge of dispensing justice. *Juvenile and Family Court Journal* 54 (4): 1–9.).

52 Post-Traumatic Stress Disorder

53 Interview, barrister, UK, 2014, Andrew Burridge.

54 Fieldnotes, Germany, 2018, Nicole Hoellerer.

judges to cut them off mid-sentence. In one instance, in Augsburg, the judge announced the end of the hearing, but

> the appellant seems angry and keeps talking. The interpreter just shrugs, takes their paper and approaches the judge's desk to sign.[55] The judge signs it, gets the bundle, says goodbye to me with a smile, and leaves the room. The appellant storms out of the room, very angry.[56]

Various appellants were surprised by the brevity of their hearings. One Italian lawyer explained that he often saw his clients

> dress up neatly. They take all the emotions, because they hope that they are going to give it another shot. But we just go there, and after just two minutes they are told to go out. They say 'is that all, are we done?' At the end of the day, they feel deflated.[57]

During another hearing in France, which concerned a claim for asylum due to the risk of persecution on the ground of political belief, the appellant was told by one of the judges that 'he needs to be fast and precise'. His whole hearing was 29 minutes long, but on the way out Jessica noticed that

> he is having a conversation with the lawyer and the interpreter. He looks really worried and is saying 'I should have said this … they locked me in a room'. They are also talking about an appointment with a psychologist. None of this was mentioned in the hearing.[58]

It was difficult for some judges to find the right balance between firmly closing hearings when there was no point continuing them and demonstrating respect. At the end of one hearing in Düsseldorf:

> The judge closes the bundle, puts it to one side, and gets the next bundle from the stack of bundles next to him. The appellant seems confused, and the interpreter says something to him. The appellant gets up, says 'Thank you', and leaves. The judge ignores him.[59]

In another instance the judge was keen to end the hearing, saying 'let's come to the proposals'. Nicole's notes, however, record that the appellant was very emotional at that point and that her lawyer asked her via the interpreter if she

55 This is a routine process that allows interpreters to be paid.
56 Fieldnotes, Germany, 2018, Nicole Hoellerer.
57 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.
58 Fieldnotes, France, 2018, Jessica Hambly.
59 Fieldnotes, Germany, 2019, Nicole Hoellerer.

needed a break. ‘But before the appellant can even respond the judge makes a dismissive hand gesture: “we only have to do the proposals now anyway”’.[60]

Judges were sometimes inflexible about their timings. When a German case had been delayed, one legal representative asked if their case could be finished by 3pm because her daughter was sick and she had a doctor’s appointment for her. ‘No,’ the judge replied. ‘I want to conclude this today.’[61] Some judges would also mention the time pressures they were under, thereby ensuring that the pressure they felt was shared with everyone. ‘Please! A yes or no is enough!’ one judge in Munich exclaimed. ‘We have to shorten these a little bit now, as we are far beyond time [judge points at the clock].’[62]

Sometimes judges employed sarcasm to express their frustration at the slowness of proceedings. ‘You can talk for two hours if you want to,’ one judge suggested after the lawyer for the appellant pleaded for an extra few minutes to cover his remaining points.[63] ‘We can sit here until 4pm to debate this ridiculousness, although I still have five more things to hear today,’ another judge exclaimed when an appellant tried to introduce a new line of argument late in the hearing.[64]

In Italy, there was concern amongst legal representatives that the brevity of hearings could lead to superficial forms of questioning. ‘I remember that the judge, at a certain stage, asked the appellant the name of the religious group he was persecuted by,’ one lawyer recalled,

> and he said it, full stop, the end. She didn’t ask which group that was, what were the specifics. I mean, it looks to me like it is impossible to give one’s questions logical coherence with respect to the story without asking more.[65]

One time-saving tactic that was specific to Germany concerned judges who encouraged appellants to withdraw their cases if they thought there was no chance of success.[66] If appellants withdraw, then judges would not have to write out a decision, and it could also save time in the hearing itself. Some judges we observed outlined how unlikely the case was to succeed at the start of their hearings, suggesting that a withdrawal would be a logical option and occasionally appellants reacted angrily to the suggestion:

60 Fieldnotes, Germany, 2019, Nicole Hoellerer.
61 Fieldnotes, Germany, 2018, Nicole Hoellerer.
62 Fieldnotes, Germany, 2018, Nicole Hoellerer.
63 Fieldnotes, Germany, 2019, Nicole Hoellerer.
64 Fieldnotes, Germany, 2019, Nicole Hoellerer.
65 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.
66 E.g. ‘a withdrawal may be advisable … Because your case has no chance of success’ (fieldnotes, Germany, 2018, Nicole Hoellerer); ‘your case will not be successful … So you may consider withdrawing’ (fieldnotes, Germany, 2018, Nicole Hoellerer).

Judge: Now, do you want to withdraw, or do you want a verdict?
Fieldnotes: The appellant bangs their fist on table, and says via the interpreter that she wants a verdict.[67]

Judges could also become frustrated, however, when their suggestions were refused:

Judge: I advise you to withdraw your case because you have subsidiary protection, and can stay in Germany anyway … the only thing that would happen today is that you would get in writing that you are not entitled to refugee protection.
Appellant via interpreter (very agitated): No, I won't withdraw the case!
Judge (sighing and frowning): But there won't be anything in it for you that I haven't told you already.[68]

Time pressures could also influence the form that interaction took within hearings. Sometimes judges were so keen to move hearings along that their speech became extremely rapid. 'The judge seems impatient now', Nicole noted in one case in Berlin, 'asking questions very fast, sometimes interrupting the appellant'.[69] When speech became fast, then interpreters were also affected. Interpreters are pivotal figures in many asylum hearings, as we discuss in Chapter 8 ('Barriers to Communication'), but their role often became squeezed and distorted when time was short. In some cases in France, judges specifically directed interpreters to interpret 'not the general contextual bits, but just the pertinent elements', just the 'conclusions'.[70] In other cases, judges who were in a hurry did not allow interpreters to interpret the whole of appellants' responses before asking their next question, which could be seen as a breach of the right to be heard.[71] One judge we observed in Dresden, who neither took notes nor recorded the testimony with a dictaphone (which is extraordinary in Germany) interrupted the interpreter throughout the hearing, not even listening to the appellant's response to her questions. This led to the judge misunderstanding several responses which had to be corrected, producing a lot of confusion for the appellant, and even frustrating the interpreter,

67 Fieldnotes, Germany, 2018, Nicole Hoellerer.
68 Fieldnotes, Germany, 2018, Nicole Hoellerer.
69 Fieldnotes, Germany, 2018, Nicole Hoellerer.
70 Fieldnotes, France, 2018, Jessica Hambly. This is not permitted in Germany, where interpreters are required to interpret everything, word-by-word, with judges usually insisting on hearing everything the appellant has said.
71 E.g. 'the judge interrupts again and again', Nicole noted in one instance in Dresden (fieldnotes, Germany, 2018, Nicole Hoellerer). In our German sample, we recorded judges interrupting interpreters before they had finished interpreting what appellants had said at least once in 32% of cases we observed. Interestingly, judges interrupted female interpreters less frequently than male ones.

who at one point stated politely but robustly: 'Well, will you let me finish interpreting what he just said,' to which the judge replied: 'No, I have everything I need already.'[72]

Occasionally interpreters would stop judges to ask for time to catch up, but this came with its own risks. In one case, an interpreter interrupted the judge several times, asking him to wait so that he could catch up, but at one point the judge looked very annoyed, put his dictaphone down (he was making the recording of the case at the time), and folded his hands in front of his mouth, looking impatient whilst the interpreter caught up with the interpretation for the appellant.[73]

When hearings were rapid, participants who were familiar with proceedings often also took less time to explain what was happening to appellants. Rebecca reflected on this in terms of the lack of 'cues' that distinguish the various temporal segments of hearings:

> Unlike many ritualised/institutional settings in which there are verbal, physical or other cues to mark the beginning and end of an event, the marking of segments of time in asylum hearings can be limited … The clerk's knock on the door may herald the start of a hearing in the sense that the judge has arrived, but often this means little more than that more discussions can begin. When hearings finish I have seen appellants left sitting at the back of the room, with no one telling them what has happened, and the judge shifting seamlessly into the next appellant's substantive hearing by instructing them to take a seat. Sometimes discussions between the legal parties morph into the hearing itself – particularly when the judge forgets or skips the introduction. I wonder whether this lack of cues puts the appellant at ease, or whether it might confuse or perhaps even alienate them.[74]

Slowing Down

Both legal representatives and appellants frequently felt that it was productive to slow down hearings at certain times. 'You don't do it well if you are doing something in a rush,' one Italian lawyer explained,

> You need to take time. The judges in [one Tribunal in Italy] treat every person as a number. They are not numbers, they are people and each person is different from the other. If you are speeding, you don't see the person who is in front of you, you just see the number … If you speed up you can miss the quality. I'm not saying that you need to take the

72 Fieldnotes, Germany, 2018, Nicole Hoellerer.
73 Fieldnotes, Germany, 2018, Nicole Hoellerer.
74 Fieldnotes, UK, 2014, Rebecca Rotter.

> whole day in assessing only one person, but at least you need to take a few minutes to talk to the person who is in front of you.[75]

There were various ways the temporal regimes of court-space times were challenged and contested, ranging from micro practices within hearings to larger-scale interventions. Lawyers as well as appellants occasionally asked judges to slow down, for instance. Lawyers are in a subordinate position to the judge in many respects as their professional success depends upon winning the judge around to their point of view. Nevertheless, legal representatives for the appellant would often take considerable time and care over their submissions. In the CNDA, the climax of cases usually occurred near the end when the legal representative took the floor to deliver their final submissions. Many legal representatives used elaborate speech and ebullient body language such as hand flourishes and frequent changes in intonation and volume. We interpreted these techniques as attempts to punctuate the legal process: to lay down markers in order to distinguish the case and the argument from whatever had gone before.

Sometimes lawyers' determination to slow down hearings became even more explicit. In one French case the President interrupted the lawyer to say, 'I think the court has understood.' The lawyer, however, objected: 'I know you want to get on, but there are certain things I need to cover. I understand your working conditions – but these are important things if there are any doubts over religious persecution.'[76]

At other times, appellants themselves slowed hearings down. One appellant in Munich insisted on having the recording played back to him multiple times before he approved it, despite the frowns and sighs of the judge.[77]

In general, although rare, we noticed that appellants who took notes could engender a more hesitant hearing, by cross-checking the meanings of technical words and correcting inaccurate official record-taking. At appellants' request, interpreters occasionally drew diagrams and chronological timelines for appellants which also seemed to help visualise the key aspects of the case.[78]

Larger-scale interventions included strike action by lawyers and court workers in protest at the passage of the 2018 French law for 'controlled immigration, an effective right to asylum, and successful integration'.[79] The strike brought the CNDA to a virtual standstill. Judges, academics and others voiced their concerns at what they saw as an ever-quicker, slicker, more efficient process aimed at deterring asylum claims and tightening up the expulsion regime

75 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.
76 Fieldnotes, France, 2018, Jessica Hambly.
77 Fieldnotes, Germany, 2018, Nicole Hoellerer.
78 Fieldnotes, Germany, 2018, Nicole Hoellerer.
79 '*Une immigration maîtrisée, un droit d'asile effectif, et une intégration réussie*'

Figure 7.1 Strike at the CNDA, 2018 (image by Jessica Hambly). The image is a mock funeral held by protestors mourning the death of asylum in France.

(see Figure 7.1). When Jessica first visited the CNDA during the strikes, more than half of the rooms were empty and there were notices on the walls of the court bearing strike slogans and statistics.

Similarly, in April 2018, Austrian judges (from all areas of law) staged a protest against budget cuts: the Austrian government at the time planned to cut 200 judicial posts over several years, and severely reduce the budget for courts across Austria. This would have led to an increase in workload for the remaining judges, and further severe delays with working through outstanding cases in all areas of law. Although the proposal was ultimately unsuccessful,[80] the way that speed and delay featured in the campaign was illustrative of how

80 Also see https://mein.aufstehn.at/petitions/rettet-die-justiz, https://www.oe24.at/oesterreich/politik/budgetstreit-eskaliert-richter-stehen-vor-streik/329628185, https://richtervereinigung.at/wp-content/uploads/delightful-downloads/2018/04/2018_Justizbudget_Budgetausschuss_b04042018.pdf [accessed 19 April 2021].

important they were felt to be, and how closely related to the financing of law they are. One poster read: 'Not like this! More than 155,000 asylum applications since 2015, + [plus] over 75% appeals against negative asylum decisions, – [minus] 120 employees at the Federal Administrative Court, = [equals] many years of proceedings'.

In September 2019, court interpreters in Austria staged a 'day of action' [*Aktionstag*] as part of much larger actions against cuts in the justice system in Austria, under the heading: 'Save justice! If someone demands the rule of law, they also have to finance it' [*Rettet die Justiz! Wer Rechtsstaat sagt, muss ihn auch finanzieren*]. Court interpreters argued that not only are they badly paid, but there are also not enough court interpreters, with a severe lack of young interpreters joining courts. Indeed, reports suggested that the average age for court interpreters was 60.[81]

Patience

We also observed numerous judges being exceptionally patient and considerate towards appellants, such as speaking very slowly and clearly when there was no interpreter, setting out the facts of the case in a lot of detail to set the scene for the appellant and stopping themselves when they interrupted ('I'm sorry,' one judge in Berlin said, 'that was a rude interruption'[82]). One judge at the CNDA asked the rapporteur to slow down their report, which Jessica noted with surprise in her field notes.[83] In other instances, judges asked the interpreter to slow down the pace of the dialogue.[84] One legal representative in Berlin complemented a judge who had allowed the appellant to speak freely for over five minutes: 'I must say, you have really made an effort to hear the appellant again … In Düsseldorf some hearings only take 15 minutes, as if the judge already made their decision beforehand … but you really took your time. Thank you for that.'[85]

When appellants indicated that they had more to say, some judges would invite them to speak. 'It's a very long story,' one appellant said in Berlin. 'Well, go ahead then. Tell us,' the judge responded calmly.[86] 'Was that everything?' another judge in Berlin asked.

81 See https://www.gerichtsdolmetscher.at/Aktulles, https://orf.at/stories/3130455/, https://tirol.orf.at/stories/3013186/. Freedom of information request concerning court interpreters: https://www.parlament.gv.at/PAKT/VHG/XXVI/J/J_02863/fname_737758.pdf [accessed 19 April 2021].

82 Fieldnotes, Germany, 2018, Nicole Hoellerer.

83 Fieldnotes, France, 2018, Jessica Hambly.

84 Often because they were writing notes, e.g. 'The judge interrupts the interpreter in between with a smile: "Wait! I can't write that fast"' (fieldnotes, Germany, 2018, Nicole Hoellerer).

85 Fieldnotes, Germany, 2018, Nicole Hoellerer.

86 Fieldnotes, Germany, 2018, Nicole Hoellerer.

Appellant (via interpreter): There would be so much more to say.
Judge: Then tell me everything you want to say, as long as it concerns you personally.[87]

It was possible, in fact, for hearings to proceed excruciatingly slowly, highlighting the difficult balance that even the most conscientious judges must strike between over-rapidity and unhelpful gradualism. In one instance, an appellant spoke freely for 20 minutes, until eventually his own lawyer told him, via the interpreter, to shorten his response.[88]

There is a risk that a glacial pace of hearings can impact upon the concentration of appellants, legal representatives and judges alike (we discuss the struggle for judge's concentration in more detail in Chapter 8, 'Barriers to Communication'). It was common to observe the hallmarks of fatigue among judges towards the end of hearing days, including slouching, cupping their heads in their hands, rubbing their eyes, yawning and staring out of the window or into the middle distance. Our researchers were not exempt from the psychological effects of ponderousness, recording how they sometimes found it difficult to pay attention and follow cases, especially towards the end of long hearing days.[89] Long hearings were physically demanding too. Hearing rooms were often hot and stuffy and, besides the usual provision of water, no food and drink were allowed. One lawyer in the UK even complained that some judges who held long hearings did so because they have not read the case papers and were using the appeal hearing as a shortcut to learning about the appellant's case.[90]

Effective time management was not about drawing hearings out, then, but exercising responsible judgement in context in ways that promoted the full engagement of all the participants. In this vein we saw numerous judges being considerate in terms of time pressures. 'Health is the most important thing,' one judge who was hearing an appellant with mental health difficulties said. 'If it is all too much, let me know, and we can stop, and take a break.'[91] Other judges demonstrated sensible flexibility – getting the formalities of the hearing out of the way before the official start time of the hearing if everyone was already present, for example. We were particularly struck by judges who seemed resilient to the temporal pressures in the interests of a fair process. In one case, a judge was running substantially behind schedule but, after discussing the delay, reiterated to the appellant in the court room that 'everybody gets the time they need, and so do you. So don't feel rushed just because of

87 Fieldnotes, Germany, 2018, Nicole Hoellerer. 'I really admire the judge's determination for the right to be heard', Nicole noted.
88 Fieldnotes, Germany, 2018, Nicole Hoellerer.
89 Fieldnotes, Germany, 2018, Nicole Hoellerer.
90 Interview, legal representative, UK, 2014, Rebecca Rotter.
91 Fieldnotes, Germany, 2019, Nicole Hoellerer.

the delay.'[92] In a different case, a judge who was also running late was nevertheless keen for the interpreter to have a rest: 'I think you need a five minute break after this. I know we are late but I insist on it.'[93]

Some judges used breaks to diffuse the tension when appellants or lawyers got emotional.[94] 'Do you want to breathe deeply and try again after a break?' one judge suggested to a lawyer who had begun to shout in exasperation. The lawyer nodded, got up, took off his robe and flung it into the chair next to him before leaving the room, but came back a few minutes later with a much calmer disposition.[95]

We noticed various judges seemingly using pauses as an opportunity for themselves and others to reflect and psychologically regroup. There is evidence from mindfulness research that pausing conversations can help to redirect attention away from the problematic aspects of social interactional dynamics towards more collaborative ways forward.[96] Judges initiated pauses for a host of reasons during the hearings, such as to read documentation and consider the previous response as well as their next question. Silences too were multifaceted.[97] Although they were hard to interpret with certainty, occasionally we felt that judges paused the conversation in order to defuse tense situations and refocus hearings.

Other judges seemed considerate about keeping waiting parties informed about delays and when they could expect their cases to begin, as well as providing detailed explanations about why certain things were done and why there were delays or breaks in proceedings. We heard about some judges in the UK who gathered the parties at the start of the day for a short conference in order to consider the best order of cases, taking into account who had not yet arrived, who was waiting for information or documents, who had problems with their interpreter, who had strong reasons to leave early such as a sick child, and who had particular physical or mental health needs.[98]

92 Fieldnotes, Germany, 2018, Nicole Hoellerer.

93 Fieldnotes, Germany, 2018, Nicole Hoellerer.

94 Breaks were common in Germany, for example, where breaks occurred in 29% of the cases we observed (most common in Berlin where breaks happened in 51% of the cases we observed there).

95 Fieldnotes, Germany, 2018, Nicole Hoellerer.

96 McIntyre, Alice (2018) Purposeful pausing: Integrating a mindfulness practice into the student teaching experience. *Teacher Education and Practice* 31 (1): 30–44.

97 For discussion on this topic see Johnson, Toni AM (2011) On silence, sexuality and skeletons: Reconceptualizing narrative in asylum hearings. *Social and Legal Studies* 20 (1): 57–78. Baillot, Helen, Sharon Cowan and Vanessa E Munro (2012) 'Hearing the right gaps': Enabling and responding to disclosures of sexual violence within the UK asylum process. *Social and Legal Studies* 21 (3): 269–296. Johannesson, Livia (2022) Silence and voice in oral hearings: Spatial, temporal, and relational conditions for communication in asylum and compulsory care hearings. *Social and Legal Studies*, 32 (3): 399–419.

98 Interview, legal representative, UK, 2014, Andrew Burridge.

Conclusion

In this chapter we have explored the pressure towards speediness in asylum appeal hearings as well as some of the micro-struggles against that pressure. Considering a matter in only a cursory way might mean relying on surface appearances rather than digging deeper into the issues at hand. It could involve relying on rules of thumb, or heuristics, to simplify complex decision-making.[99] It might mean asking only a few quick questions rather than drilling into the topic in detail, or taking apparent contradictions in appellants' accounts at face value rather than taking the time to develop an understanding of what has given rise to them.

One can point to various causes of haste in the hearings: the increasing number of appeals to be determined; the moral panic about refugee crises and the cost of dealing with them;[100] the political situation in many European countries that made governments feel unable or unwilling to increase the resources available to legal systems in the mid to late 2010s and drove them instead to attempt to streamline them in various ways; and the particular location of decision-making on asylum appeals in lower, often administrative court structures that were typically designed with efficiency in mind.[101]

As we have demonstrated, the effects of this quantitative pressure in Europe's asylum appeal processes are various and significant. We developed concerns that not all the appellants we saw were able to effectively impart important aspects of their cases in the time available, especially when part of the way that many appellants communicate their stories relies upon the generation of a narrative which takes time to build.[102] Additionally, we detected disappointment in the legal process among some appellants owing to its brevity. Judges are not practically able to allow appeal hearings to continue indefinitely, and doing so could be counterproductive. But the weight of our observations points strongly in the opposite direction: towards a range of missed opportunities to effectively manage time in appeal hearings so as to make the hearings meaningful and satisfying for the parties involved. To the extent that positive perceptions of fairness are an important outcome of legal processes,[103] this dissatisfaction should be seen as legally significant.

99 See Bone, Robert G. (2007) Who decides – A critical look at procedural discretion. *Cardozo Law Review* 28 (5): 1961–2024 for a discussion.

100 See Gill, Nick, and Anthony Good (2019) 'Introduction'. In Gill, Nick and Anthony Good (eds) *Asylum determination in Europe: Ethnographic perspectives*. Cham: Palgrave Macmillan, 1–26.

101 See Thomas, Robert (2006) Assessing the credibility of asylum claims: EU and UK approaches examined. *European Journal of Migration and Law* 8 (1): 79–96.

102 We acknowledge that we did not have access to the paperwork for cases and were not privy to the legal reasoning behind them.

103 Tyler, Tom R. (1984) The role of perceived injustice in defendants' evaluations of their courtroom experience. *Law and Society Review* 18 (1): 51–74.

Alongside the pressures to speed up, we have also highlighted a variety of ways appeal hearings were slowed down. The system-level disagreement that prompted the strikes at the CNDA was precisely the speed with which asylum claims are processed. The myriad micro-level contestations and forms of resistance from judges, interpreters, legal representatives and appellants themselves to the rapid temporal regime were remarkable in a different way, demonstrating how the life of the law that exists beyond the world of formal, planned and written rules offers a space of potential resistance and reinterpretation that can render even rigid and rapid legal systems pliable and potentially redeemable. Their actions helped us to discern a particular sort of resistive political action within the appeals we observed: an insistence on slow justice akin to the politics of slow travel[104] and slow scholarship.[105]

Of course, there are no easy answers to the issue of the political pressure of speed. We would not, for example, recommend a particular length of appeal. As the ECRE notes:

> Time is a critical, yet uncertain factor in asylum proceedings. Given their heterogeneity and complexity, refugee status determination processes are by nature difficult to reconcile with prescriptions of administrative clarity and convenience. While there may be indications that an asylum procedure is too short or too long, determining the appropriate, or 'right' length of such a procedure seems almost impossible *in abstracto*.[106]

In general however, what this chapter makes clear is not only the seriousness of speed in affecting the character and effectiveness of asylum appeal processes but the depth of the imbrication of the politics of time in legal processes. 'Is there something that really stands out across hearing centres, across judges perhaps in terms of procedure?' we asked one lawyer in the UK:

Interviewee: It's everybody having more time. More time to prepare a case, better quality of interpreters, and it's more money pumped into the whole system … Judges not under pressure of time as well … I think every single stage of the procedure; if there were more time to deal with things it would be better.[107]

104 Dickinson, Janet and Les Lumsdon (2010) *Slow travel and tourism*. London: Routledge.

105 Hartman, Yvonne and Sandy Darab (2012) A call for slow scholarship: A case study on the intensification of academic life and its implications for pedagogy. *Review of Education, Pedagogy, and Cultural Studies* 34 (1–2): 49–60.

106 European Council on Refugees and Exiles [ECRE] (2016) *The length of asylum procedures in Europe*. Brussels: Asylum Information Database (AIDA). https://www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf [accessed 25 April 2024].

107 Interview, legal representative, UK, 2014, Andrew Burridge.

8 Barriers to Communication in Asylum Appeals

Interpretation, Disclosure and Distractions

In the previous chapter we discussed the consequences of rushing or curtailing speech, including the alienation and exclusion that overly rapid communication can produce. In this chapter we focus more squarely on communication, or, more particularly, on the range of challenges to the flow of effective communication that we observed during the hearings.

Effective communication is obviously central to appeal hearings. The question-and-answer format of appeals allows appellants to impart aspects of their narratives that might be unclear in the paperwork, or difficult to convey through the medium of text, and in many cases we saw this approach working very effectively. What is more, appellants who communicated effectively were able to convey not only the main facts of their story but often also the emotions involved. The vividness of spoken communication, combined with body language and facial expression, was often an extremely persuasive method of conveying complex narratives.

It was also clear that judges, as well as the other actors involved, were usually mindful of the importance of good communication. Many judges asked appellants if they understood their interpreters at the start of hearings and checked their ability to communicate with a short practice dialogue (also see Chapter 11, 'Judicial Styles'), and many also set out some rules for communication at the start of the hearing to create a common understanding. For example, if there was an interpreter, judges frequently explained to the appellant that they should talk in short sentences to allow the interpreter to translate each segment of speech.

On the other hand, there were also some formidable barriers to effective communication in the courts and we identify some that were particularly prominent in our data in this chapter. The first concerns comprehension. Effective communication requires that the words appellants use are understood by the other actors involved and that the words that they hear hold the appropriate meaning for them. In what follows, we identify numerous ways in which comprehension was problematic with a particular focus on interpretation difficulties. Comprehension alone, however, describes only a fraction of the difficulties in communication we observed, and we argue for a broad, holistic understanding of the challenges that exist.

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There are, for example, a range of emotional and mental resources that are necessary for effective communication in asylum appeals, including the ability to concentrate and the ability to talk about events that are distressing, and we set out various instances in which these prerequisites were lacking. A further condition for effective communication concerns the appropriate cultural dynamics between speaker and listener and we identify various situations in which cultural differences during the hearings inhibited communication flow. Finally, unrelated interruptions can impoverish communication. We identify a series of common types of interruption in the hearings we observed, including from the public areas of the court, from children, and as a result of technology employed during the hearings.

All in all, although by no means exhaustive, in highlighting this series of communicative difficulties, our aim is to illustrate the heterogeneity of circumstances that can undermine effective communication during hearings and, by implication, the gravity of the challenge of ensuring it.

Interpretation Difficulties

Although asylum seekers are expected to fashion their narratives in specific ways in their applications and in their appeals, they are often not the sole authors of their stories.[1] Questioners can influence the way narratives unfold and legal advisors may influence the way that their accounts are presented – indeed, legal representatives may do most of the talking in legal settings.[2] As Shuman and Bohmer note, '[l]awyers and others who provide assistance to claimants fill a crucial role in reframing the claim not only to be consistent with the law, but also, to correspond with current Western social values, regardless of the merits of any particular claim'.[3]

Interpreters can have a strong influence over the ways narratives emerge. The literature on interpretation in the context of refugee status determination has emphasised that the role of the interpreter cannot be understood in terms of a simple, mechanical matching of words in one language with words in another.[4] The intricacies and vagaries of translation, both in linguistic terms and in terms of how to navigate the interpersonal encounter with asylum seekers themselves, mean that interpreters inevitably wield discretion over how

1 Smith-Khan, Laura (2017) Telling stories: Credibility and the representation of social actors in Australian asylum appeals. *Discourse and Society* 28 (5): 512–534.

2 'While asylum-seekers may be held responsible for the final refugee narrative (and thus credibility), in reality, other participants … all play a role in its construction' (Smith-Kahn, 2017: 513).

3 Shuman, Amy and Carol Bohmer (2004) Representing trauma: Political asylum narratives. *Journal of American Folklore* 117 (466): 394–414, page 398.

4 Pöllabauer, Sonja (2004) Interpreting in asylum hearings: Issues of role, responsibility and power. *Interpreting* 6 (2): 143–180; Inghilleri, Moira (2005) Mediating zones of uncertainty: Interpreter agency, the interpreting habitus and political asylum adjudication. *The Translator* 11 (1): 69–85.

they do their work.[5] They are 'active social participants'[6] who make important and frequent choices about how to translate which are influenced by their backgrounds and training as well as 'their beliefs about what constitutes good or institutionally valued interpreting'.[7]

Being an interpreter in asylum appeal courts can be a difficult job for various reasons, and for the most part the interpreters we observed appeared to do a very good job.[8] Listening to traumatic stories is difficult for everyone, but judges and lawyers are typically not constantly in court because they also spend time writing decisions or preparing cases at their desks. Interpreters working in languages that are common among appellants can be at court every day of the week, however, and are arguably therefore the most exposed of the professional actors present in the appeals to secondary trauma. Alongside this, the work is intellectually demanding, even for the most proficient, and often interpreters have to work long hours. We saw judges waive breaks numerous times to finish hearings, sometimes with interpreters' consent and sometimes without. Interpreters also sometimes have the same country of origin as appellants and may have family in the country in question. Some stories might consequently be particularly traumatic and difficult to hear for people with shared backgrounds.

Judges were usually extremely mindful of interpreters' need for breaks, and generally respectful to them during the hearings. At the National Court of Asylum (CNDA) in Paris though we learnt that they were often mistaken for appellants by the security staff there, meaning that they had to go through security each time they entered the court building.[9] This made it harder for them to take breaks outside the court, especially because, according to the

5 Gibb, Robert and Anthony Good (2014) Interpretation, translation and intercultural communication in refugee status determination procedures in the UK and France. *Language and Intercultural Communication* 14 (3): 385–399; Maryns, Katrijn (2014) *The asylum speaker: Language in the Belgian asylum procedure*. London: Routledge. Dahlvik, Julia (2019) 'Why handling power responsibly matters: The active interpreter through the sociological lens.' In Gill, Nick, and Anthony Good (eds) *Asylum determination in Europe: Ethnographic perspectives*. Cham: Palgrave Macmillan, 133–154.

6 Smith-Khan, 2017: 521

7 ibid.

8 Remuneration by thebigword for face-to-face interpreting for Ministry of Justice jobs in the UK was £18/hour for standard, £24/hour for complex and £29/hour for complex written cases with potential uplifts for working out of hours, for security, and for urgency, plus potential travel mileage and time supplements, plus a daily incidental booking bonus of £7.5. See https://www.thebigword.com/static_file/2117_TBW%20RATE%20CARD_JULY16_LR.pdf [accessed 09 May 2024].

9 Maréchal, Maxime (2021) *An existing role, an emerging function? The complex process and consequences of interpreters' professionalization at the French National Court of Asylum*. ASYFAIR Conference 2021 Adjudicating Refugee Claims in Practice: Advocacy and Experience at Asylum Court Appeals, Virtual, Exeter, 30 June – 2 July. Recording available at: https://www.youtube.com/watch?v=wWgYZWIuc5A&t=6s [accessed 17 August 2021].

same source, they could face financial penalties for being only a few minutes late to hearings.

Despite these difficulties, interpreters were often extremely helpful in making the appeal process accessible to appellants. Most obviously, without them many appellants would not have been able to participate in hearings and impart their narratives, and so, in an important sense, interpreters were essential to facilitating appellants' participation. As an illustration of what can happen when there is a need for an interpreter but one does not attend, we observed a case in Austria in which the legal representative insisted on not having an interpreter present to demonstrate the language ability of the appellant.[10] The legal representative seemed to have overestimated the appellant's language skills though, who struggled to convey his story to the judge, leading to significant frustration among all participants in a cumbersome and gruelling seven-hour hearing.[11]

Admittedly, communication via an interpreter is not as natural compared to direct conversation, because each party has to pause in order to allow the interpreter to translate. Even these pauses, however, could be helpful in affording the appellant thinking time and everyone involved the opportunity to 'cool off' if questioning became particularly intense or heated.[12] Moreover, interpreters could also be helpful to appellants in practical ways. When one judge was a few minutes late to arrive at a hearing in Berlin for example, we observed an interpreter explaining the purpose of the recording process to the appellant in a clear and thorough way. 'I already told him this [referring to the recording procedure],' the interpreter said when the judge started to explain it. 'Well, that's absolutely excellent. Thank you!' the judge replied.[13]

Often interpreters would be asked for their cultural knowledge, with mixed results. Sometimes they appeared to be able to shed light on aspects of hearings (although see below on the risks of treating interpreters as expert witnesses). 'It is not unusual that matriarchs collect all the salaries of the family members, store it safely, and then hand it over to family members on demand,' one interpreter explained during a case involving a young Afghan man, having

10 In Austria, judges assess cases based on both asylum and immigration law, and therefore can take 'integration' into account, awarding 'regular' immigration status to appellants based on their evidenced level of integration.

11 We were convinced that not having an interpreter present may have negatively impacted on the appellant's chances of success, because he was not able to fully participate in the hearing and respond freely to the questions posed. But the judge was unable to adjourn the hearing because as he emphasised right at the start: 'There is an *explicit* [judge's emphasis] waiver of an interpreter [by the legal representative], and therefore there was no reason to get an interpreter. The legal representative stated that the appellant wants to hold this hearing in German' (fieldnotes, Austria, 2019, Nicole Hoellerer).

12 See also Gill, Nick, Rebecca Rotter, Andrew Burridge, Jennifer Allsopp and Melanie Griffiths (2016) Linguistic incomprehension in British asylum appeal hearings. *Anthropology Today* 32 (2): 18–21.

13 Fieldnotes, Germany, 2018, Nicole Hoellerer.

asked the judge if he could say something. 'This is also how I understand it, and it corresponds to my own experiences.'[14]

At other times though there were problems. Often these related to the fact that words in one language did not have a direct translation in another. This was often the case in religious conversion cases, during which interpreters struggled to translate Christian doctrinal terms from German, for instance, into appellants' native languages. Kinship terms,[15] native proverbs and figurative language[16] may also not have equivalents in European languages. We also noted problems with conversion from Islamic (*Hijri*) to Gregorian calendar years, and although interpreters attempted to convert them for judges (some even had calendar conversion tables printed out), judges often preferred to note down the Islamic calendar year mentioned by the appellant. As one judge explained: 'Never mind the conversion … I can look this up myself later on.'[17]

In some cases, mistranslations had serious consequences. In one case in Germany, the judge questioned the appellant's credibility, because she had said at the initial stage of her application that her husband had 'run away' [*davonlaufen*] from violent attackers, but in her account at court she had described him driving away. Questions arose over whether 'running away' can imply that the person escaped by car, or whether it only means the physical act of running (on foot): if the latter it would have made the narrative of the appellant inconsistent. The interpreter intervened and stated: 'In Dari, this word can also apply to horses or cars. Therefore, I would – as an interpreter – say run away *with* … Because the word does not necessarily imply running on foot.'[18] This illustrates that even minor omissions in interpreting may have serious implications for appellants and their cases. Even though credibility assessment should not be like this (as we discuss in Chapter Two), we repeatedly saw judges grasping for this kind of minor detail which could undermine a claim, meaning that minuscule details can really matter.

Sometimes however, the approach of the interpreter was the issue, rather than linguistic difficulties per se, highlighting the fact that soliciting the cultural knowledge of interpreters treads a problematic line between interpretation and the interpreter being relied on as an expert witness, which is not appropriate.

14 Fieldnotes, Germany, 2018, Nicole Hoellerer.

15 For example, in one case the interpreter tried to explain a kinship term that refers to the sister of the father of the mother. The legal representative of the appellant, who spoke fluent Farsi, explained to the judge: 'We have individual words for everything [in Farsi] … is there a word for [such a relative] in German?' In consultation with all participants, consensus was found to translate it as the 'sister of [the appellant's] maternal grandfather' (fieldnotes, Germany, 2018, Nicole Hoellerer).

16 In one case, an appellant used a Dari proverb which the interpreter translated as 'I didn't even know my name', and Nicole noted in her fieldnotes: 'I suppose this means that the appellant doesn't remember anything, not even simple details, such as his own name' (fieldnotes, Germany, 2019, Nicole Hoellerer).

17 Fieldnotes, Germany, 2018, Nicole Hoellerer.

18 Fieldnotes, Germany, 2018, Nicole Hoellerer.

In one case in Berlin we noted that: 'the interpreter often tries to forcibly insert his own opinion, and often does not cross check with the appellant, but responds to questions himself. The judge only picks up on it sometimes.' We observed that 'the interpreter answers without asking the appellant', 'the interpreter asks a further question to the appellant independently but does not interpret what the appellant says' and 'the interpreter is very forcibly trying to give his own opinion'. At one point the judge checked with the interpreter if the appellant said what he had interpreted. 'I come from this region,' the interpreter responded, 'so I know families like this.' Multiple times the judge had to remind the interpreter of the obligation of interpreting.[19]

Although extreme, these were not isolated cases. Occasionally, interpreters would embellish or correct appellants' responses. 'Did *he* say that or do *you* say that?' the judge asked in a case in Munich during which the interpreter seemed to add a sentence as an afterthought to the translation. 'Well, he said [something about the last president of Afghanistan],' the interpreter replied, 'and this is factually incorrect.'[20] Others would decide what was relevant or important and attempted to steer or curtail conversations on the basis of their views. 'There is no point in interpreting the legal talk, because most of them don't understand it anyway,' one interpreter told us during a break in Dresden. 'So I don't bother. I just tell them that they talk about "legal things", most of them don't care about these things anyway.'[21] Another interpreter interrupted an Afghan appellant during a case that involved him being threatened by the Taliban. 'He wants to tell exactly how his nephew was killed. But that's not important,' the interpreter said. The judge raised his eyebrows and told the interpreter off: 'Yes it is! Please let him tell me!'[22]

Occasionally interpreters would also steer the appellants towards making procedural choices or concessions. At the end of one case in Munich the interpreter, who was speaking English to the appellant, offered the appellant the chance to hear the recording that had been made during the hearing, which is standard practice, but explained 'nobody ever wants to hear the recording again'. Whilst untrue, the appellant then revoked their right to check the recording.[23] Some interpreters were also difficult to manage, struggling to understand why they should not share their views or knowledge on particular issues. 'You should only translate what he [the appellant] says,' one judge told an interpreter in Dresden. 'But I know these things myself!' the interpreter retorted.[24]

19 All quotes in this paragraph: Fieldnotes, Germany, 2018, Nicole Hoellerer.
20 Fieldnotes, Germany, 2018, Nicole Hoellerer.
21 Fieldnotes, Germany, 2019, Nicole Hoellerer.
22 Fieldnotes, Germany, 2018, Nicole Hoellerer.
23 Fieldnotes, Germany, 2018, Nicole Hoellerer.
24 Fieldnotes, Germany, 2018, Nicole Hoellerer.

The countries in which we undertook observations have differing approaches to regulating court interpretation and although we do not have the space to provide an exhaustive account here, we can provide a few observations. In the UK, interpretation services have been outsourced from the Tribunal since 2012, and at the time of writing the bigwordgroup and The Language Shop, both private language services suppliers, have been responsible for interpreting and quality assurance respectively across the Ministry of Justice since 2016.[25] The Language Shop holds a register of linguists permitted to work in Ministry of Justice–related areas such as asylum appeals, and linguists listed on this register are required to abide by a code of conduct issued by the Ministry of Justice and to have passed an assessment process. This assessment process consisted of both a desk-based check of qualifications and an in-person assessment, but non-standard languages were subject to less rigorous qualification requirements.[26]

In Germany, a publicly appointed and sworn interpreter must be used for interpreting court hearings. Germany has a national database of court translators and interpreters that numbered around 25,000 in 2020.[27] Although the German federal states (Länder) have different approaches to contracting interpreters (some of which undercut the minimum pay rates set out at the federal level), commentators have expressed the view that the requirement to take an oath, coupled with higher pay rates and more stringent qualification requirements, mean that court interpreters often take the job 'more seriously'[28] than interpreters working on the initial claim at the Federal Office for Migration and Refugees (BAMF), although it is also worth bearing in mind the acute challenges facing interpreters working on initial claims (we take this issue up in more detail in Chapter 9, 'Mistakes and Incompetence').

In France, the national court seeks to develop capacities for interpretation via public tenders for a wide variety of languages or, more precisely, 'packages' of languages for each tender.[29] There are some 130 languages offered by the CNDA, and, according to their Head of Communications, the selection of

25 Henderson, Mark, Rowena Moffatt and Alison Pickup (2022) *Interpretation at the hearing*. Available at: https://www.ein.org.uk/bpg/chapter/34 [accessed 17 June 2022].

26 Henderson, Moffatt and Pickup (2022).

27 Faes, Florian (2020) 'Pay raise for Germany's judicial translators and interpreters criticized as inadequate'. *Slator: Language Industry Intelligence*. Available at: https://slator.com/pay-raise-for-germanys-judicial-translators-and-interpreters-criticized-as-inadequate/ [accessed 17 June 2022].

28 Hoffmeyer-Zlotnik, Paula (2022) *AIDA Germany country report: Regular procedure*. Available at: https://asylumineurope.org/reports/country/germany/asylum-procedure/procedures/regular-procedure/#_ftnref45 [accessed 17 June 2022].

29 Licoppe, Christian and Julie Boéri (2021) Is there such a thing as summary interpreting? 'Cross-linguistic formulation', facilitation and mediation in French asylum proceedings. *Language and Communication* 77: 56–69.

interpreters entails an in-depth examination of their curriculum vitae to verify their skills as well as monitoring during their contract.[30]

Italy presented an unusual case among the countries in which we conducted research because numerous interviewees told us that appellants were expected to find and finance their own interpreters for their appeal hearings in 2018 and 2019. Under these circumstances appellants naturally selected interpreters who were known to them, such as friends, family members and acquaintances, who may be neither trained, regulated or qualified. While this may have helped to provide solidarity during the hearings, judges we spoke to in Italy were frustrated because they frequently had to explain to amateur interpreters how to interpret (e.g. not to add anything to the narrative and to talk in turns). Judges suspected that such interpreters often embellished appellants' narratives. They 'empathise too much with the story,' one judge explained.[31] 'They add things,' another judge complained.[32]

Judges in all the countries we observed varied in terms of how patiently they waited for interpreters to complete their translations before continuing. When judges were impatient, it was not uncommon to see interpreters only translate direct questions posed to appellants, while ignoring conversations between the judge and other participants .

Interpretation in Belgium can be further complicated by Belgium having two official languages (Flemish and French) (see Chapter 2: 'What are asylum appeals?'). At one set of hearings where most appellants were from Afghanistan, two interpreters were present as the language of the court that day was Flemish and the interpreter for the appellants spoke only French. A complicated double translation would therefore occur. Yet, even under these circumstances, the judge did not slow proceedings down to give appellants a clear understanding of the appeal as a whole.[33]

Both the governance and individual agency of interpreters therefore exerted influence over the dynamics in hearings. To reiterate: most interpreters we saw seemed to do an impressive job under difficult conditions and were highly appreciated by judges and appellants alike. Our examples show, however, that there were situations in which interpretation fell short of what was required.

Concentration

We now turn to some of the broader challenges, beyond comprehension, to effective communication during the hearings. To communicate effectively, the participants need to not only understand the words being used but also be

30 Stuber, Sophie (2020) 'Translation machines': Interpretation gaps plague French asylum process. *The New Humanitarian*. Available at: https://www.thenewhumanitarian.org/news-feature/2020/10/27/france-migration-asylum-translation [accessed 17 June 2022].

31 Interview, Judge, Italy, 2019, Lorenzo Vianelli.

32 Interview, Judge, Italy, 2019, Lorenzo Vianelli.

33 Fieldnotes, Belgium, 2018, Dan Fisher.

able to focus on what is being said. As a result of the length of hearing days and the intensity of the work, this was often not assured: participants' minds could wander towards the end of hearing days. In particular, while appellants and lawyers were typically present for only one case at a time, interpreters and judges often had to participate in numerous cases per day and could get tired and make mistakes. We saw numerous interpreters appear to suffer from fatigue (blinking, slouching, stretching, yawning), for example, especially if they had several cases in a row.

In one instance a judge and interpreter worked through five cases without a break, and by the fifth case, both appeared tired, and began to make more and more mistakes. At one point, the interpreter had to repeat something several times, and, after apologising, the judge said in a kind tone: 'I understand. It was a very long day so far. It's your fifth hearing today.' When the interpreter asked the judge to repeat a question for the appellant several times later on, stating 'that was too fast for me', the judge smiled: 'my apologies, we all want to get this done.'[34]

We observed some interpreters in Germany acknowledging the limits of their concentration and asking for breaks. In one case, an interpreter was struggling in the last of four hearings in a row, resulting in their frequent mistaken translation of Herat as Tehran. The interpreter asked for a break, and, after the break, said to the judge with an embarrassed smile: 'My apologies for before – I did have a few senior moments there.' The judge smiled back and commented: 'Well, it was – and still is – a long day … most important for me is to know that you can still perform to the best of your abilities.' The interpreter replied with a smile: 'Absolutely. If not, I will let you know.'[35]

Judges, too, were occasionally susceptible to tiredness. In one extreme example, a judge appeared to fall asleep during a hearing[36]:

> [The judge] nodded off, jerked to attention, wrote a short note and then nodded off again in a perpetual cycle throughout the legal representative and government representative's examinations. … The interpreter later told me that she had noticed and thought it was very poor practice.[37]

34 Fieldnotes, Germany, 2018, Nicole Hoellerer.

35 Fieldnotes, Germany, 2018, Nicole Hoellerer.

36 The issue is not new. See, for example, Grunstein, Ronald R. and Dev Banerjee (2007) The case of 'Judge Nodd' and other sleeping judges—Media, society, and judicial sleepiness. *Sleep* 30 (5): 625–632; Longo, Catherine (2010) Sleeping judges: Consideration of prejudice and counsel responsibility at trial. *Canadian Law Library Review* 35 (1): 11–19; Tranberg, Heidi (1998) While you were sleeping: What to do about sleepy judges – Stathooles v. Mount Isa Mines Ltd. *University of Queensland Law Journal* 20 (1): 130–132; Murray, Sarah (2008) To judge is 'to sleep: Perchance to dream: Ay, there's the rub'. *Alternative Law Journal* 33 (3): 151–154.

37 Fieldnotes, UK, 2014, Rebecca Rotter.

In the UK (as well as in Germany) judges frequently did not break for lunch in the middle of the day, although there was a more developed habit of taking lunch in France. Sometimes this was because they wanted to work through a case before taking a break, to allow witnesses and others to leave as soon as possible, or to complete their cases for the day promptly. Legal representatives and interpreters told us that they, too, sometimes prefer not to take a break so as to maintain their flow of thought.[38] We noticed, however, that some judges appeared irritable if they had to forgo their lunch break due to cases running over time. In one case in Munich, the judge was unable to have a lunch break due to the previous case overrunning, and remarked upon this on several occasions in the following hearing, and even started the hearing with: 'So, we shall continue without lunch.'[39] Another judge remarked on the importance of a lunch break for all participants:

> I think a lunch break is essential. Not because I have lunch, but because it is only fair to participants, for the judge to have a fresh, tentative mind. I have to concentrate, focus. A break is good – no, essential – to clear one's mind, and not to fall into the trap of comparing cases before the verdict.[40]

The issue of lunch breaks illustrates how important it is that participants are physically comfortable during hearings. Some hearing centres, for example, had hard, uncomfortable seats. This may sound like a trifling matter, but discomfort featured prominently in our fieldnotes in various locations. In Austria, for example, most chairs (except the judges') were wooden and exceptionally uncomfortable, as Nicole noted in her fieldnotes, making it very difficult to remain seated for the hearings, and leading to Nicole suffering from severe back-pain during and after the hearing.[41] Other forms of discomfort included the hotness of hearing rooms: in Berlin judges were often forced to keep the windows in the courtrooms shut, due to the noise from the busy street outside. On hot days, and without any air conditioning, Nicole wrote that some courtrooms were so hot, it 'fried the brain'.[42] On many occasions judges had to take breaks to allow the room to be aired, and for the participants to cool down, but, of course, this became less likely when judges fell behind schedule. When participants are uncomfortable they may find it harder to concentrate on the communicative dynamics taking place and may also be more inclined to

38 There have been calls from judges, however, to make sure that the judiciary break for lunch to safeguard their wellbeing and the quality of their work. See for example https://www.lawgazette.co.uk/practice/lunch-means-lunch-family-judge-issues-wellbeing-protocol/5102700.article [accessed 4 November 2020].

39 Fieldnotes, Germany, 2018, Nicole Hoellerer.

40 Fieldnotes, Germany, 2019, Nicole Hoellerer.

41 Fieldnotes, Austria, 2019, Nicole Hoellerer.

42 Fieldnotes, Germany, 2018, Nicole Hoellerer.

rush through hearings, omit details and cut corners in their eagerness to reach the end of the hearing, thereby curtailing and squeezing communication.

Judges were often mindful of the importance of physical comfort for the effective running of hearings. The Austrian judges we observed, for example, made efforts to check whether the appellant was physically and mentally fit enough to participate in the hearing.[43] As one judge explained, asking health questions before the testimony

> is an informal way to ease the facilitation of the procedure … although it is not legally stipulated, it is useful insofar as the question of the ability to participate is sensibly clarified at the beginning … if someone says he is not fit to participate – the normal procedure would be to stop the hearing and adjourn.[44]

Judges' concern for establishing the health of appellants underscores its importance for the effectiveness of hearings. Many appellants have poor mental and physical health, as a result of their reasons for flight, their journeys and, potentially, also their poverty, reduced access to medical support and general reception conditions in their destination countries (see Chapter 4, 'Before the Hearing' for a more detailed discussion of the mental health challenges asylum seekers commonly face). Appellants may also be on medication that can influence their abilities to concentrate and participate in extended and intense conversations.

Emotional and Psychological Barriers to Communication

Alongside linguistic barriers and challenges surrounding concentration, the re-traumatising effect of conveying one's narrative can cause blockages in communication or simply unwillingness to revisit extremely painful memories.[45]

It was sometimes only too clear from the emotionality of appellants that they found recollection uncomfortable, bearing in mind that cases often included recounting experiences of rapes, torture, mutilation and murders, and it was not uncommon for judges to question appellants on the precise details of these. Under such circumstances, in some cases appellants would explicitly refuse to talk about certain experiences. 'I cannot talk about all of this again,' one appellant in Berlin said via the interpreter when the judge made reference

43 In Germany, on the other hand, only 4% of judges asked health questions before the appellants' testimonies, and there was only one case in which the judge asked if the appellant was able to continue in the hearing due to health problems.

44 Fieldnotes, Austria, 2019, Nicole Hoellerer.

45 Herlihy, Jane and Stuart W. Turner (2007) Asylum claims and memory of trauma: Sharing our knowledge. The British *Journal of Psychiatry* 191 (1): 3–4. Puvimanasinghe, Teresa, Linley A Denson, Martha Augoustinos and Daya Somasundaram (2015) Narrative and silence: How former refugees talk about loss and past trauma. *Journal of Refugee Studies* 28 (1): 69–92.

to some of his childhood experiences. 'It's too difficult for me.'[46] In other cases, appellants' speech could become very quiet and their responses short, or they could fall into complete silence.

> The appellant hesitates, clutches the tissue in her hands even tighter [she had been crying], and touches her face. She says something very quietly that the interpreter and the legal representative cannot understand. She looks down timidly, shrugs and says 'I don't know', or doesn't respond at all. 'You have to try to remember today … to talk with me, and respond,' the judge says, 'otherwise I cannot help you.' The appellant still looks down after the interpretation.[47]

Mental illness could have affected the communicative abilities of some appellants who seemed disengaged from hearings. 'The appellant often stares into nothingness in front of him and seems downcast', Nicole noted during one case in Chemnitz at which the appellant had been treated for depression. 'He often only gives one-syllable responses, and speaks very quietly'.[48] 'He looks very upset and nervous', she noted in another case at which the appellant had struggled with depression. 'He lets his head hang down, speaks quietly, and doesn't look up. His replies are short and vague'.[49] Under these circumstances, appellants seemed particularly likely to withdraw or zone out of hearings when the hearings were of a highly confrontational nature or involved high degrees of judicial scepticism about their narrative.

For their part, most judges were empathetic when faced with very emotional or detached appellants. We observed examples of judges stopping questioning, avoiding lines of questioning that were not central to the evidence, taking breaks and being reassuring to appellants when they could be. There were occasional exceptions though, when judges seemed aggravated by appellants' emotionality or quietness and, on rare occasions, we witnessed judges becoming cross with appellants.[50] We also noted that judges seemed particularly sensitive to crying as an emotional response, whereas shaking, whispering and shouting did not always elicit similar levels of compassion.

Some appellants told us that nervousness about the hearing itself could make them clam up and have difficulty recalling or expressing their experiences. For many appellants, general anxiety problems acted as compounding factors in this struggle. One appellant in the UK told us that he couldn't remember much about the hearing 'because of the nerves'.[51] 'Was I there?'

46 Fieldnotes, Germany, 2019, Nicole Hoellerer.
47 Fieldnotes, Germany, 2018, Nicole Hoellerer.
48 Fieldnotes, Germany, 2018, Nicole Hoellerer.
49 Fieldnotes, Germany, 2018, Nicole Hoellerer.
50 Appellants too sometimes became angry or behaved inappropriately.
51 Interview, appellant, UK, 2015, Natalia Paszkiewicz.

another appellant mused. 'I wasn't myself. I was sitting there and not taking it in. I didn't understand anything. I hated the whole thing. Mentally I wasn't there.'[52] 'I was really nervous and … sometimes I was completely lost,' another appellant told us.

> Before I go to that court I had so many things to say but when I was there it was all completely … out of my brain, I didn't remember anything. … It wasn't anybody's fault, I mean there wasn't anything that they didn't allow me to say or anything like that, but because of the situation it was really stressful and nervous and for me it was really big issue. I forgot everything …[53]

'It is very scary, really, really very scary and emotional,' another appellant told us. 'you get very upset … you cannot talk.'[54] These experiences and reflections illustrate how powerfully emotional and psychological factors influence communication during hearings.

Cultural Barriers to Communication

Appellants could also experience various communication challenges arising from the cultural dynamics that they shared with other participants. Young and female appellants sometimes found it difficult to converse with older, male interpreters, for instance, because of cultural norms that made such communication difficult, especially in cases concerning sexual orientation and gender identity (SOGI) claims. In one case concerning a young male appellant talking about his experiences as a gay man in both his country of origin and Germany, both the appellant and the interpreter struggled with expressions concerning sexual acts. Nicole wrote in her fieldnotes: 'The appellant remains vague, and does not mention sexual intercourse or even the word "homosexual",[55] and the interpreter only translates that the appellant "was doing something"'.[56]

Cultural barriers were particularly acute with respect to communicating about sexual violence. Research has already established that shame, dissociation and cultural norms can seriously inhibit disclosure of rape and sexual abuse.[57] For numerous female appellants, the difficulties of disclosure began

52 Interview, appellant, UK, 2015, Natalia Paszkiewicz.
53 Interview, appellant, UK, 2015, Abigail Grace.
54 Interview, appellant, UK, 2015, Natalia Paszkiewicz.
55 The use of 'homosexual' in this work reflects verbatim comments.
56 Fieldnotes, Germany, 2018, Nicole Hoellerer.
57 Johnson, Toni AM. (2011) On silence, sexuality and skeletons: Reconceptualizing narrative in asylum hearings. *Social and Legal Studies* 20 (1): 57–78. Baillot, Helen, Sharon Cowan and Vanessa E Munro (2012) 'Hearing the Right Gaps': Enabling and responding to disclosures of sexual violence within the UK asylum process. *Social and Legal Studies* 21 (3): 269–296. Baillot, Helen, Sharon Cowan and Vanessa E Munro (2012) 'Crossing borders, inhabiting

not in the asylum appeal hearing but well before then, during their first meeting with their lawyer, or during their first interview with a government decision-maker. 'The solicitor himself was a man and the interviewer was a man,' one woman told Natalia, recalling the first time she met her lawyer.

> Because of fear, the solicitor they gave me, I did not get used to him. I go into the interview room and I was shy first of all. [I was] not understanding that these men are not the same men as those in Africa, as the rapist who raped us. You know in some African cultures you never say anything about the rapes, not even to our fellow females so how could I have told that man about the rape? So that affected my case, because I did not tell them that. And when I had the chance afterwards in court they did not give me time because I told them you have to give me a female solicitor and you have to give me more time. They refused and they threw out the case.[58]

When cases reach appeal, the same male lawyer that it was hard to disclose to in the run-up to the hearing may be in the hearing room, making on-the-spot disclosure of rape or other sexual violence during the hearing difficult and unlikely. This account indicates the importance of offering appellants the choice of the gender of their interpreter and questioners where possible.[59] In the 25 cases we observed concerning only female appellants in Germany, 14 of the judges were male (8 female and 3 mixed gender panels). There were also practical shortages of interpreters which made it difficult to guarantee a choice of gender.

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spaces: The (in) credibility of sexual violence in asylum appeals.' In Fitzgerald, Sharron (ed) *Regulating the international movement of women: From protection to control.* Abingdon: Routledge, 111–132. McFadyen, Gillian (2019) Memory, language and silence: Barriers to refuge within the British asylum system. *Journal of Immigrant and Refugee Studies* 17 (2): 168–184. Holmes, Emily A, Ata Ghaderi, Ellinor Eriksson, Klara Olofsdotter Lauri, Olivia M Kukacka, Maya Mamish, Ella L James, and Renée M Visser (2017) 'I can't concentrate': A feasibility study with young refugees in Sweden on developing science-driven interventions for intrusive memories related to trauma. *Behavioural and Cognitive Psychotherapy* 45 (2): 97–109.

58 Interview, appellant, UK, 2015, Natalia Paszkiewicz.

59 We do not assume that all appellants will want interpreters and questioners who are the same gender as them, even if this is most likely. Male appellants talking about sexual violence they have experienced may prefer female interpreters and questioners for instance. So the principle of appellant choice wherever possible is the important point here, rather than necessarily same-gender courtrooms. It is also worth noting that the fact that an appellant may have chosen the gender of their interpreter and questioners, or that a court is same-gender, is not, in itself, a guarantee of disclosure.

Interruptions

Other challenges to communication came in the form of interruptions to the conversations that took place during the hearings. In numerous countries we visited it was often hard to keep the distractions of the corridor, including people chatting and walking up and down, out of the hearings. Some courts in the UK and Germany, as well as the CNDA, were regularly visited by university students and school pupils, adding to the 'bustle'. Appellants occasionally appeared to be put off by the intrusions, stopping mid-sentence or losing their train of thought when children shouted or occasional laughter filtered into the hearings.

Lawyers could be put off by corridor noise too. In one case in France the lawyer was delivering his final speech, which was repeatedly punctured by interruptions from the corridor:

Lawyer: The context is religious persecution and there is a significant danger to my client.
Fieldnotes: There is noise – laughing? – in the corridor outside.
Lawyer: There came a day when he said to himself 'I just cannot live here anymore. I need to leave' [the tone of the lawyer's speech is forceful and passionate. She makes a lot of hand gestures. Often leaning forward on the chair or the bench].
Fieldnotes: Again there is noise in the corridor – this time there appears to be a woman sobbing/crying. The panel of judges looks up and the lawyer pauses while the noise passes.[60]

Although it might have made sense to close the door when the noise in the corridors became loud in Paris, to do so would have indicated that the hearing was private, which was against the rules at the CNDA (unless a prior decision had been made for the hearing to be heard in private). During one case, this constraint became particularly clear when the rapporteur got up to close the door because there was a baby crying outside.

> The panel look very worried about this and start shaking their heads. The presiding judge says 'we can't close the door because it's a public hearing!' The rapporteur says she cannot hear anything to take notes. But the presiding judge replies: 'yes but if we close the door that means it is *huis clos* [private hearing], and we cannot do that!' So … they ask the interpreter to speak up.[61]

60 Fieldnotes, France, 2018, Jessica Hambly.
61 Fieldnotes, France, 2018, Jessica Hambly.

The instinct to close the door to keep out the noise was sometimes so strong that clerks would wedge a chair under the door handle so that it remained partially open, thereby fulfilling the legal requirement to keep the door to public hearings open, but also partly blocking out the sound from the corridor. Similarly, in Belgium the doors to the courtrooms were always kept open during our observations regardless of the level of noise in the corridor.[62]

All in all, the corridors at various courts we visited had a life of their own that rendered them influential and problematic sites in the context of overall court centres. The interruptions that spilled over into the hearing rooms could affect communication by causing stoppages, diverting the attention of the participants and even occasionally drowning out what was being said.

Other interruptions could come from visitors in the public seating areas within the hearing rooms. Visitors were fairly common in both France and Germany. In Germany, for instance, visitors were present in 44% of the hearings we observed and, despite clear instructions to be quiet, there were often times when visitors made their presence felt. 'There seem to be so many of us!' Jessica wrote during a case concerning political persecution in Bangladesh at the CNDA. 'the gallery is now full and there are some people standing at the back'.[63] Even when attempting to be quiet, visitors often rustle, cough, stand up and sit down, or even 'accidentally lean on the light switch and plunge us into momentary darkness!' (this incident caused the appellant, who was in the middle of talking in a loud and animated way, to stop talking instantly).[64]

Sometimes visitors would forget to switch their mobile phones off, precipitating an embarrassed and desperate scramble to turn them off when they rang. They would occasionally talk amongst themselves too. In one case in Augsburg '[t]wo visitors started giggling uncontrollably', causing the judge to stop the hearing to reprimand them.[65] Sometimes visitor talk would persist even after a request to be quiet from the judge, generating additional room-management challenges. At one hearing in Berlin, Nicole noted that a pair of visitors 'keep talking with each other very loudly'. This continued until

> The interpreter turns around making a 'shhhh' sound [to tell them to be quiet]. One of the visitors looks embarrassed and says sorry but soon afterwards they are talking again, loudly and agitatedly. The judge looks at them very annoyed, and the interpreter tells them again to quieten down by turning around and placing his finger on his lips.[66]

62 Fieldnotes, Belgium, 2018, Dan Fisher.
63 Fieldnotes, France, 2018, Jessica Hambly.
64 Fieldnotes, France, 2018, Jessica Hambly
65 Fieldnotes, Germany, 2018, Nicole Hoellerer.
66 Fieldnotes, Germany, 2018, Nicole Hoellerer.

In another case, in Düsseldorf, a judge had to reprimand a group of visitors who were compatriots of the appellant:

Judge: Enough now! Sit down now! I need to conduct a hearing here!
Fieldnotes: The visitors seem annoyed with that comment [and] keep chatting. Before the appellant can respond, the judge yells at the visitors.
Judge: You stop talking now! I have to listen and concentrate here, and you are not helping your fellow countryman![67]

Occasionally visitors would interject in proceedings from the public gallery to try to offer new information. Judges responded to these attempts in different ways, sometimes allowing them but often having to remind visitors not to call out.

Interjections were so common and unwelcome in some types of cases that judges had not only learnt to expect them but took measures to reduce their likelihood at the start of hearings. During cases based on religious conversion in Germany, for instance, visitors were particularly common, these often being members of the congregations that the appellants were associated with. One judge in Augsburg said at the outset of one such hearing:

> I know in conversion hearings it's tempting to call out unasked during the testimony … but keep in mind that whenever anything is yelled from the back, I cannot assess it. I might even have to dismiss whatever the appellant says thereafter … I recently had a conversion case with five people in the public area, who kept calling out from the back … I was tempted to ask them to leave the courtroom.[68]

The Dilemma of Publicness

There was considerable disagreement among our interviewees and others we spoke to during our fieldwork about whether hearings should ordinarily be public. For some judges and legal representatives, an audience offered a 'mechanism of informal control on the judge's behaviour or how the interpreter translates',[69] especially because 'the lawyer is normally kind of intimidated by the judge' in private circumstances.[70] There was also a perceived need to demonstrate that justice has been carried out properly. Some legal representatives also saw great value in public hearings because appellants could come and observe cases before their own, thus acclimatising to the conditions

67 Fieldnotes, Germany, 2019, Nicole Hoellerer.
68 Fieldnotes, Germany, 2018, Nicole Hoellerer.
69 Interview, trainee lawyer, Italy, 2019, Lorenzo Vianelli.
70 Interview, judge, Italy, 2019, Lorenzo Vianelli. This quote is from Italy where hearings take place in judges' private offices.

(this was very common in France). For their part, some appellants viewed public hearings positively because they wanted as many people as possible to know about the injustices they had experienced.[71] Others felt the audience gave them confidence. '[W]hen I see many people in front of me I have the courage to speak even more,' one appellant explained in Italy. 'They give me the courage to talk.'[72]

On the other hand, there was considerable concern among judges and lawyers that the presence of the public could potentially inhibit disclosure, especially of sensitive issues. Even if appellants had the right to request a closed hearing (which was commonly exercised in the UK and France) they perceived a risk that appellants may not understand this option, feel able to use it, or appreciate its importance.[73] Italy has closed hearings and Italian lawyers were generally suspicious of opening them, worrying that appellants could feel intimidated in front of audiences, and that malicious attendees could gain valuable information that might put appellants' safety at risk. The media could also jump on the words of asylum seekers in their hearings, they felt, and use them out of context to support one-sided or sensationalist views without due attention to the complexity of cases.[74]

There were, indeed, occasionally times when we thought that the principle of the publicness of hearings may have been pursued too enthusiastically. In one case in Germany the appellant was clearly uncomfortable at the presence of a lot of people (12–15) from an adult education centre in a small hearing room. 'Why are there so many people here?' he asked.

> The judge frowns and looks slightly annoyed, and says in a very loud voice: 'This is the public, and they want to watch your case. In Germany, our system is open for public scrutiny.'[75]

71 Fieldnotes, France, 2018, Jessica Hambly.

72 Interview, appellant, Italy, 2019, Lorenzo Vianelli.

73 A different issue generated by the publicness of hearing rooms was that of coaching appellants when they were responding to questions. Trivia questions, in which judges would ask details about appellants' places of origin or other aspects of their story in an attempt to ascertain the veracity of their claims, were common among our observations (see Chapter 10, 'Judicial Questioning'). We saw several attempts by visitors in the public areas of courts to pass information to appellants facing these sorts of questions. In Düsseldorf one visitor looked up something on his phone, and tried to whisper towards the appellant, which the judge did not notice (fieldnotes, Germany, 2019, Nicole Hoellerer). 'The friends of the appellant in the public seats are trying to tell him the answer', we noted during another case in Paris where the President was asking geography questions about a place that featured in the appellant's narrative. 'No-one seems to notice from the panel. [The appellant] does not recognise many of the place names. The friends in the gallery tut and make noises suggesting correct and incorrect answers' (fieldnotes, France, 2018, Jessica Hambly).

74 You could 'find that your history is on everybody's lip hence on the newspaper,' one appellant in Italy said (interview, appellant, Italy, 2019, Lorenzo Vianelli).

75 Nicole noted: 'This is the first time I feel unwelcomed by an appellant, and I feel like leaving. However, I sit very far away from the door, and I think that it is the sheer volume of people

We also saw two film crews shooting within the court buildings in Germany, and were concerned that both the appellants and the interpreters involved were uneasy about their presence. Although the crews asked for permission and had to leave when the detail of cases was being discussed, one interpreter told us that even in the waiting area and during the preliminaries of the cases he did not want to be filmed. 'I feel very uncomfortable,' he told us.

> 'One time, I was told in advance by the judge, and was able to find a replacement, because I really do not want to be recorded. But today, I won't be able to dodge it.' I ask him if the appellants are informed: 'No, they are not … it's quite unfair to them, I feel … But what can they do? Especially if they don't have a legal representative to advise them …'[76]

These reflections not only raise difficult questions about the limits of publicness, but also highlight the extent of disparities in practice in different countries.

Children

An additional source of disruption that could easily interrupt the flow of communication in hearings was the presence of children. Although appellants may have been advised to leave them at home or in the care of a trusted friend or relative, some had no choice but to bring them.[77] Within the hearing rooms, children could be not only sources of profound distraction for appellants and others involved in the hearing, but also inhibit disclosure from appellants. During one hearing at which the son of the appellant was present, the judge asked the mother: 'can you describe in further detail why you brought your son to the doctor?', at which point the mother 'struggles to explain, and glances back at her son', obviously finding it difficult to disclose in case her son heard

in this small room, that upsets the appellant. Nevertheless, as the hearing progresses, the appellant seems to forget about the audience, and the hearing goes on as usual' (fieldnotes, Germany, 2018, Nicole Hoellerer).

76 Fieldnotes, Germany, 2018, Nicole Hoellerer.

77 As per the German Asylum Act, Section 12 (1) only adults can file individual asylum applications, and are the legal representative of their children who are minors (up to 18 years old, Section 12 (3)). However, in family cases, children are also summoned by the court, often referred to as 'others' in the summons, but there are no specific laws or guidelines on whether children should be present at court. Judges thus have discretion over whether to insist that children that have been summoned with their parents should be present at court. Also see (in German) Deutsches Kinderhilfswerk e.V. (2019) *Sammelband Kindgerechte Justiz: Wie die Rechte von Kindern im Justizsystem verwirklicht werden können*, 76–77 Available at: https://www.dkhw.de/fileadmin/Redaktion/1_Unsere_Arbeit/1_Schwerpunkte/2_Kinderrechte/2.19_Kindgerechte_Justiz/Sammelband_Kindgerechte_Justiz.pdf [accessed 18 August 2021].

and understood.[78] Similar difficulties could also surround disclosures of sexual violence and domestic abuse.

Many appellants with children left their children outside the hearing rooms. Indeed, a number of judges we saw advised appellants to do this because of the content of the discussions. The children themselves, however, sometimes wanted to go back into the hearing room to see their parents and in some cases spent their time constantly knocking on the door or tapping at the window. What is more, when left, unaccompanied children could become riotous in the corridor and waiting areas. At one point Jessica recorded that '[t]wo kids are riding around on the little toy cars that they have at court. One is riding around the main corridor where the hearing rooms are'.[79] Later the same day she noted:

> Back in the waiting room, the tall skinny security guard looks like he has really had enough of the kids today! There is one little boy that is really winding him up by threatening to jump down the stairs, and the security guard keeps wagging his finger and saying 'no don't do it'! I have no idea where the parents are. This security guard is pretty light-hearted and good natured about it, laughing at some of the little ones as they toddle around, but you can also sense that he is a little annoyed and exasperated!

Generally, judges were able to ignore the sounds of children in the hearings, if they did come into the hearing rooms. Indeed, numerous times Nicole expressed her admiration in her fieldnotes that judges were able to continue despite the din that the children present were generating, even when, for instance, they were 'crazy, yelling and laughing – even behind the judge's table'.[80] Occasionally, though, judges' tempers could fray. 'All of a sudden', Nicole recorded during a case,[81] 'the judge yells at the children: "Feet off the desk! I am allergic to that!" – the sudden outburst makes me jump in my seat'.[82] Judges could also find it hard to concentrate on what was being said as a result of the children present. In one French case, Jessica noted that the 'presiding judge looks at the appellant but is also distracted by the kid'. Several times the judge seemed to lose the thread of the conversation and ask questions that required information which had just been given.[83]

In Belgium, appellants would wait for their case to be heard in the public gallery of the courtroom and appellants who came with their families would

78 Fieldnotes, Germany, 2019, Nicole Hoellerer.
79 Fieldnotes, France, 2018, Jessica Hambly.
80 Fieldnotes, Germany, 2018, Nicole Hoellerer.
81 Fieldnotes, Germany, 2018, Nicole Hoellerer.
82 Fieldnotes, Germany, 2018, Nicole Hoellerer.
83 Fieldnotes, France, 2018, Jessica Hambly.

often struggle to keep children quiet both during their appeals and while waiting for their case to commence. Although judges would frequently attempt to hear the appeals of those with families first, this could not always be arranged if, for example, legal representatives had not yet arrived.[84] Hearing rooms would, therefore, often take on a restless atmosphere as parents (or older siblings) attempted to keep small children occupied. Parents would not always succeed in their efforts, and some hearings took place amidst the noise of children playing.

Judges are usually very patient with children,[85] and most of them have built up a good deal of experience of managing them in hearing rooms. Some set out rules at the start for the children who are present, telling them that they are expected to be quiet and to do what they are told, and most of the judges we came across did not object to the presence of children. One judge in Berlin spoke to Nicole about her approach to children in the hearings, explaining that, although she would prefer them not to come, she understands that some appellants do not have a choice.

> They have no childcare, or no help … so what can they do? I am a mum myself, so I don't mind … They can run around … But I prefer them not to be in the room when they are a bit older and listen to the harrowing stories their parents tell me. We had boxes with toys once and placed them in hearing rooms, but it got so chaotic that we had to stop it … it was simply too loud …[86]

Babies were sometimes present and could be particularly distracting for their mothers, especially if they were alone. Occasionally visitors or others present were able to hold babies or distract them, to give the mother a chance to talk.[87] Sometimes, though, mothers appeared embarrassed or anxious. During one case in France involving a young female appellant, Jessica noted that she 'jiggles her baby on her lap, and seems desperately anxious to keep the baby quiet … I get the impression she cannot wait for this to be over'.[88]

Children who are a little older (roughly 3–9 years old) can present different challenges. One toddler tried to run off while his mother was delivering a narrative. Despite its importance, her account was quickly curtailed as a result: 'She gets up quickly and runs after him', Nicole observed. 'The judge has to smile at that'.[89]

84 Fieldnotes, Belgium, 2018, Dan Fisher.

85 Judges do not question minors in cases concerning their parents.

86 Fieldnotes, Germany, 2018, Nicole Hoellerer.

87 Although this depends very much on who is present and how comfortable the mother is with this approach.

88 Fieldnotes, France, 2018, Jessica Hambly.

89 Fieldnotes, Germany, 2018, Nicole Hoellerer.

Sometimes siblings can entertain each other or look after each other while they wait, but at other times they can become fractious. 'Their kids argue again in the background', Nicole observed in one case involving a family, 'they seem to be fighting over who could have the mobile phone. The female appellant turns around quickly, and whispers something to them very angrily. The girl looks triumphant, and the boy looks quite upset'.[90]

If there are multiple children, then courtrooms can become particularly chaotic. In one case in France an appellant arrived with her two small children. Jessica estimated they were both under two years old:

> The kids sit at the bench with the appellant but they are very restless – walking around, banging, talking, shouting, climbing up onto the chairs and back down again, climbing onto the bench. At one point the little girl falls over and smashes her face on the metal chair, causing her to start screaming. The mother picks her up to comfort her.
>
> Judge: Do you also have fears relating to your in-laws? Aside from the risk to your little girl?
>
> The kids are now on/around the chair between the interpreter and the appellant. The appellant sits next to the lawyer. The little boy wanders out of the room and down the corridor – I get up to go and get him. The secretary also comes out, and then sits with him on the front row of the public gallery.
>
> The lawyer is invited to begin. The little boy is now walking around with some crisps.[91]

The disruption that children can cause to the flow of communication in hearings was a common theme across our case countries.

Technological Intrusions

Another way communication flow could be disrupted was as a result of the technology used during hearings. In Germany, many of the judges used voice recorders to make a record of the proceedings, since having a transcript of the proceedings is a legal requirement there. Although judges had different styles of recording, this very often meant that conversations would be halted at regular intervals so that the judge could repeat or summarise what had been said for the benefit of the record.[92] Longer pauses also ensued when judges

90 Fieldnotes, Germany, 2019, Nicole Hoellerer.

91 Fieldnotes, France, 2018, Jessica Hambly.

92 On rare occasions, we saw court writers employed to take on the function of making a record, which aided the flow of communication. However, even court writers can be detrimental to communication: in one case in Austria, the court writer kept making mistakes in the transcript, and the judge had to repeatedly interrupt the appellant's testimony, to make sure that the court writer transcribed everything correctly (fieldnotes, Austria, 2019, Nicole Hoellerer).

struggled with the technology: this was common in general, but especially common in courts in Saxony, where judges often used voice recorders with cassettes that had to be regularly changed. It should be noted, though, that even without technology employed to record cases, there were often pauses in the conversation to allow judges to write notes, especially in the UK.

Remote Hearings

We also occasionally saw cases conducted via live video-link from France to French territories overseas. One French case we saw involved an appellant in French Guiana:

> There is a man's voice heard announcing the next case, presumably he is somewhere in the French Guiana court – we don't see who the voice belongs to. When the appellant comes into view on the screen it takes a few seconds to refocus on them. I am not sure what the appellant can see on his screen in French Guiana. Can he see the panel? The room? Or just the person questioning him? One of the judges starts the questioning. Meanwhile, [the presiding judge] looks really bored and fed up. He reads his diary, shunts his chair back and forwards, leans back, yawns, makes faces, pinches his nose, picks his teeth, bites his nails. There is a bit of an echo on the microphones; the line is not clear.[93]

The introduction of video-linking reorganises the space of the court profoundly, splitting it between two or more sites.[94] The result is that a series of ambiguous absent-presences are introduced: voices are disembodied, participants are visible but blurred, audible but muffled. It is also not always clear who can see what. One particular absence we observed with video-linking involved the interpreter. Because the appellant is being interpreted via a microphone the judge and legal representatives only ever hear the interpreter's voice. They never hear the intonation, pitch, volume and expression in the appellant's original words in their own language.

Since we saw only a few video-linked hearings in France, our data is not sufficient to explore the many complex aspects of the use of this technology in detail, but it is nevertheless worth noting its importance and the fast-increasing scholarly attention it has attracted. Numerous European countries have recently explored using digital technologies to make asylum processes speedier and more accessible, including for initial interviews, as well as submitting and

93 Fieldnotes, France, 2018, Jessica Hambly.

94 Hynes, Jo, Nick Gill and Joe Tomlinson (2020) In defence of the hearing? Emerging geographies of publicness, materiality, access and communication in court hearings. *Geography Compass* 14 (9): e12499. Hynes, Jo, Joe Tomlinson, Emma Marshall, Maria Wardale and Cecilia Correale (2021) Holes in the digital parachute: An analysis of the introduction of online immigration appeals. *Journal of Immigration, Asylum and Nationality Law* 35 (1): 28–49.

processing appeals.[95] Related to these developments, several countries were beginning to explore the potential of live video-linking in appeal hearings much more seriously at the time of our research. After our fieldwork ended in 2019, remote hearings, and digital processes generally, received further significant interest because of the COVID-19 pandemic.[96] Italy (as well as Ireland and Romania) explored video-linking as a way to keep asylum hearings running during the COVID-19 pandemic[97] and in the UK, the use of video-linking was seen as an essential way to allow the justice system to continue to operate safely and remain accessible during successive lockdowns. Video conferencing for asylum appeals within France was introduced in 2019 at the discretion of the CNDA (i.e. potentially without the consent of the appellant) but met with strong objections from lawyers and NGOs who pointed to the lack of minimum legal guarantees, lack of access to the public, and technical issues in practice. After a temporary suspension they were resumed in 2020 but on the basis that the appellant's explicit consent was first secured.[98] This established an important principle, which we condone, that appellant's consent should be sought in the use of video conferencing for asylum appeals.

Remote hearings come in a variety of forms: consider, for example, the difference between the use of video-linking to display one or two participants on screens in a court and the fully distributed courtroom in which no central 'court' continues to exist and all participants engage remotely. There is now a significant literature that addresses the pros and cons of video-linking in hearings and trials,[99] including work prompted by the COVID-19 pandemic.[100]

95 AIDA (2022) *Digitalisation of asylum procedures: Risks and benefits*. Available at: https://asylumineurope.org/wp-content/uploads/2022/01/Digitalisation-of-asylum-procedures.pdf [accessed 23 June 2022].

96 EASO (2021) *EASO asylum report 2021: Annual report on the situation of asylum in the European Union*. Available at: https://euaa.europa.eu/sites/default/files/EASO-Asylum-Report-2021.pdf [accessed 23 June 2022].

97 ibid.

98 AIDA, 2022.

99 E.g. Tait, David, Blake McKimmie, Rick Sarre, Diane Jones, Laura W McDonald and Karen Gelb (2017) *Towards a distributed courtroom*. Available at: https://courtofthefuture.org/wp-content/uploads/2017/07/170710_TowardsADistributedCourtroom_Compressed.pdf [accessed 04 August 2022]. Rowden, Emma (2018) Distributed courts and legitimacy: What do we lose when we lose the courthouse? *Law, Culture and the Humanities* 14 (2): 263–281. McKay, Carolyn (2018) Video links from prison: Court 'appearance' within carceral space. *Law, Culture and the Humanities* 14 (2): 242–262, page 242. For work that compares telephone and in-person legal advice see Burton, Marie (2018) Justice on the line? A comparison of telephone and face-to-face advice in social welfare legal aid. *Journal of Social Welfare and Family Law* 40 (2): 195–215.

100 Such as the following concerning the UK: Byrom, Natalie, Sarah Beardon and Abby Kendrick (2020) *The impact of COVID-19 measures on the civil justice system*. Civil Justice Council & The Legal Education Foundation. Available at: https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf [accessed 04 August 2022]. McKeever, Grainne (2020) Remote justice? Litigants in person and participation in court

There are important concerns surrounding trust, trauma, credibility assessment, equal access to technology, recognition of vulnerabilities, and off-screen coercion or distraction, among others, when considering remote ways to communicate with people seeking asylum.[101]

Conclusion

This chapter has explored the diversity of challenges to effective communication in asylum appeal hearings. Our data show that communication relies upon not only linguistic knowledge but also psychological, physical and cultural conditions to proceed effectively. When these conditions are not met, communication can be truncated, impoverished or liable to misunderstandings and mistakes.

Our observations therefore convey the fragility of communication in asylum appeals. Communication is vulnerable to a raft of potential disturbances and intrusions, including members of the public intervening in conversations, children within the hearing rooms, and the effect that technology can have over interpersonal interactions. Although we have discussed a range of factors that shape communicative dynamics in hearings, there were certainly others, including the effect that accompaniers could have over what appellants felt that they could disclose or discuss.

It is clear from our analysis that linguistic comprehension is only part of the picture regarding effective communication. Linguistic knowledge is, of course, central and necessary, but there are also social, cultural and contextual factors that can constrain and limit communication in extra-linguistic ways. This indicates that communication should be a topic that is approached in an interdisciplinary way, with collaborations between linguists and social scientists.

Our intention is in no way to imply that communication was impossible in hearings. Indeed, various actors worked to ensure effective communication

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processes during COVID-19. *Modern Law Review*. Available at: https://www.modernlawreview.co.uk/mckeevers-remote-justice/ [accessed 04 August 2022]. Ryan, Mary, Sarah Rothera, Alice Roe, Jordan Rehill and Lisa Harker (2021) *Remote hearings in the family court post-pandemic*. Nuffield Family Justice Observatory. Available at: https://www.nuffieldfjo.org.uk/resource/remote-hearings-post-pandemic [accessed 04 August 2022]. The Law Society (2020) *Law under lockdown: The impact of COVID-19 measures on access to justice and vulnerable people*. Available at: https://www.lawsociety.org.uk/topics/research/law-under-lockdown-the-impact-of-covid-19-measures-on-access-to-justice-and-vulnerable-people [accessed 04 August 2022].

101 Walsh, Frank M and Edward M Walsh (2008) Effective processing or assembly-line justice: The use of teleconferencing in asylum removal hearings. *Georgetown Immigration Law Journal* 22 (2): 259–284. Eagly, Ingrid V (2015) Remote adjudication in immigration. *Northwestern University Law Review* 109 (4): 933–1020. Gill, Nick (2021) 'Remote justice and vulnerable litigants: The case of asylum.' In Cowan, Dave and Ann Mumford (eds) *Pandemic legalities: Legal responses to COVID-19–Justice and social responsibility*. Bristol: Bristol University Press, 27–40.

even in less-than-ideal conditions, notably interpreters and appellants themselves, who often had to devise different ways of explaining things to the other participants when there were misunderstandings. We sometimes saw legal representatives who were familiar with the first language of the appellant also intervene to check, challenge and clarify interpretations that they heard.

Communication itself, then, is best understood as a collaborative project that relies on diligence, expertise and agency from all of the parties involved. Occasionally we felt that this project was not pursued as enthusiastically as it might have been. Some legal representatives for the government in the UK, for example, seemed to consciously allow misunderstandings of certain words and phrases to linger during their cross-examinations of appellants, rather than clearing them up, to portray the appellant as evasive and incoherent in front of the judge.[102] For the most part, however, parties tended to work together (with varying degrees of success) to ensure effective communication. As such, the issue of communication in asylum hearings underscores the reliance of the judge, and the system as a whole, on groupwork[103] within the hearings and the cooperation of all those involved.

102 Gill, Nick, Jennifer Allsopp, Andrew Burridge, Daniel Fisher, Melanie Griffiths, Jessica Hambly, Jo Hynes, Natalia Paszkiewicz, Rebecca Rotter and Amanda Schmid-Scott (2020) *Experiencing asylum appeal hearings: 34 ways to improve access to justice at the first-tier tribunal*. Exeter University and the Public Law Project, page 51. Available at: https://publiclawproject.org.uk/resources/experiencing-asylum-appeals/.

103 Hambly, Jessica (2019) 'Interactions and identities in UK asylum appeals: Lawyers and law in a quasi-legal setting.' In Gill, Nick and Anthony Good (eds) *Asylum determination in Europe: Ethnographic perspectives*. Cham: Palgrave Macmillan, 195–218.

Part III
Policy and Practice Compendium

Time Management

Our research showed that saving time and streamlining procedures was a common concern across asylum appeal settings. However, speed should not be at the expense of fair and just decision-making. Effective time-management is about exercising responsible judgement that promotes the full engagement of all the participants (by preventing fatigue and negligence), and making hearings not only just, but also meaningful and satisfying for the parties involved.

- Canvassing the views and experiences of the timing of hearings from the actors involved is an important first step in understanding the influence of scheduling over participation. Consultation services, feedback opportunities and independent research can help system designers to understand this issue and solicit ideas for improvement.
- Involving panels of decision-makers working together can help to reduce variability and the impact of individual personal biases. It can also help to improve deliberation over cases.[1]

Overly tight scheduling can be counterproductive as a time-saving device, as this can lead to appeals not being given due time or attention, potentially leaving points unresolved and giving rise to further appeals down the line. Alternatively, it can mean that earlier appeals in the day overrun, leading to later appeals either being rushed or pushed to another day, often at great inconvenience and cost to all parties.

- It can be helpful to build in flexibility to court scheduling – such as breaks throughout the day – to act as a buffer and prevent delays accruing.

1 Also see Hambly, Jessica, Nick Gill and Lorenzo Vianelli (2020) Using multi-member panels to tackle RSD complexities. *Forced Migration Review* 65: 32–35.

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- Judges can also sometimes take an active approach to scheduling, arranging to hear cases in which the participants might find it hard to wait (such as when they have small children with them) before others.

Our research demonstrated that fast and repetitive hearings contributed to judicial fatigue. We also noted the impact of fatigue on interpreters.

- Breaks scheduled throughout the day can act as a safeguard against fatigue.
- Senior judges could take the lead in fostering a culture of taking breaks where necessary and suggest ways to ensure that judges use their breaks in ways that help them and others to feel refreshed.

In some countries, court clerks and ushers play a pivotal role not only in ensuring the slick running of appeals but in keeping appellants and their representatives informed of delays and managing expectations as to when their hearing will commence.

- Explore ways in which appellants can be kept updated with timings so they can plan refreshment or comfort breaks, or step out for fresh air, rather than be stuck in waiting rooms for long periods of time.

Our research suggests that blanket attitudes towards adjournment requests built up at particular courts or before particular judges. This hinted at the existence of distinct court cultures with respect to adjournment requests.

- Mechanisms could be put in place, or strengthened, to ensure that requests for adjournments are considered on an individual, case-by-case basis, with regard to fairness and the administration of justice.
- A consultation with legal professionals and those affected could be carried out into judicial approaches to adjournments.
- Senior judges may want to foster a culture of prioritizing kindness and cooperation where possible in their assessment of adjournment requests and their dealings with appellants generally.[2]

Withdrawals on the day of the hearing, as we observed in several jurisdictions, should not be used or encouraged as a last-minute way to save court time and money, or to reduce judicial workload, where this denies the appellant a fair hearing.

2 Paul, Susannah (2021) *Cooperation and kindness in the immigration and asylum chamber. ASYFAIR Conference 2021 Adjudicating Refugee Claims in Practice: Advocacy and Experience at Asylum Court Appeals*. Virtual, Exeter, 30 June–2 July. Available at: https://asyfair.com/output/events/asyfair-conference-2021/asyfairconfvideos/ [accessed 14 December 2021].

- As far as possible, withdrawals could be considered well in advance of the hearing day.
- Senior judges could provide guidance to judges about what constitutes unacceptable pressure on appellants to withdraw their cases.

We found that the effect of rushing can be to undermine appellant trust that their appeal has been properly heard and considered.

- It is good practice for judges to take time at the start of hearings to explain the process and who every person present is.
- During hearings judges can continue to fully explain matters and allow for adequate interpretation.

Our research showed that overly abrupt endings to hearings can increase the sense of disorientation and frustration among appellants.

- Judges could set out the structure of hearings at the outset so that appellants know what to expect.
- Judges can advise appellants that their hearing will soon come to a close at an appropriate point towards the end of the hearing.
- At the close of hearings, it can be helpful for judges to offer the final word to appellants.
- Judges might also inform appellants of next steps and ensure that appellants have a point of contact, whether through the court, a legal representative or other agency.
- Judges could also refrain from making gestures that signify that they are no longer interested, such as packing their bags and putting on jackets during the final speech of lawyers or appellants.

Attitudes to time management should be trauma-informed, and alert to the emotional and psychological impact of appeals on appellants.

- This may require putting training in place for judges, interpreters, representatives, and other court staff on how to administer appeals in an efficient and timely manner while remaining vigilant to dealing with trauma and the risks of (re)-traumatising appellants.
- Training and systems for dealing with secondary trauma experienced by decision-makers and other personnel could also be put in place.

Communication

Our research revealed multiple intersecting fragilities in communication between parties, including linguistic, cultural, emotional and mental barriers,

not to mention physical aspects of the appeal environment that made appeals vulnerable to interruption and disruption.

- As suggested previously (see Chapter 5, 'Assembling Appeals'), in-person oral hearings should be the norm for asylum appeals. Verbal communication allows appellants to emphasise certain parts of their stories and convey complex narratives that would not necessarily come across in textual accounts, provide clarification on discrepancies, and make emotions visible through body language and facial expressions.
- Asylum appeals should take place in spaces designed as safe, calm environments, where participants are able to concentrate and participate with minimal disruption.

We found that children can inhibit the process of giving evidence and disrupt hearings.

- Courts could provide facilities for children, such as designated and supervised play areas (preferably a room that is not adjacent to a courtroom, to minimise noise) for appellants who bring their children to court.
- Courts could consider voucher schemes for childcare.
- Play workers could be employed on specific days or for specific hours in the court, and appellants with children scheduled for those times.
- Charities or local community organisations could be invited to court to provide activities for any children present.

While open courts and public hearings can be essential features of democratic justice systems, due regard should be had for the sensitive nature of asylum appeals, security and privacy issues, and the impact open hearings may have on appellants' ability to participate fully.

- Appellants and their legal representatives should be allowed to request private hearings from the presiding the judge. The need to go private may arise during the course of a hearing and judges should be responsive to this.
- Courts could take more measures to ensure that visitors are aware of their obligation to remain silent and unobtrusive at court (both in court rooms and other spaces at court), and not cause interruptions to hearings.
- Rather than keeping the doors to court rooms open to indicate a public session, other systems could be used, such as signs on the door (e.g. a traffic-light system using green and red cards) that indicate whether a session is open or closed to the public.
- In hearings with several visitors, the judge could mention at the start of the hearing that any comments from the public area may impact negatively on the judges' ability to consider the appellants' testimony.

- Appellants and other actors could be advised of any media presence at court, and participants allowed to refuse to participate and/or be filmed by representatives of the media in any area of the court.
- Appellants could be advised prior to their hearing that they are able to observe other public hearings (in countries with public hearings) before their own, to familiarise themselves with the court and procedure.

We became concerned during our research about the possibility that hearings can inflict additional suffering on appellants or re-traumatise them.

- Judges, representatives, interpreters, and other court staff could be offered training in trauma-informed court practices, and managing emotions and mental health, to best facilitate appellant participation. Such training could also cover risks and strategies associated with recognising and managing secondary trauma for other regular participants in asylum appeals.
- Judges should consider checking with appellants whether they are physically and mentally fit enough to participate in the hearing at the start of the hearing, to ensure the best opportunity for effective and fair participation of appellants.
- Judges could be advised to allow emotional appellants to take a break to compose themselves.

Our research highlighted the impact of cultural background, age and gender on courtroom interactions and communication in asylum appeals.

- One practical measure we observed was the possibility for appellants to opt for a particular gender composition of the court (if possible). Having a choice of gender (of judge, interpreter, representative, etc.) can be especially impactful when it comes to full and free disclosure of sensitive information and/or sexual violence.
- Measures could be taken to raise awareness among all participants that, prior to and during hearings, appellants may have not revealed sexual violence or sexual orientations due to shame, dissociation and cultural norms, and that late revelations of such experiences do not necessarily imply discrepancies or lack of credibility.
- Judges and lawyers should be aware of the confusing effect sarcasm or humour may have on participants.

Our research indicated that physical discomfort could undermine concentration during hearings.

- Fresh and clean air flow should be a requirement of court spaces, including ensuring rooms are maintained within the bounds of safe working temperatures.
- Drinking water could be provided for all participants.

Interpretation

Our research underscored that interpreters are active social participants in asylum appeals and play a key role in upholding fairness and facilitating the participation of appellants. Given the central role played by interpreters, it is crucial they are given adequate training, and quality control is assured throughout, for example, via registration or accreditation schemes. While it is inevitable that interpreters bring their own socio-cultural backgrounds and experiences to their work, they should not be relied on as expert witnesses in the hearing. It is good practice for courts to provide and remunerate their own interpreters, rather than rely on appellants to bring their own, or rely on family or friends. Other practices that may potentially be helpful include the following.

- Appellants could be allowed to request an interpreter of a particular gender or dialect if they regard this as necessary for full and free participation in their appeal hearing.
- Judges may want to meet the interpreter before the hearing to inform them about some of the case details which could help the interpreter during the hearing.
- Judges may encourage interpreters to take notes as the appellant speaks, to ensure that none of their testimony gets lost before interpretation.
- The role of the interpreter, including their independence and qualifications, could be discussed with the appellant before the hearing begins. This can help ease concerns about mistrust and misunderstanding. It can also be helpful for appellants to be given an opportunity to notify the court where there are concerns relating to interpretation that may impact the substance and outcome of the hearing.
- Time devoted at the start of the hearing for the interpreter and appellant to engage in sufficient conversation to establish mutual understanding can facilitate smooth communication during the hearing. Judges may also wish to conduct more formal means of testing comprehension between interpreters and appellants.
- Senior judges could take measures to emphasise to judges the importance of not rushing interpreters or interrupting them.
- To ensure that appellants can follow as much of their hearing as possible, interpreters could be permitted and encouraged to interpret (or at least to summarise) broader aspects of what is discussed in hearings, not only the direct questions from judges or representatives.
- Senior judges and system managers may consider undertaking activities to raise awareness that interpreters may experience secondary trauma due to their daily work and presence at court and provide strengthened infrastructures to support interpreters with their mental health.

Part IV

Procedure

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9 Mistakes and Incompetence

Asylum appeals offer unique insight into the process of government decision-making that takes place before the appeal is heard. A good deal of attention has been given to government decision-making on asylum claims in existing literature, which has highlighted the effect of trauma over the ability to give testimony,[1] the politics of vulnerability[2] and the political subjectivity of categorisation.[3] Contributors have attended to the limitations of expressing narratives within European languages,[4] as well as the cultures of disbelief that are known to have persisted in initial decision-making systems in Europe.[5] Other concerns have been raised over the difficulties of transforming spoken asylum narratives into written accounts[6] and the effects that a managerial emphasis on output-orientated measurement can have in squeezing and shaping the material and discursive spaces of encounter between government officials and asylum seekers.[7]

1 Memon, Amina (2012) Credibility of asylum claims: consistency and accuracy of autobiographical memory reports following trauma. *Applied Cognitive Psychology* 26 (5): 677–679. Herlihy, Jane, Laura Jobson and Stuart Turner (2012) Just tell us what happened to you: Autobiographical memory and seeking asylum. *Applied Cognitive Psychology* 26 (5): 661–676.

2 Eastmond, Marita and Henry Ascher (2011) In the best interest of the child? The politics of vulnerability and negotiations for asylum in Sweden. *Journal of Ethnic and Migration Studies* 37 (8): 1185–1200.

3 Wettergren, Åsa and Hanna Wikström (2014) Who is a refugee? Political subjectivity and the categorisation of Somali asylum seekers in Sweden. *Journal of Ethnic and Migration Studies* 40 (4): 566–583.; Crawley, Heaven and Dimitris Skleparis (2018) Refugees, migrants, neither, both: Categorical fetishism and the politics of bounding in Europe's 'migration crisis'. *Journal of Ethnic and Migration Studies* 44 (1): 48–64.

4 Blommaert, Jan (2009) Language, asylum, and the national order. *Current Anthropology* 50 (4): 415–441.

5 Jubany, Olga (2011) Constructing truths in a culture of disbelief: Understanding asylum screening from within. *International Sociology* 26 (1): 74–94.

6 Jacquemet, Marco (2009) Transcribing refugees: The entextualization of asylum seekers' hearings in a transidiomatic environment. *Text and Talk* 29 (5): 525–546.

7 Poertner, Ephraim (2017) Governing asylum through configurations of productivity and deterrence: Effects on the spatiotemporal trajectories of cases in Switzerland. *Geoforum* 78: 12–21.

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We should emphasise that we did not directly study initial government decision-making. As a result, our remarks in this chapter are not based directly on first-hand observation of what happened in initial government decision-making processes, but on the ways that initial decision-making was discussed later in court. We did not interview many government representatives for this research, nor did we directly observe initial government interviews. Our comments in this chapter must therefore be seen as partial in the sense that we did not have the whole picture. This is especially true given that much good quality and diligent work at the initial stage of decision-making may have escaped our notice precisely because it was not appealed.[8] What we provide in this chapter should therefore not be seen as complete or representative.

Notwithstanding these caveats, what struck us during our observations at courts was the frequency and gravity of apparently easy-to-avoid mistakes that came to light concerning the initial decision-making process. We recognise that our vantage point from asylum appeal courts would naturally steer us towards the poor, questionable and erroneous decisions produced by government departments, and that this is one reason why the issue loomed so large in our data. Nevertheless, recall from Chapter 1 ('Introduction') that the rate of success of asylum appeals for the EU-27 was over a quarter between 2012 and 2021,[9] which implies that a substantial proportion of initial decisions that were appealed were found to be deficient when they were re-examined at the appeal stage,[10] indicating that the issue may not simply be a product of our point of view.

In this chapter we develop an understanding of mistakes that goes beyond the common view that sees them as unpredictable and exceptional. We make the case that mistakes represent a de facto border-control mechanism, the elimination of which is not particularly attractive to the governments involved. In light of this, we suggest that mistakes need to be more fully and critically theorised and empirically examined in migration studies.

We begin by setting out some examples of the mistakes we encountered to both introduce the topic and convey the persistent, 'sticky' nature of mistakes in bureaucratic contexts. We then discuss ways to understand mistakes

8 For example, in Germany in 2015, 84% of government decisions were not appealed (68% for negative decisions), and in 2016 75% were not appealed (57% for negative decisions). This decreased in 2017, where 50% of decisions were not appealed (27% for negative decisions), and in 2018 46% were not appealed (24% for negative decisions). ASYFAIR calculations based on http://www.bamf.de/SharedDocs/Meldungen/DE/2019/20190328-gerichtsstatistik-2018.html and http://dipbt.bundestag.de/dip21/btd/19/087/1908701.pdf) [accessed 16 August 2021].

9 Based on data from Eurostat (2022) First instance decisions on applications by citizenship, age and sex – annual aggregated data (rounded) MIGR_ASYDCFSTA. Available at: https://ec.europa.eu/eurostat/data/database [accessed 29 June 2022]. Also see Chapter 1, 'Introduction'.

10 Unless something of relevance changed between the first instance and the appeal.

and incompetence beyond the exceptional frame that is most commonly used, drawing on a set of ideas from management science and critical studies of ignorance. We then return to our empirical material to provide a typology of the mistakes that we observed and conclude with some observations on their consequences.

Introducing Mistakes

We often heard about paperwork that had gone missing or been mislaid during the process. People seeking asylum often come through chaotic experiences and hanging onto key identity documents and proofs to support their case can be very challenging.[11] When they manage to do so, only to find that official authorities are far less diligent, the results can be both extremely disheartening and damaging to their asylum case.[12]

One appellant who had been detained in the UK had endured two periods of inaccess to his own paperwork. First, his solicitor had abandoned his case whilst he was in detention. When a new solicitor was found, the old one demanded GBP 30.00 (EUR 34.65) for the return of the files. The appellant told us, months later, that he paid the GBP 30.00 but was still never sent his old file with the evidence he needed for his case. 'Up to now I have not got the file,' he said, 'so I didn't have all the documents that we used in detention and I didn't have any copies.' Then, separately, the Home Office lost a second file related to his case, which also contained his passport. The Home Office acknowledged losing the passport, although they had no record of the existence of the file that had once accompanied it. By the time his appeal came around, 'they had to just work on the documents that were available from that time', which the appellant felt weakened his case substantially.[13]

Another appellant in the UK waited two years for his appeal hearing following an initial rejection by the Home Office. When the date of the court hearing finally arrived, and the appellant made the journey to court, they were confronted with another obstacle: the Home Office announced at the hearing that they had lost the file for the case. The appellant paraphrased their approach as 'We lost the files, we can't find his files, come back again'. He was forced to travel back to his accommodation again from the tribunal and wait months for a rescheduled hearing. Eventually the second appeal date arrived. Incredibly though, the appellant recalled that at the second hearing 'Again they lost the files'[14] and the hearing had to be adjourned and rescheduled once

11 Darling, Jonathan (2014) Another letter from the Home Office: Reading the material politics of asylum. *Environment and Planning D: Society and Space* 32 (3): 484–500.

12 'BAMF supposedly lost all the original documents the appellant provided,' one lawyer recounted to the judge in a hearing in Berlin. 'It's a disgrace what's happening there' (fieldnotes, Germany, 2018, Nicole Hoellerer).

13 Interview, appellant, UK, 2015, Natalia Paszkiewicz.

14 It might be assumed that the Home Office never found the files.

again. Only the third time could the hearing go ahead, when the Home Office finally came to the hearing with the files. The successful outcome of the appeal – and with it, the acknowledgement of the mistakes that the Home Office had made – did not have the effect of effacing his memories of how these mistakes had been 'killing' his morale over many months. The problem, as he saw it, was that the Home Office did not accord the process the gravity it deserved: 'The process is not very, I don't know if I can say friendly or if I can say good, but it's not fair. I think for things to be good or fair … they should try to take it seriously.'[15]

Aside from the inconvenience and frustration that bureaucratic errors caused, there were further negative consequences. Consistently delaying a case in the UK restricts an individual from seeking employment and continues to tie them to oft-criticised support systems. Furthermore, when government authorities lost documents, British lawyers told us that their asylum-seeking clients sometimes blamed them, not believing that an official government department in a rich country could be so inept. The delicate relationships of trust that legal representatives have to nurture with their asylum-seeking clients can be poisoned by mistakes such as these.

Another source of frustration concerned the delivery of government decisions. Once government officials come to a decision, it has to be delivered to the relevant people, including the appellant. We came across numerous examples of situations in which this basic communication had apparently not been completed successfully. One lawyer in Rome told us about a recurring issue with the delivery of decisions from the Italian Territorial Commission.

> Sometimes if the postman doesn't find the person, they leave the mail sticking to something, and it can fall down. Some applicants … didn't find anything. The postman is not a judicial officer and only leaves the notification … the applicant goes to the police office explaining that their provision hasn't arrived and the answer they get is: 'No, no, go away, go …' They are pushed away without hearing them, without checking their names in the computer, and then the deadlines expire.[16]

What makes mistakes like these more frustrating is when appellants act proactively, aware that mistakes might have occurred, and attempt to notify the authorities involved, but the authorities are unresponsive. It is this sort of persistence of mistakes in bureaucratic settings that David Graeber calls bureaucratic 'stupidity'.[17]

15 Interview, appellant, UK, 2015, Natalia Paszkiewicz.
16 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.
17 Graeber, David (2015) *The utopia of rules: On technology, stupidity, and the secret joys of bureaucracy.* Brooklyn, NY: Melville House.

One Afghan woman who had fled to Germany to avoid a forced marriage was initially housed in a centre for refugees but moved to a flat-share with a friend she made at the centre. When the Federal Office for Migration and Refugees (BAMF) made a decision on her asylum claim, it was undelivered because they thought that she was still living in the centre. She said that she had notified BAMF about her change of address. Indeed, according to her detailed account of what happened, which she gave at her appeal in court, she notified them on three different occasions. She was aware that the decision from them should have arrived and she actively sought it out, but was told, in her words; 'it's not our problem that you didn't get our letters'. It was only at the third time of asking that she was eventually shown the decision.

By the time she finally received the decision (she was awarded a deportation ban, but had appealed the decision in order to obtain full refugee protection, and so had appealed in order to 'upgrade'[18]), the statutory period for appealing the decision had elapsed. She faced the prospect of a lack of recourse to legal aid or forfeiting the right to an appeal hearing altogether. The court spent nearly two hours hearing her case for an extension to the period for submitting an appeal, but the judge did not grant it. Instead the judge recommended that a separate appeal was necessary to decide whether or not her substantive appeal could be considered. This would require a case to be made in writing and witnesses to be gathered.[19] We have no way of knowing whether her case for an extension was eventually successful, but it is clear that it demanded a great deal of judicial time, the time of the other professionals like officials in the Berlin Immigration Office[20] and BAMF, as well as her own time and emotional energy to mount this additional case.

This persistent character of bureaucratic mistakes was also evident in transcription errors made at the point of the initial decision. At the end of asylum interviews with government decision-makers, it is common practice to read out the transcript of the interview to make sure that the person seeking asylum is satisfied with the account of the conversation. One appellant told us that, when their interviewer read out the transcript, there had been a significant mistake that they corrected: the date on which they had left their country of origin had been recorded as the date they had arrived in the European country in which they had claimed asylum, whereas in fact the journey had taken several months.

> When they printed it out, the interviewer, she read everything to me. At that moment I told them 'no, it wasn't on this date'. … She said 'okay',

18 Upgrade claims are discussed in Chapter 2 'What are Asylum Appeals'.

19 Fieldnotes, Germany, 2018, Nicole Hoellerer.

20 See Chapter 6 ('Assembling Appeals') on the Berlin Immigration Office (*Landesamt für Einwanderung, LEA*) – in other federal states called Central Foreigner/Aliens Department (*Zentrale Ausländerbehörde, ZAB*).

> so she changed it on the paper but she didn't change it on the computer. The paper was given to me, I signed [it], but it wasn't changed in the [computer].[21]

Later in the process this error counted against them. The decision was negative and cited inconsistencies in their story relating to the dates of travel. They complained about the inaccuracy, exhibiting the typed version of their transcript of the initial interview, which they had kept, with the date corrected in pen. The authorities assured them that they will change it in the system:

> 'We will change it' they said. But up until today they are still using the old date.... I believe the date is something that is not favourable to me. When you tell them something, they don't change it; they leave it the way it is.

By the time the case went to appeal, the appellant faced scepticism about the discrepancies concerning the dates noted in their case.

> They said that the dates in my story did not coincide. They said I told them this date but I didn't … I didn't say this … I showed them the transcript where they cancelled it and put another date. They didn't believe me.[22]

Understanding Incompetence

It is possible to see errors not just as exceptions to a usual state of efficiency and accuracy in border control settings. Mistakes are related to the speed with which legal and bureaucratic systems are expected to operate, as well as the resources and time devoted to considering asylum claims. A certain risk of error is inherent to the design and resourcing of decision-making systems. Yet governments could act to build in more checks, quality control and monitoring, more accessible complaint processes, more serious disciplinary measures, and better filing systems to avoid these sorts of mistakes.

How, then, are we to think about incompetence more critically? What concepts can social science offer us? A recent strand of literature in management science has begun to examine the *functionality* of incompetence in complex societies and organisational settings. It posits that the characteristics of 'absence of reflexivity, a refusal to use intellectual capacities in other than myopic ways,

21 Interview, 2019, country and interviewer suppressed.

22 Interview, 2019, country and interviewer suppressed. We note that the appellant might be lying about the whole story and may have added the date in pen themselves to the transcript of the initial interview. But why would they have told us this story in that case?

and avoidance of justifications'[23] as well as unwillingness to learn from errors, carelessness and short-sightedness, can be beneficial to organisations under specific conditions. This literature turns a primary assumption that underpins much talk of 'smart' societies, 'smart' cities and the drive towards intelligence (artificial or otherwise) on its head: what if the characteristics of ineptitude are not always damaging, costly or antithetical to organisational goals? What if, in fact, the traits and behaviours commonly associated with incompetence actually hold some form of benefit either to the individuals concerned, a wider group, or both?

Writers in this literature are interested in what they describe as functional stupidity.[24] It can make sense for organisations to permit and even tacitly encourage unreflexivity in their employees when they want those individuals to carry out narrow tasks without questioning the wider consequences or purposes of what they are doing. Advantages might include the ability to maintain momentum towards a particular management goal, maintain consensus, and avoid arguments or indecision within a work team. It can also help to 'facilitate decision-making, create a good workplace climate, safeguard people's sense of self, and offer a sense of direction'.[25] Among profit-making private companies, it can have reputation or brand-related benefits when resources are directed to image-maintenance at the expense of substantive effort. It can also be associated with management strategies of simplifying decision-making and reducing complexity in order to save time, energy and scarce resources.

Ignorance, similarly, can offer strategic benefits from a managerial point of view. This line of argument questions the opposition between ignorance and power.[26] While knowledge has long been associated with power, influence and capacity, the way that ignorance can assist the powerful, protect them, and generally serve as a 'productive asset' has often been overlooked. Writers in this vein have explored the way that ignorance is deliberately manipulated and deployed in the areas of big pharmacology, oil, technology, agriculture and food industries, and conclude that it is a highly valuable, poorly understood yet pervasive resource in contemporary organisations.[27]

23 Alvesson, Mats and André Spicer (2012) A stupidity-based theory of organizations. *Journal of Management Studies* 49 (7): 1194–1220. See also, for example, Paulsen, Roland (2017) Slipping into functional stupidity: The bifocality of organizational compliance. *Human Relations* 70 (2): 185–210.

24 See in particular Alvesson and Spicer, 2012. Alvesson, Mats and André Spicer (2016) *The stupidity paradox: The power and pitfalls of functional stupidity at work*. London: Profile Books.

25 Alvesson and Spicer, 2016: 213.

26 McGoey, Linsey (2019) *The unknowers: How strategic ignorance rules the world*. London: Zed Books. McGoey, Linsey (2012) The logic of strategic ignorance. *The British Journal of Sociology* 63 (3): 533–576.

27 ibid. See also Schaefer, Stephan M. (2019) Wilful managerial ignorance, symbolic work and decoupling: A socio-phenomenological study of 'managing creativity'. *Organization Studies* 40 (9): 1387–1407. Bakken, Tore and Eric Lawrence Wiik (2018) Ignorance and organi-

Even though these literatures on stupidity and ignorance are predominantly based on examples from private, profit-making organisations, there may be even more reasons to suppose that incompetence could be functionally important in the public sector. Brands are extremely important to profit-making organisations, meaning that quality and efficiency of service are central to long-term corporate success. But why would European governments who are reluctant to welcome migrants give much thought to their reputations for good quality and efficient decision-making? What credible disincentives are there to European governments that offer poor service and inefficient ways of processing claims? The threat of taking one's business elsewhere – so powerful in a corporate environment – is empty coming from often-unwelcome forced migrants who are passing through European states' border control processes. Even the democratic threat of voting for a different political party is severely weakened, because many migrants do not have voting rights. If anything, a reputation for inefficiency and poor service could be framed as a way to discourage all but the most persistent or desperate claimants. Of course, European governments could never say this openly, but the incentives to devote managerial attention to generating a reputation for efficiency and customer service in the context of asylum decision-making are much weaker than in the profit-making sphere.

The need to minimise costs and be seen to be controlling migration mean that although European states are subject to international refugee law, they are often grudging protectors of refugees. Over many years, they have developed intricate practices of externalisation of responsibility for border control upwards to international fora, downwards to local states and regional governments, and outwards to private companies, NGOs and charities, the latter taking on more and more responsibility to provide services to refugees and migrants.[28] International interception and push-back of migrants continues to operate and evolve, despite its dubious legality[29] and there is an ever-wider enrolment of sectors of society in verifying, checking and reporting immigration status.[30] In short, European states often seek to squirm out of their responsibilities to refugees whenever they can. In the light of this tendency

zation studies. *Organization Studies* 39 (8): 1109–1120. Slater, Tom (2014) The myth of 'Broken Britain': Welfare reform and the production of ignorance. *Antipode* 46 (4): 948–969.

28 Guiraudon, Virginie and Gallya Lahav (2000) A reappraisal of the state sovereignty debate: The case of migration control. *Comparative Political Studies* 33 (2): 163–195. Lahav, Gallya (2005) *Immigration and politics in the new Europe: Reinventing borders.* Cambridge: Cambridge University Press.

29 Moreno-Lax, Violeta (2017) *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU law.* Oxford: Oxford University Press. Gammeltoft-Hansen, Thomas (2011) *Access to asylum: International refugee law and the globalisation of migration control*. Cambridge: Cambridge University Press.

30 In the UK this is part of the generation and consolidation of a hostile environment that is largely co-ordinated beyond states themselves, see Webber, Frances (2019) On the creation of the UK's 'hostile environment'. *Race and Class* 60 (4): 76–87.

it might be possible to see incompetence as another form of responsibility avoidance.

These lines of thought about incompetence have their limitations. The management literature has been accused of employing an attractive, buzzword-type phrase ('functional stupidity') without thoroughly unpacking what the concept means.[31] There is also a long history of literature attending to the phenomenon of 'unthinking' in bureaucratic settings, beginning with Hannah Arendt's work,[32] and it remains unclear how newer concepts like strategic ignorance and functional stupidity relate to this body of work.

There are also issues with the notion of calculation in the literature. Typically, managers and corporate elites are depicted as calculative in their deployment of incompetence and ignorance, whereas, in border control settings, such a sharp sense of general calculative-ness is probably misplaced.[33] The notion of a centralised, powerful intelligence deploying incompetence premeditatively resembles a conspiracy theory whereas experience points towards the chaotic, incoherent, self-contradictory, poorly co-ordinated and improvised nature of border control in practice.[34] If an understanding of incompetence as organisationally functional is to be useful in border studies, its genesis needs to be thought about in less top-down terms. It is much more likely that the role functional incompetence has come to play in border control is the de facto product of a multiplicity of causes that operate not always – or even primarily – through thoughtful co-ordination, but through thoughtlessness, withdrawal, a lack of prioritisation, scarce resources and poor political incentives to reform the situation.

Systematic Underinvestment in Expertise, Competence and Capacity

Despite these reservations, the core insight that incompetence could serve important organisational functions in border control is important to explore. In this section we return to our empirical material to identify the various forms of incompetence that thwarted appellants' access to justice. We examine the consequences, not only in negative terms but also in terms of the advantages

31 See Butler, Nick (2016) Functional stupidity: A critique. *Ephemera: Theory and Politics in Organization* 16 (2): 115–123, page 116: 'Alvesson and Spicer end up presenting a management buzzword as if it were a piece of critical scholarship. This matters, I suggest, because it opens up a space for further research that is based on highly problematic foundations.'

32 Arendt, Hannah (1981) *The life of the mind*. New York : Harcourt Publishers.

33 In her careful and insightful treatment of the role of ignorance in migration and border guard offices in Sweden, Switzerland and Latvia, for example, Lisa Borelli discusses both the conscious and unconscious management of ignorance and knowledge. Borrelli, Lisa Marie (2018) Using ignorance as (un) conscious bureaucratic strategy: Street-level practices and structural influences in the field of migration enforcement. *Qualitative Studies* 5 (2): 95–109.

34 Burridge, Andrew, Nick Gill, Austin Kocher and Lauren Martin (2017) Polymorphic borders. *Territory, Politics, Governance* 5 (3): 239–251.

that incompetence (and a reputation for it) offers to governments who are unenthusiastic about their responsibilities under asylum and refugee law.

Linguistic Competence

There were various forms of expertise, skills, competencies and capacities that appeared to be lacking in the initial processing of asylum claims. Perhaps the most common complaint was about the quality of interpretation at the initial government interview. One Italian lawyer listed a set of common words and phrases used in asylum claims that, in his opinion, were routinely misunderstood and mistranslated during the initial government interview process, including 'debt', 'fraud', 'blackmail' and 'usury'.[35] Despite the sensitivity of cases to interpretation errors, though, easy and straightforward measures to ensure against them were often not taken. It would be easy, the same lawyer suggested, to provide a list of these common terms and distribute them widely to interpreters of the most common languages of appellants in Italy.[36] To his knowledge, however, no such list was employed.

Appellants' lives could hang in the balance as a result of linguistic inaccuracy. At the National Court of Asylum (CNDA) in France, one claimant narrated multiple episodes of arbitrary arrest and torture. His case relied in part on an arrest warrant from the authorities in his origin country but, according to the appellant's lawyer, the translation of the arrest warrant made by the French Office for the Protection of Refugees and Stateless Persons (OFPRA) was 'absolutely incomprehensible'. In a passionate speech at the end of the hearing the lawyer raised grave concerns about what he called 'monumental errors committed at OFPRA …' and that 'there is a real lack of prudence here'.[37]

During a case in Germany, an appellants' story about how they had escaped their country of origin seemed to be at odds with their material evidence. BAMF had recorded that they had entered their country of origin on a particular date, which was actually the time they were supposed to have left. The rest of the story the appellant told did not make sense because it happened outside their country of origin, and they had consequently been refused asylum by BAMF. Upon re-translating the stamps on the documentary evidence the appellant provided at court, however, it became clear that the stamp confirmed the appellant's exit from, not entry to, their country of origin, and the rest of the story fell into place.

35 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.

36 Dahlvik recognises the importance of qualifications and training for interpreters in asylum cases, and sets out how this could work, such as by being compulsory and paid for by the state. Dahlvik, Julia (2019) 'Why handling power responsibly matters: The active interpreter through the sociological lens.' In Gill, Nick and Anthony Good (eds) *Asylum determination in Europe: Ethnographic perspectives*. Cham: Palgrave Macmillan, 133–154.

37 Fieldnotes, France, 2018, Jessica Hambly.

> The judge smiled: 'So now that the translation discrepancy is resolved, the appellant's account of his life in [his country of origin] is credible. Clearly BAMF has mistranslated the documents and the stamps on the documents.'[38]

The hearing occurred well over a year after BAMF had initially rejected the claim, representing a protracted period of waiting and uncertainty for the appellant that could have been avoided.

The discovery of misspellings of names and places, as well as general mistranslation, was common in Germany, and numerous judges mentioned that BAMF made such errors frequently. One apparent problem was the supposedly 'low pay' for BAMF interpreters. An interpreter in Augsburg told us that he had stopped working at BAMF years ago because 'they don't pay well'.[39] A lawyer, also in Augsburg, joked during a hearing that 'we all know that BAMF employs *anyone* to serve as interpreters'.[40] Another interpreter in Berlin told us that BAMF finds it difficult to recruit good interpreters due to their 'shabby pay'. As a result, in his opinion, 'BAMF translation errors are the most common problem in court hearings'.[41]

It is not that the expertise for translating more accurately did not exist in Europe, even at the time of the increasing number of cases in the mid-2010s, as evidenced by the presence of many skilled interpreters at the courts that we observed. Rather, a certain level of competence – and an according level of incompetence – is endemic to the design of the first-instance decision-making process. The quality of decisions reflects a managerial judgement that balances between the costs and benefits of hiring workers of the required skill.

Typing

Linguistics were not the only skills in short supply. There was also frustration among lawyers, judges and appellants at the apparent lack of office skills such as the ability to touch type. One Italian lawyer expressed concern that there are likely to be mistakes 'at the fourth hearing, at 6.30 pm, if the commissioner doesn't have typing competences'. He continued: 'and nobody is selected for their typing competences, nor do the present commissioners necessarily have typing competences'. According to his experience of the Territorial Commission 'there were people who were typing with two fingers, two! We must get out of the Middle Ages!'.[42] Again, it is not that these competences are difficult to recruit for or instil via training.

38 Fieldnotes, Germany, 2018, Nicole Hoellerer.
39 Fieldnotes, Germany, 2018, Nicole Hoellerer.
40 Lawyer's emphasis (fieldnotes, Germany, 2018, Nicole Hoellerer).
41 Fieldnotes, Germany, 2018, Nicole Hoellerer.
42 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.

One German judge discussed the potential of using speech recognition software to help with translation of documents. We have used speech recognition software to help us transcribe fieldnotes and interviews we conducted for this project. It can be helpful, but it needs to be corrected by a diligent human otherwise important errors can occur. When it comes to asylum claims, which can hinge on single words or concepts being mistranslated, the importance of this checking cannot be underestimated. For anyone who has used the most commonly available speech recognition software at the time of writing (2022), the propensity for mistakes is obvious, and often gives rise to the most odd-sounding phrases and mistakes. And yet, according to the German judge we spoke to who outlined how BAMF used speech recognition software:

> The problem is that at BAMF they use [speech recognition software], but don't read it again. So a lot of their transcripts are incredibly confusing, full of mistakes, and wrong on many occasions.[43]

If true, this is unlikely to be because BAMF did not know about the likely faults and flaws in speech-recognition software generated transcripts, which are notorious. Rather, the lack of scrutiny of transcripts is a product of the organisational priorities in this area of decision-making. Quick decisions are valued whereas a reputation for accuracy and precision is accorded a low value. Furthermore, the choice to prioritise speed over accuracy also highlights the lack of consequences faced by decision-makers – the cost and strain of appealing a decision largely not being theirs to bear.

Interviewing and File-Keeping

Other concerns surrounded the competence that government officials commanded over the interview process and the records they produced in relation to it. In one hearing in Germany, the judge was highly dissatisfied by the lack of detail with which the original asylum interview had been conducted by BAMF. 'I think this is quite ridiculous,' the appellant's legal representative argued.

> The appellant said that he was threatened and BAMF didn't even continue asking questions?! It is also not clear in the BAMF transcript if some statements are made by the appellant or [if these] are just the assumptions of the BAMF interviewer/assessor. Also, the hearing took 85 minutes, so the transcript should be much, much longer. [44]

43 Fieldnotes, Germany, 2019, Nicole Hoellerer.
44 Fieldnotes, Germany, 2018, Nicole Hoellerer.

The judge nodded in agreement, saying, 'It's not that there are discrepancies, but that [the interview] didn't go into depth at all! […] I am not satisfied with this [BAMF] transcript at all! We cannot consider it for this case today.'

This is not an isolated example. Another judge at a hearing in Berlin remarked that 'there is nothing in the BAMF report! Therefore I have to be careful with my assumptions.' He observed that BAMF reports frequently relied on passages of text that were copied verbatim from other reports. The judge complained that they contain

> always the same pre-written text elements … we really have to talk about this problem! I always read the same, and it is very concerning. There seems to be no investigation of individual cases … In the end the work has to be done by someone, and at the moment, I feel that BAMF simply shifts responsibility for everything onto us.[45]

Appellants' legal representatives made similar observations in other cases. 'It is ridiculous that a 60-minute [BAMF] interview can fit on three pages,' one lawyer complained in a hearing.[46] 'The brevity of [BAMF] interviews are always a problem,' another lawyer observed. 'The transcripts of these interviews are, more often than not, completely inaccurate.'[47]

Reasoning and Empathy

Lawyers for appellants sometimes drew attention to what they perceived to be limitations in the legal reasoning that upstream government officials had employed to reach their decisions. At times these were referred to with humour, as a gentle way to undermine the strength of arguments against appellants. One legal representative in France, for instance, quipped that OFPRA had contradicted itself: 'It seems OFPRA both accept and deny the existence of certain events in order to reach their conclusions.'[48] At other times however the gravity of the case material and the seriousness of the apparent limitations in reasoning elicited stronger emotions from appellants' legal representatives. At the time of our fieldwork, many Chechens continued to endure serious human rights abuses leading them to flee to Western Europe.[49] In one case in France we observed a family from Chechnya who had been refused asylum despite having proven that various members of their household had already been killed by the authorities.

45 Fieldnotes, Germany, 2018, Nicole Hoellerer.
46 Fieldnotes, Germany, 2019, Nicole Hoellerer.
47 Fieldnotes, Germany, 2018, Nicole Hoellerer.
48 Fieldnotes, France, 2018, Jessica Hambly.
49 See for example (in German): Swiss Refugee Council (2016) *Tschetschenien: Aktuelle Menschenrechtslage*. Available at: https://www.refworld.org/docid/576396104.html [accessed 21 September 2022].

Fieldnotes: The lawyer stands. He begins.

Lawyer: I am here before you for this family. The decision from OFPRA is INDECENT!!!

Fieldnotes: He really emphasises this word – he uses the French '*indecent*' which means indecent but also improper/ nasty.

Lawyer: It is INDECENT that they find that this [family member] has the power to be such a LIAR.

Fieldnotes: The lawyer speaks passionately and frequently raises his voice for emphasis. The panel listen and seem very engaged.

Lawyer: [Many of] their family are here in France, or dead, killed by our Russian friends … HOW can you say these people are liars!!??

Fieldnotes: He becomes extremely angry and uses swear words in his speech.

Lawyer: … isn't it enough that the [relatives] have died!? I have the death certificates! I have sent them to you! What more do you want!? If we look at the human rights reports from the region, it doesn't get much worse! One more death over there … (he gestures to the appellants) … *Monsieur*? *Madame*? *Ma voisine* [my neighbour]?

Fieldnotes: He is referring to each appellant in turn – implying any of them could be killed.

Lawyer: What will that change? … I am not asking you to do them a favour. I am asking you to respect the law. I have no idea why OFPRA rejected this case. You have the law. You have a credible account. You have the Geneva Convention …[50]

In confrontational legal settings like those of the court, where argument and disagreement are commonplace, it is to be expected that lawyers might characterise the opposition as nonsensical. It is sometimes difficult from the public gallery to form a clear impression of a legal case, especially when much of it relies on paperwork that we usually did not have access to. Notwithstanding these concerns though, the gravity of accusations of incompetence like these were impossible to ignore.

We came across numerous examples of apparent failures in emotional intelligence too, especially concerning empathy, demonstrating a lack of reflection on the difficulties that a truth-telling asylum seeker might encounter in disclosing their case during the first interview (see also Chapter Eight 'Barriers to Communication in Asylum Appeals'). This gave rise to unrealistic expectations about the degree of information they were likely to be able to provide in support of their claim.

One appellant, for example, explained at the appeal hearing that he had relationships with a political dissident group that the government in his home country were suppressing. He had been arrested multiple times, was frequently interrogated and had been tortured at a government camp. He had

50 Fieldnotes, France, 2018, Jessica Hambly.

scars corresponding to his reported injuries and described being locked up for a protracted period of time. What is more, he said that a family member had been tortured in an attempt to elicit his whereabouts from them.[51]

The initial interview had lasted only 40 minutes, during which time the appellant had been expected to recall the traumatic details of these experiences. His story was difficult to recall emotionally. It had various elements: the political context and his involvement in the dissident group, the arrests, the camp, the particularities of his injuries, and the treatment of his family member. His past arrests, which had involved violent interrogations, meant that the appellant also had good reason to be fearful and distrustful of the initial interviewer (and representative of government authority). To expect the appellant to rapidly, accurately and in fulsome detail relay these complex experiences to a government official was arguably unrealistic and dangerous. The fact that so many more details came out in the court hearing demonstrated how difficult practical disclosure had proven to be during the initial interview.

Features of bureaucratic asylum decision-making systems that can suppress empathy include the distancing and insulation of decision-makers from the individuals whose lives they make decisions about. Real people also become represented by numbers and statistics in the decision-making process, while department heads nurture short-sightedness via internal competition between work teams and target cultures in administrative agencies.[52] A lack of empathy is a type of ignorance rooted in a poor grasp of the realities of other people's lives, feelings and suffering and can easily expose appellants to structural violence.[53]

Some judges also expressed concerns about the limited legal reasoning employed by government authorities during the initial decision-making process. One judge in Dresden, for example, commented that BAMF had to recruit people quickly when the number of cases rose in 2015 and 2016. The result was that they often had to hire people with only the most rudimentary knowledge of law. 'They hired lots of people who had no clue about the law and asylum,' the judge told us, taking 'anyone with just a term in a [university] law course'. The consequence, however, was that 'a lot of BAMF decisions are useless. And we have to deal with the fallout'.[54]

Another judge in Berlin expressed similar misgivings:

> often BAMF sends people here for nothing at all … they look so young and inexperienced, and sit opposite me here with blank faces for hours

51 Fieldnotes, 2018, country and researcher suppressed.

52 Gill, Nick (2016) *Nothing personal? Geographies of governing and activism in the British asylum system*. Chichester: John Wiley & Sons.

53 Jones, Hannah (2021) *Violent ignorance: Confronting racism and migration control*. London: Zed Books.

54 Fieldnotes, Germany, 2018, Nicole Hoellerer.

> … and have absolutely nothing to add to the procedure … What is this? It's a complete waste of time … of the court's time … a waste of time for all participants.[55]

In comparison to legal representatives for asylum appellants, BAMF representatives were not obliged to hold legal qualifications as a criterion for their appointment. One BAMF representative we met had a degree in Sociology, and, after training as a BAMF decision-maker, transferred to their legal team, without any prior legal training.[56] At the Austrian court, we met a retired police officer working as a government representative.[57] Similarly in the UK, 'the entrance requirements for [Home Office Presenting Officers] only require A-level qualifications (i.e. a high school diploma) … they are given five weeks of intensive training and a further four weeks of mentoring before taking up their responsibilities'.[58]

Consequences of Incompetence

Having set out some of the forms of expertise that appeared to be lacking in the initial asylum determination process, we can now turn to the effects of these lacunae. According to the managerial literature discussed earlier, from an organisational perspective incompetence and ignorance can present both risks and benefits. One consequence that irked some of the judges we observed was the transfer of responsibilities to judges and asylum courts from government decision-makers. Judges' frustration was particularly pronounced when it became obvious that they would have to take on evidence-gathering tasks as a result of inaction by government decision-makers. In one case, which was severely delayed, having languished with BAMF since 2013 (Nicole observed the appeal hearing in 2018), the judge had received no written statement from BAMF, meaning that the burden of researching the case fell squarely on the judge's shoulders. The BAMF representative happened to be present that day, which resulted in them receiving a strict talking to by the judge:

> It is *not* the job of the court to get this information! … The burden of proof lies with *BAMF* … I am not even opposed to doing my own investigations … I once emailed an NGO in Afghanistan to ask for proof for a case, and I had their reply within 48 hours – from *Afghanistan*! … How can it be that other organisations work, and BAMF doesn't?! …

55 Fieldnotes, Germany, 2018, Nicole Hoellerer.

56 Fieldnotes, Germany, 2018, Nicole Hoellerer.

57 Fieldnotes, Austria, 2019, Nicole Hoellerer.

58 Campbell, John R (2016) *Bureaucracy, law and dystopia in the United Kingdom's asylum system*. London: Routledge, page 35.

> How can BAMF even *make decisions* [waving at bundle again], without considering foreign language documents? This is beyond me![59]

At one point in this hearing the BAMF representative tried to interject something to defend himself but the judge waved away his protestation with a very dismissive gesture. 'No, there is a line,' the judge continued, 'the burden of proof lies with BAMF … the cap doesn't fit and I'm not willing to wear it … I do not take responsibility for this.' Although this BAMF representative felt the sharpness of the judge's tongue, the judge's frustration illustrates the general effect of the fact that they were having to pick up the work that BAMF was incapable of doing. Incompetence functioned as a way to send tasks downstream, save money, and relinquish the burden on them.

Sometimes the mere fact that government administrations had developed reputations for incompetence made it more likely that work or risk would be shouldered by someone else in the system. When one legal representative said to a German judge that there could be a mistake in the translation of an appellant's name in the transcript of the initial government interview the judge replied: 'Indeed. I assume so', adding in a sarcastic tone 'typical BAMF spelling'.[60] Legal representatives would also refer to 'typical BAMF'.[61] One judge referred to the quality of BAMF's work as 'often appalling'.[62] Another told us that they 'never count on BAMF … I would fall over dead in shock if they do any additional work at all'.[63] The result of this notoriety was that both legal representatives and judges knew not to ask BAMF for anything they did not absolutely *have to*. If they could do the paperwork themselves this became the easiest and safest option.

Even appellants adjusted their behaviour because of the reputation of government decision-makers. One lawyer in Italy explained why many appellants do not correct mistakes that they find in their transcripts after they have come home from their interviews.[64]

> The delay is longer if the individual decides to make changes to his personal data … due to a mistake of the interpreters, or the Commission. You can declare that while on the [transcript] your name is shown as Mohamed with one 'm', your name instead is Mohammed, written with two 'm's. But, in these cases the delay gets longer… the court writes to the zonal Territorial Commission, then the Territorial Commission

59 Judge's emphasis. Fieldnotes, Germany, 2018, Nicole Hoellerer.

60 Fieldnotes, Germany, 2018, Nicole Hoellerer.

61 Fieldnotes, Germany, 2018, Nicole Hoellerer.

62 Fieldnotes, Germany, 2018, Nicole Hoellerer.

63 Fieldnotes, Germany, 2018, Nicole Hoellerer.

64 It is at this point that they often detect mistakes, rather than during the pressurised re-reading at the end of their interview when they may be exhausted.

> needs to write back to the court that at this point approves [it]. So, you can imagine![65]

In these ways the poor reputations of administrations actually served to protect the administrations themselves from completing tasks. Long backlogs, data mishandling, procedural errors, glitches and high turnover rates all serve to create reputations for incompetence that can serve the valuable purpose (from the perspective of states) of deterring future claims and encouraging others in the system to take on work or risk. Blunders can be embarrassing for administrations in the short term, but they also serve to underscore the image of ineptitude in the minds of lawyers, judges and appellants, who may then go even further out of their way to remove tasks from the hands of government administrations.

It is possible that some appellants might have given up seeking asylum altogether. The toll in terms of numbers of would-be appellants who decided never to appeal a negative decision because they lost faith in the system of refugee status determination is hard to determine, and there are no clear European-level statistics available on this point to our knowledge (see Chapter 1, 'Introduction'). Socio-legal scholarship, however, has emphasised the costs of going through the court process in terms of time, lost earnings and effort, even suggesting that these costs can be more significant in the eyes of litigants than the costs and benefits of the eventual outcome.[66] It is plausible, then, that some asylum seekers – for whom the costs of waiting and the stress of erroneous judgement are arguably higher than for the general population owing to their often-limited financial means, language ability and cultural capital – are deterred by incompetence itself.

Conclusion: Stupid Borders?

The smart borders concept gathered pace in the wake of the terrorist attacks of 9/11 and the securitising efforts made by the USA to manage incoming and outgoing passengers in a more technologically advanced and comprehensive way.[67] The EU has invested heavily in smart borders as well, which are understood to offer 'modern, effective and efficient management of … external borders'.[68] It gives the impression that borders are increasingly technologically sophisticated and well managed, increasingly ubiquitous throughout a

65 Interview, legal representative, Italy, 2019, Lorenzo Vianelli.

66 Feeley, Malcolm M. (1979) *The process is the punishment: Handling cases in a lower criminal court*. New York: Russell Sage Foundation.

67 Koslowski, Rey (2005) Smart borders, virtual borders or no borders: Homeland security choices for the United States and Canada. *Law and Business Review of the Americas* 11 (3 & 4): 527–550.

68 See European Commission (2017) Migration and Home Affairs – Smart borders: Background. Available at: *https://home-affairs.ec.europa.eu/pages/page/smart-borders-background_en* [accessed 18 July 2022].

territory like the EU, and increasingly interoperable with other technologies such as databases held by domestic police forces.[69]

According to our observations, however, only parts of border operations are smart and other parts are decidedly slow-witted. The slowness of data processing and its unreliability, the repetition of mistakes and inability to learn from these, the hiccups in paper management and translation, and the incomprehension that officials and systems exhibit in the face of relatively easy to understand real-life circumstances speak of a state-backed border infrastructure that is seriously cognitively limited. We have catalogued some of the mistakes that asylum appellants appeared to have endured as a result of the paucity of expertise, knowledge and capability that seemed to characterise the processing of claims (accepting that our view from the public areas of appeal hearings was limited). These mistakes appeared so prominent in our data, and were so serious, that we feel moved to characterise them not as aberrations or exceptions to the usual condition of smartness that states exhibit, but as part of the very infrastructure of control they employ.

A burgeoning literature in management studies points towards the strategic importance of 'functional stupidity' in the pursuit of management objectives and aspirations at the institutional level. Incompetence, this literature suggests, can have unique value for institutions, associated with strategic ignorance, a lack of reflexivity and a belligerent focus on localised outcomes to the exclusion of wider social and moral consequences.

It may be, we suggest, that this perspective is useful in understanding European governments' approaches to refugees. By under-investing in capabilities of smartness, discernment, administration, interpretation, translation, keyboard skills, legal reasoning and empathy in key areas of border administration – particularly refugee claim determination – states might be seen to have utilised incompetence itself to shift responsibility for refugee protection onto Europe's judges, tribunals and courts, at least at the height of the numbers of cases being processed in the 2010s.

The potential pay-offs of incompetence and ignorance in the area of refugee status determination should not be under-estimated. They include less time spent on cases, research and deliberation, less money spent on recruiting and employing people with the appropriate skills and qualifications, and fewer

69 For critical discussions see Amoore, Louise, Stephen Marmura, and Mark BB Salter (2008) Smart borders and mobilities: Spaces, zones, enclosures. *Surveillance & Society* 5 (2): 96–101; Topak, Özgün E, Ciara Bracken-Roche, Alana Saulnier and David Lyon (2015) From smart borders to perimeter security: The expansion of digital surveillance at the Canadian borders. *Geopolitics* 20 (4): 880–899; Bigo, Didier, Sergio Carrera, Ben Hayes, Nicholas Hernanz and Julien Jeandesboz (2012) Justice and home affairs databases and a smart borders system at EU external borders: An evaluation of current and forthcoming proposals. *CEPS Papers in Liberty and Security in Europe,* No. 52.

expensive checks and balances built into the system.[70] There are also potential advantages (from a narrow, myopic and protectionist state-centric point of view at least) of developing a reputation for unreliability and mismanagement. Other actors in the system (such as appeal courts) then are obliged to pick up the pieces, and learn to expect to, while asylum seekers themselves could lose faith in the protective competences of states, constituting a deterrence to onward appeals and future claims.

A possible effect that the discourse of smart borders might be having is to obscure the sort of incompetence we observed. The image of a single, reductionist view of borders and their capabilities is often misplaced while a polymorphic view of state border power – meaning a view that does not accept any one particular story about borders as *the* dominant story – is often more appropriate.[71] Similarly with respect to 'smartness', we suggest that while parts of the border apparatus are smart, there are risks with universally accepting this vision. Smartness is, after all, evocative of a state that is in control, calculative and intelligent: an image that states themselves would very much like to promote in the context of popular concerns over border mismanagement. Parts of border control systems may be smart, but other parts, we suggest, show evidence of blank incomprehension and incapacity that paradoxically serve the very same function as technologically sophisticated and well-managed borders do (i.e. the deterrence of forced migrants).

For would-be refugees who have sought protection under international law but who have had their asylum claims rejected, a stupid adversary may be more problematic than a smart one.[72] Social scientists and anthropologists have warned in recent years about the perils of state abandonment in various aspects of society[73] and state incapacity or unwillingness to engage adequately with the activity of determining refugee claims justly and fairly might be seen as a particularly insipid form of this withdrawal.

70 We note for example that in Germany, asylum law did not have an internal appeal mechanism within the government department responsible for the initial decision, in contrast to other areas of administrative law.

71 Burridge, Gill, Kocher et al, 2017.

72 For Ronell, a theorist of stupidity, its power lies in its sheer unreasonableness. Stupidity does not play by the rules. One cannot bring an idiot around to one's point of view with logic, analogy, persuasion or rhetoric. Once their course is set it is very hard to undo. If one finds oneself opposed to an idiot, one is faced not with opposite arguments to one's own, or differing worldviews (both of which might at least be engaged with) but with sheer vacancy, which is a far more terrifying adversary. The conversation, and the struggle, are over before they begin. See Ronell, Avital (2002) *Stupidity*. Urbana and Chicago: University of Illinois Press.

73 See for example Biehl, João (2013) *Vita: Life in a zone of social abandonment*. Berkeley : University of California Press. Davies, Thom, Arshad Isakjee, and Surindar Dhesi (2017) Violent inaction: The necropolitical experience of refugees in Europe. *Antipode* 49 (5): 1263–1284.

10 Judicial Questioning during Hearings

Previous chapters have revealed how challenging the work of hearing asylum claims can be and questioning is both reflective and constitutive of the challenges judges face. In the first section of this chapter, we discuss a variety of different types of questions as well as a series of factors that influence the sorts of questions that judges ask. Having set out the terrain of questioning, the second section reports on what we saw as constructive ways to ask questions employed by judges. We understand constructive practices as actions and approaches that seemed to help appellants to understand and participate effectively in their appeals. We provide a set of examples that enable us to characterise certain strategies of questioning, including those that involved patience, listening, empathy and reassurance, as effective in creating the space and time for appellants to give their best responses and a suitable atmosphere within which they could feel confident to speak.

The third section is more critical, recounting questioning that reflected implicit biases in the way judges verbally reasoned about what was likely or unlikely. We explore such biases in relation to countries of origin and gender. We also note that, when some judges expressed scepticism and engaged in intensive questioning about parts of appellants' accounts, they referenced global Northern, white, mainstream Christian and heteronormative[1] standards of what was 'normal' and hence what could be considered 'abnormal', unusual or improbable. Some questioning consequently suggested a lack of reflexivity about judges' own subject positions and privilege.

1 Heteronormativity can be defined as a 'hegemonic system of norms, discourses, and practices that constructs heterosexuality as natural and superior to all other expressions of sexuality', which legitimises the discrimination and marginalisation of those who do not conform to these heteronormative standards (Robinson, Brandon (2016) 'Heteronormativity and homonormativity'. In Naples, Nancy, Renee Hoogland, C Wickramasinghe, Wong Maithree and Wai Ching Angela (eds) *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies*. Malden, MA: Wiley Blackwell Publishing, page 1).

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Introducing Questioning

Judges' approaches to questioning varied according to a range of factors. In inquisitorial systems, for example, such as those to be found in many European countries, the judge traditionally adopts an active, questioning role. The adversarial legal system in the UK, on the other hand, envisages a role for the judge that is more akin to a referee and that places more emphasis on the parties' discussion while the judge listens, which in turn involves more questioning of the appellant by legal and government representatives.[2] Under these circumstances judges most often affected the style of questioning in the hearings by regulating the questions that were asked by representatives.[3] In the rest of the chapter, we mostly refer to judges' questioning, although many of the points we make applied to representatives' questions too. This means that this chapter draws less on the data from the UK, although in all countries, judges were more likely to undertake questioning of their own when there was no representative for either the appellant or the state. Whether the judge assessed the case *de novo* (i.e. considering the case anew and afresh) also affected the number and breadth of questions asked.

The type of case can also affect the degree of questioning judges undertake. Some judges described certain cases as particularly complex and difficult to judge, such as cases based on sexual orientation or religious conversion, which they said could require significantly more questioning than other types. In our German sample, judges asked the most questions concerning religious conversion, as well as Afghan asylum appellants being threatened by the Taliban (49 questions each on average compared to 36 on average for the whole sample). Those appellants who sought protection due to conflicts and/or war in their country of origin were least questioned by judges, however (18 questions on average), potentially due to the judges' access to external evidence. For example, Syrian appellants were often not questioned about the situation in Syria, possibly because the Syrian conflict was well documented in country-of-origin information (COI).

2 'The adjudicator is an impartial referee whose role is primarily to hold the ring between the parties and to decide the case solely on the basis of the evidence and arguments that the parties have chosen to present', Thomas writes of adversarial court hearings. Thomas, Robert (2012) *From 'adversarial v inquisitorial' to 'active, enabling, and investigative': Developments in UK administrative tribunals,* page 1. Available at: http://dx.doi.org/10.2139/ssrn.2144457 [accessed 05 August 2022].

3 Appellants can find the experience of being questioned by a government representative in an 'adversarial' way difficult and disturbing, especially if they are accused of lying outright. See Gill, Nick, Jennifer Allsopp, Andrew Burridge, Daniel Fisher, Melanie Griffiths, Jessica Hambly, Jo Hynes, Natalia Paszkiewicz, Rebecca Rotter and Amanda Schmid-Scott (2020) *Experiencing asylum appeal hearings: 34 ways to improve access to justice at the first-tier tribunal.* Exeter University and the Public Law Project. Available at: https://publiclawproject.org.uk/resources/experiencing-asylum-appeals/ [accessed 27 April 2024].

Judges might also ask fewer questions if they had been able to narrow down the issues in dispute before the hearing, perhaps via the paperwork or a pre-meeting with the representatives. It could also sometimes help if judges were experts in the area, having considered similar cases before, which can provide a guide about the most incisive questions to ask.

Appellants' responses also influence judges' (and representatives') questioning. Some appellants were well-educated and confident and even occasionally legally trained. Such appellants were sometimes able to provide expansive, but focussed, answers to questions. They were also able to follow complex and convoluted questions, would sometimes proactively offer pertinent information to the judge, would rarely become agitated, angry or upset, and could occasionally control the mood of the hearing, such as with a joke to defuse tension. Other appellants, however, who may have been less educated, healthy, or comfortable in formal, institutional or legal settings, could sometimes give too much or too little information in their responses, struggling to distinguish legally relevant content.[4] Sometimes such appellants contradicted themselves either within their response or in relation to the statements they gave during the initial decision-making process. Others seemed to not understand a high proportion of the questions asked, even with an interpreter, which could produce awkward and stilted exchanges in the hearing. Judges sometimes had to rephrase the same question several times, or repeat it, if they felt dissatisfied with the appellants' responses. Other appellants could be cagey and uncommunicative, perhaps not wanting to co-operate or contradict themselves. The degree to which appellants were forthcoming in their replies was a complex product of the advice they received, the exercise of their agency, past experiences, their well-being, as well as their understanding of and trust in the asylum system.

There was room for considerable judicial discretion during the moments in which appellants did not engage with the appeal process in the ways judges expected or perceived to be in appellants' best interests. Judges sometimes encouraged appellants to speak, explained the process to them or described the difficult position that they, as judges, would be in without more information from the appellant. Some judges appeared mindful that silence or disengagement in the face of questioning could stem from a myriad of causes including trauma, mistrust, cultural unfamiliarity or misunderstandings. Alternatively, judges could also interpret silence and disengagement negatively as an inability to answer the question or as hostility towards them.[5]

4 Shuman and Bohmer provide a discussion of the disorientation of asylum appellants in the America legal system. Shuman, Amy and Carol Bohmer (2004) Representing trauma: Political asylum narrative. *Journal of American Folklore* 117 (466): 394–414.

5 Scholars have established the wide range of meanings that silence can assume in asylum proceedings, including how silence can be an important form of agency see Johnson, Toni AM. (2011) On silence, sexuality and skeletons: Reconceptualizing narrative in asylum hearings.

In some cases, judges have a particular order to the questions that they have prepared in advance, deviation from which they could find irksome. 'Just a moment. That I have a specific order of questions is not a coincidence,' one judge snapped, in Germany, when a lawyer attempted to introduce a fresh line of questioning.[6] A judge's insistence on a particular questioning order can have the effect of pointedly establishing their power. 'The appellant speaks very confidently and starts to tell his story', Nicole noted during one case in Düsseldorf, 'but the judge interrupts abruptly saying to the appellant "I'm sorry to cut you off", and to his lawyer "before we can go to that I want to get a better picture of him, as a person, before he can continue talking".'[7]

One way to structure judicial questioning was in the form of a prepared list of questions that were written down in advance. A list of questions could ensure that judges did not forget to ask anything they had intended to or thought was important. The list may also reflect the best ways to approach certain topics drawing on pooled expertise (such as the judges' colleagues or chamber). We got a strong sense that some lists of judges' questions followed prescribed question formats in academic work too.[8] On the other hand, following a question list can produce a formulaic exchange, and give the impression that the judge is not really treating the case on its own terms. One judge in Germany questioned the utility of fixed or general lists of questions:

> I know some of my colleagues have fixed lists of questions [*Fragekatalog*], and they ask all appellants exactly the same questions. I think this is wrong … one has to be more case-specific. Personally, I prepare for each case, and write down a few questions that interest me, and that I think are relevant … This allows me to really get to the point in each individual case.[9]

At the other extreme, some judges seemed happy for appellants to take the narrative in the direction they wanted – recall the 20-minute answer provided by an appellant that we discussed in Chapter 7 ('The Politics of Speed'). There were pros and cons of this approach. It allowed appellants time to say what they felt was important, but sometimes appellants would tie themselves in knots, get confused or wander off the point. One judge explained to us: 'We have to

Social and Legal Studies 20 (1): 57–78; Chase, Elaine (2010) Agency and silence: Young people seeking asylum alone in the UK. *British Journal of Social Work* 40 (7): 2050–2068.

6 Fieldnotes, Germany, 2018, Nicole Hoellerer.

7 Fieldnotes, Germany, 2019, Nicole Hoellerer.

8 E.g. Berlit, Uwe, Harald Doerig and Hugo Storey (2015) Credibility assessment in claims based on persecution for reasons of religious conversion and homosexuality: A practitioners approach. *International Journal of Refugee Law* 27 (4): 649–666; Kagan, Michael (2010) Refugee credibility assessment and the religious imposter problem: A case study of Eritrean Pentecostal claims in Egypt. *Vanderbilt Journal of Transnational Law* 43 (5): 1179–1234.

9 Fieldnotes, Germany, 2018, Nicole Hoellerer.

balance between what is relevant and the right to be heard … Therefore I let appellants talk, even if it is not relevant for the hearing. But sometimes I have to intervene.'[10]

The approach to questioning can also vary from the beginning to the end of a hearing. Hearings in most countries and courts follow a pattern. In the UK, for example, hearings typically move from the opening remarks of the judge, through examination-in-chief (during which time the appellant's representative leads the questioning of the appellant), cross-examination (during which the government representative leads the questioning), sometimes re-examination (which, if taken up, is again led by the appellant's representative), and then closing submissions.[11] At the outset of hearings in Germany, many judges posed 'ice-breaker' questions intended to get the appellant used to talking in the hearing. 'Today, you are here at court. But what would you do if you weren't here?' one judge asked in Berlin for instance, 'and what do you do in your free time?'[12] We also noticed judges using broad questions at the start of the hearing and then probing specific aspects of the narrative that they found important in more detail as the hearing progressed, a method akin to what has been called 'funnel' questioning by psychologists.[13] Conversely, at the end of hearings we sometimes got the impression that judges' minds were made up and they were simply going through the motions, asking relatively few questions and not interested in probing the answers in more detail.

Judges employed various methods to keep their questioning clear and precise. Short questions and short sentences could be helpful. Sometimes visual aids were used such as maps and timelines, or judges held up their hands and used fingers to count days and sequences, providing a visual tool that they and the appellant could refer to. Another tactic was recapping, meaning short recapitulations of the information that had been exchanged over the previous round of questions. Often these recaps would be in the form of pseudo questions themselves – sentences that were not actually phrased as questions but still asked with questioning intonation and followed by a short silence to allow the appellant to interject, object or correct any aspects they disagreed with. An example would be: 'So you moved in, and one day later you attached your name on the postal box, and one day later you registered with the police.'[14] Here the judge is summarising and checking information via the recap.

10 Fieldnotes, Germany, 2018, Nicole Hoellerer.

11 Henderson, Mark, Rowena Moffatt and Alison Pickup (2021) *Best Practice Guide to Asylum and Human Rights Appeals*. Available at: https://www.ein.org.uk/bpg/contents [accessed 22 November 2021]. See also Thomas, Robert (2011) *Administrative justice and asylum appeals: A study of tribunal adjudication*. Oxford: Hart Publishing.

12 Fieldnotes, Germany, 2018, Nicole Hoellerer.

13 Matsumoto, David, Hyisung Hwang and Vincent Sandoval (2015) *The funnel approach to questioning and eliciting information*. Available at: http://davidmatsumoto.com/content/TPjan15-info-mat-hwa-sand%201.pdf [accessed 19 November 2021].

14 Fieldnotes, Germany, 2018, Nicole Hoellerer.

An approach that works in lots of situations might not always work, however. During one case the judge was recapping a particularly sensitive and harrowing episode that the appellant had recounted. 'So, you tried to kill yourself, but your [relative] found you, and prevented you from doing it. And then your [other relative] arrived.' In this instance, Nicole was surprised at the directness of the judge: their recapping and the shortness of sentences came across as brusque and unfeeling in response to the disturbing details of the case.[15]

A hesitant questioning style or complex questions could confuse the appellant. Complex questions often involved more than one question at once, conditionals within the question (e.g. 'and if so …') or double negatives (e.g. 'there was not much point not talking, was there?'). When faced with complex questions some appellants asked for them to be broken down and repeated. Appellants often took their time, asked for clarification and exerted agency in these situations. Interpreters could also be helpful in avoiding complex questions, asking the judge to break up their questions, for example.

Sometimes it was possible to observe political tensions between the word choices of judges and appellants in their questioning and responses. Different ways to refer to the act of leaving the appellant's country of origin could be revealing of different viewpoints, for example. Judges would sometimes use neutral words like 'depart' or 'leave' rather than 'flee' or 'escaped', which had the effect of keeping open the possibility that the appellant had migrated for economic reasons and had had a choice. One judge used the word 'emigrate',[16] which suggested the economic incentive to move. Occasionally these word choice differences were a source of consternation. 'In this last month before you departed – "fled", as you call it – did anything else happen?' one judge in Berlin asked, thereby drawing attention to the discrepancy in word choice that he and the appellant were using. 'The appellant gets agitated when responding' after this point in the hearing, Nicole noted.[17]

Some judges were extremely formal in their questioning. Formal questioning was characterised as lacking humour, although very polite and courteous. Under these circumstances, appellants' formal titles might be used (e.g. 'Mister X') and some judges would insist on being addressed formally themselves (e.g. 'sir' or 'ma'am'). Formal questions were characterised by formal pronouns and strictly correct grammar, as well as very few instances of slang and colloquialisms. Formality can be associated with stuffiness and exclusivity and some appellants seemed nervous and uneasy when the atmosphere was formal. We also noticed that when there was an interpreter, some judges introduced a peculiar type of interpersonal distance between themselves and the appellant by using the third person instead of the second person in their

15 Fieldnotes, Germany, 2018, Nicole Hoellerer.
16 Fieldnotes, Germany, 2018, Nicole Hoellerer.
17 Fieldnotes, Germany, 2018, Nicole Hoellerer.

questioning (e.g. 'ask them if they had ever left the country before' rather than 'had you ever left the country before?').[18] This gave the impression, at least to us as observers, that the conversation was *about* the appellant rather than *with* them. Under some circumstances though, formality might have been helpful.[19] Social conventions are arguably more transparent and hence less confusing in formal situations. Formal language might be closer to that learnt from textbooks or in language classes (which was how many appellants had probably learnt European languages) and sarcasm and other forms of humour that can alienate appellants were generally less frequent.

It is also worth reflecting on the role of repetition in questioning. Questions were repeated for a variety of reasons. On the one hand, government representatives in some British cases repeated questions cynically as an attempt to induce the appellant to contradict themselves.[20] On the other hand, judges sometimes repeated questions in order to give appellants every opportunity to provide the information they were looking for. Appellants frequently did not provide the answers judges expected, such as when their responses lacked specific details of the people and places involved in their narrative. Under these circumstances, judges were often keen for more details and sometimes struggled to convey the level of detail that they wanted from appellants: 'Give me so much detail that someone who was never there can imagine it!' one judge in Munich enjoined.[21] As part of this elicitation, judges would sometimes explain to appellants that they needed to elaborate on a key part of their response. Judges would then ask the same question they had previously asked again to give appellants another chance. One judge in Düsseldorf was questioning an appellant who was describing being arrested by security forces in his country of origin, but whose responses on this crucial part of his evidence were persistently 'vague and one-syllable', 'brief' and provided 'no details'.[22] The judge asked the same question three times as a result, the final time making it clear to the appellant that he was posing the question 'for the last time'.[23] Sometimes judges who wanted appellants to elaborate on certain aspects of their story would also repeat sections or snippets of what appellants had said previously to direct them towards the specific part of their narrative that needed

18 In Germany, we noted that older judges tended to use the third person when addressing appellant (via the interpreter) more frequently (42% once or more than once) than younger judges (28% once or more than once), and that this form of questioning was particularly common in Chemnitz (once or more than once in 80% of hearings observed there), demonstrating regional differences in this approach.

19 For a defence of formality, see Delgado, Richard, Chris Dunn, Pamela Brown and Helena Lee (1985) Fairness and formality: Minimizing the risk of prejudice in alternative dispute resolution. *Wisconsin Law Review* 6: 1359–1404.

20 Gill, Allsopp, Burridge et al. (2020).

21 Fieldnotes, Germany, 2018, Nicole Hoellerer.

22 All fieldnotes, Germany, 2018, Nicole Hoellerer.

23 Fieldnotes, Germany, 2019, Nicole Hoellerer.

development. ‘What do you mean when you said, “you didn’t have the nerves for it”?’ one judge asked an appellant in Berlin, for instance.[24]

Types of Questions

Although judges asked a range of different types of questions, including open, closed, simple and complex, there were two types of questions that we found particularly noteworthy. First, we understand leading questions to suggest a particular response to the person being questioned.[25] Typically, they contain information in the question (rather than the answer) and invite a limited number of responses (e.g. ‘yes’ or ‘no’). The effect of a leading question is that the questioner has a high degree of authorship over the recounting of events. It can be argued that leading questions reduce the authority of evidence because questioners can be viewed as having put words into the mouth of the person being questioned. When a person is nervous or overwhelmed they could be more inclined to agree with what is being suggested by people they perceive as authority figures.

A second noteworthy type of question concerns ‘test’ questions, which required specific factual knowledge that the judge could independently verify. Trivia-type test questions could refer to a large range of specialist information that was often highly dependent upon the content of the case.[26] One appellant discussed running a bookmaker as part of his narrative, and the judge took the opportunity to question the appellant about this line of work. ‘All questions are detailed and in depth about the betting syndicates, for example about amounts of cash, profits, margins – the technical details’, our researcher observed. ‘The Judge has really done the maths, and seems to be “testing”’.[27] Judges had the opportunity to read the appellant’s cases before the hearings and could select areas of knowledge that the appellant could be expected to possess if their account was true. One appellant was asked for the name of the private rubbish collection company that operated in the neighbourhood that featured in

24 Fieldnotes, Germany, 2018, Nicole Hoellerer.

25 Scholars have suggested that leading questions have ‘the purpose of influencing a person’s thinking, feeling, willing or acting and to discourage the respondent from a rationally, self-determined answer … The questioner composes the question in such a way as to put a certain answer in the mouth of the respondent, or to induce them to bring about an ambiguous answer in order to ‘pin him down’ or to object to their statements. Fundamentally, such leading questions are as inadmissible as questions that aim to confuse the respondent. However, questions that test the validity and credibility of the statement, are not excluded [i.e. they are permissible]’ (Löwe, Ewald, Werner Rosenberg and Peter Riess (2001) *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz: Großkommentar*. Berlin: Walter de Gruyter, pp. 11ff, translated from German by N Hoellerer).

26 Our quantitative data from Germany revealed that trivia questions occurred in 85% of religious conversion hearings, but only in 15% of te other types of claim.

27 Fieldnotes, 2018, country and researcher removed for anonymity.

their narrative.[28] Another appellant was asked for the exact name of the student branch of the political party that they claimed to be part of[29], and another was asked to describe the uniforms of the bodyguards of a prominent national figure that featured in their account.[30] Under these lines of questioning the importance of a good memory is clear, as well as the damage that mental blanks could cause (see Chapter 4, 'Before the Hearing' and Chapter 5, 'Arriving at Court'). Government officials could also use such testing questions to try and 'catch out' an appellant. Dan once observed a government representative in the UK Googling dates of elections held in an appellant's country of origin while quizzing them on these.[31] What was less clear to us, however, was how judges assessed the answers to such questions (their own and those of legal representatives). Occasionally answers could be compared to COI reports and past answers given by the appellant during their asylum interviews.

A subset of 'test' questions concerned geography, which might involve asking appellants for the names of geographical features such as settlements, rivers and mountains as well as the distance between them (or the length of time it would take to walk or drive between them) and their topology such as whether they are north, south, east or west of each other. Occasionally judges would involve maps, such as by asking appellants to sketch simple maps or to mark features onto maps that were presented to them.

Geographical questions could be problematic when different place names existed in formal and local discourse.[32] Such questions also sometimes risked assuming that appellants would know geographical attributes associated with their narratives and be familiar with Westernised cartographic representations of the places in question. During one case in Berlin an appellant who claimed to be a former taxi driver was asked to show the judge where a particular geographical feature that figured prominently in his narrative was located.

> The appellant, legal representative and interpreter all approach the judges' desk and the judge turns the computer screen, so they can look at the Google map of [the appellant's city]. The appellant says that he cannot find it. The judge raises her eyebrows: 'But you were a taxi

28 Fieldnotes, Germany, 2019, Nicole Hoellerer.

29 Fieldnotes, France, 2019, Jessica Hambly.

30 Fieldnotes, Germany, 2019, Nicole Hoellerer.

31 Fieldnotes, UK, 2018, Dan Fisher.

32 See Spotti's arresting discussion of a young person seeking asylum who refers to 'the big mosque' and 'the marketplace' and knows these features by no other name, because these were always the names used locally to refer to them (Spotti, Massimiliano (2019) '"It's all about naming things right": The paradox of web truths in the Belgian asylum-seeking procedure.' In Gill, Nick and Anthony Good (eds) *Asylum determination in Europe: Ethnographic perspectives*. Cham: Palgrave Macmillan, 69–90.

driver!' The lawyer counter argues: 'He knows all the roads, but he cannot read a map'.[33]

Geographical test questions also sometimes did not take into account cultural conventions, kinship relations and gender inequalities. In one case in the UK, a young Somali woman was describing her experiences living in a village which was repeatedly plagued by armed fighting between government forces and Al-Shabaab,[34] as a result of which her father had made the decision to send her away to avoid kidnapping and forced marriage. She explained that she did not attend school and spent most of her time at home, but the government representative (male) and judge (female) both seemed to expect her to have specific knowledge about the demographics of her village. 'How large is the village?' the government representative asked.

Appellant: It's a small village, not that big.
Government representative: How many houses?
Appellant: I don't know.
Government representative: How many streets?[35]

Young women can have limited mobility in patriarchal societies and may not be allowed out of their home unaccompanied. In addition, this line of questioning belies the judge's European positionality in their questioning (discussed in more detail below); seeking to gain an understanding of the village based on its size (measured in number of houses) rather than its sounds, sights and people, and thereby revealing a desire to categorise and quantify in the Global Northern context. The issue being, of course, that only the village's size can potentially be verified through country policy and information notes, Google Earth, or other independent sources. Later in the Somali woman's case, a witness, who was a female relative of the appellant, was examined in a similar way. The government representative asked her how many people lived in the appellant's town, to which the relative replied that she did not know because she cannot read and write.

Judge: You don't need to be able to read and write to say how many people there are. You can see and count. How many people are in this room?
Witness (confused): In this room?
Judge: Yes.
Witness: There are six people [there were seven including the researcher].
Judge: See? You can say whether there are a few people or a lot of people.

33 Fieldnotes, Germany, 2018, Nicole Hoellerer.
34 Al-Shabaab is a jihadist fundamentalist group, active in East Africa and Yemen.
35 Fieldnotes, UK, Rebecca Rotter.

A third type of test question concerned knowledge that appellants were supposed to hold as part of their claimed identities, such as judges who assumed that appellants who claimed to be gay would be familiar with gay clubs or social hubs in their city. In one case in Berlin, the judge asked the appellant: 'Do you know any gay clubs in Berlin, and where the "gay scene" is?' When the appellant replied that he had only been to gay clubs twice, the judge seemed incredulous: 'Why were you only there twice?'[36]

We commonly observed judges 'testing' appellants' knowledge of religious prayers and customs in religious conversion cases, too, and judges often had little patience for appellants who struggled with basic religious knowledge if their claim was on religious grounds. One lawyer interjected in Düsseldorf when their client did not know their baptismal verse, objecting timidly: 'I don't know mine either.' The judge dismissed her however: 'But we didn't convert to Christianity under the threat of the death penalty. We also did not claim asylum based on our faith, that is so strong, and so formative for our identity, that we cannot return to our country of origin.'[37]

Questioning that Promoted Access and Participation

Numerous judges we observed displayed patience when questioning appellants, waiting for responses and asking follow-up questions to resolve parts that were unclear. When inconsistencies arose in appellants' responses, some judges gently pointed these out and asked the appellant for clarification, thereby giving the appellant an opportunity to resolve apparent contradictions. The UNHCR states – in reference to Article 4(1) of the QDII[38] – that one of the decision-makers' duties is to provide the asylum seeker (or appellant) with an opportunity to 'know of and comment on any significant inconsistency', and suggests that decision-makers should identify 'any apparent inconsistencies, contradictions, discrepancies, omissions, and implausibilities at the interview and [put] them all to the applicant … Where explanations [by the applicant] are offered, these need to be considered before a final decision is taken on the application'.[39] Thus, for judges to point out discrepancies and inconsistencies in the appellants' statements, allowing asylum appellants to

36 Fieldnotes, Germany, 2018, Nicole Hoellerer.

37 Fieldnotes, Germany, 2019, Nicole Hoellerer. Also see Hoellerer, Nicole and Nick Gill (2021) 'Assembly-line baptism': Judicial discussions of 'free churches' in German and Austrian asylum hearings. *Journal of Legal Anthropology*, 5 (2), 1–29.

38 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). Also see Chapter 2, 'What are Asylum Appeals?'.

39 UNHCR (2013) *Beyond proof: Credibility assessment in EU asylum systems*. Brussels: UNHCR. Available at: https://www.unhcr.org/uk/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html [accessed 25 April 2024].

respond and explain, is an aspect of fact-finding and cooperation that helps to ensure fairness and the right to be heard. In the hearings we observed in Germany, for example, judges regularly pointed out discrepancies in the appellants' statements,[40] both in comparison to what they said at the Federal Office for Migration and Refugees (BAMF) interview and to what appellants may have said in the hearing.

We also saw judges using silence and effective listening strategies as ways to be patient. For example, at the start of one case in Berlin, the appellant and the interpreter were deep in conversation when the judge wanted to get started. Instead of interrupting and insisting the case got underway, the judge appeared to surmise from the interpreter's body language that the conversation was helping the appellant to understand the procedure and allowed their conversation to continue. 'The judge scratches his chin', our notes record, then 'puts his pen down, and smiles at the appellant, waiting for him to finish'.[41]

Some judges seemed particularly good at letting the appellant and others present at the hearing know that they were listening by making copious notes, signalling their attentiveness. Body language like nodding was also important in signalling that an appellant had a judge's attention. One judge we observed in Berlin, who was dealing with a traumatised appellant in a gentle manner using a hushed voice, employed the technique of head tilting. 'The judge speaks even more softly now', our notes read, 'leaning his head on his hand – but not as a sign of fatigue – more a gesture of listening intently'.[42]

We also observed judges that demonstrated empathy or understanding for the emotional difficulties appellants faced. Numerous judges called a break to allow particularly emotional appellants to compose themselves, and some judges also took time to reassure emotional appellants that it was common to feel emotional. 'Take your time,' one judge told a male appellant in Berlin who had started to cry. 'I see many people cry here. Please don't feel ashamed in any way.'[43] When judges combined soft tones of voice, an unhurried manner and compassionate facial expressions to convey empathy the results could be extremely effective. We noted that one judge in Berlin, faced with an appellant imparting some particularly harrowing evidence, 'adopted an exceptionally

40 We noted that in Germany younger or female judges tended to point out discrepancies more often than older or male judges, and that this was particularly common in Berlin and Augsburg. Furthermore, judges pointed out discrepancies more often in cases concerning political opposition or religious conversion, but less often in cases concerning conflict or war in the country of origin, or membership to a particular social group, potentially because there is more COI available to test the appellants' claims. Pointing out discrepancies was also more common when the appellants' legal representatives were present than when they were absent.

41 Fieldnotes, Germany, 2018, Nicole Hoellerer.

42 Fieldnotes, Germany, 2018, Nicole Hoellerer.

43 Fieldnotes, Germany, 2018, Nicole Hoellerer.

gentle tone, speaking very calmly and softly'. 'I can sense the empathy in both the judge's tone of voice and his facial expression', Nicole concluded.[44]

Judges sometimes also tried to be helpful by giving examples of the sort of replies they were expecting when questioning appellants. When a judge asked about the weather, for example, they might say 'Was it hot? Was it cold? Was it windy?' Often this was a good way to help appellants understand the sort of response that was being asked for, but at times it could backfire. When one judge in Dresden asked, 'How large is [the village], more or less?' they offered a series of prompts: 'And every village in the area, how large are they? How many houses? How many families are there more or less?' Unfortunately the appellant became confused, thinking that he had to respond to every question. 'Several pointers in one question can be confusing', Nicole noted.[45]

Some judges would also put questions into context to make the appellant understand why they were being asked. For example, in one religious conversion case the judge stated:

> I am trying to understand … Some people have dramatic experiences, which made them say 'I become Buddhist', for example … For others it is a process … How was it with you? … See Mr. [appellant], I don't know you. I don't know what happened to you. You come from a strictly religious country … where conversion is almost unheard of. I am really trying to understand what drove you to read the Bible and ultimately convert to Christianity. I have to comprehend your reasons.[46]

Procedural Bias during Questioning

Conversely, we also noted some procedural elements that made participation harder. For example, in relation to pointing out discrepancies discussed above, we noted that it was sometimes problematic if judges expressed nonverbal and direct signs of disapproval in response to answers from appellants, such as shaking the head, raised eyebrows, exchanging sceptical looks, audible expressions (tutting, sighing) and other facial expressions and gestures (we discuss demeanour in more detail in the next chapter, 'Judicial Styles'). These could unnerve the appellant and put them off from speaking further.

Nationality and Countries of Origin

In relation to countries of origin, judges occasionally made generalising remarks that suggested that their judgements of appellants were informed by impressions of the national group as a whole, rather than the specific appellant

44 Fieldnotes, Germany, 2018, Nicole Hoellerer.
45 Fieldnotes, Germany, 2018, Nicole Hoellerer.
46 Fieldnotes, Germany, 2018, Nicole Hoellerer.

before them. One case in Germany began tensely, with the judge declaring at the outset that he was 'irritated, because you [the appellant] lied several times' in his dealings with the authorities before the hearing. As part of the uncomfortable exchange that followed, during which the judge counted on his fingers the 'lies' the appellant had told , the appellant – a young man from Iran – said that he had lost his passport. 'Iranians always lose a passport,' the judge exclaimed. 'I hear hundreds of Iranians and I've never seen a passport! … Either they don't have one … or as the appellant said now, it's "lost".'[47] While it may be true that the judge had heard similar accounts before, the statement seemed to cast aspersions over the national group and, by association, the appellant himself near the start of the hearing.

Another judge told us that there were sometimes 'epidemics' of particular types of asylum cases from certain countries of origin. It had become a 'running joke' in his court, he explained, that asylum seekers from Gambia are 'all claiming [asylum]' on the grounds of sexual orientation. 'I am surprised by the population boom in some African countries,' he continued, 'considering that so many of the asylum seekers from there claim to be homosexuals',[48] thereby generalising from his sample of cases to Gambia, and then to multiple African countries.[49]

In another case in Germany a man from Nigeria argued that he was scared to go back there because at least one of his family members had been killed in attacks by separatist forces in the country. He was also worried that he would not be able to find employment because he relied on a family member for work who had been killed. Near the start of the hearing Nicole wrote in block capital letters that the judge 'DOES NOT RECORD WHAT THE APPELLANT IS SAYING AT ALL' and that he only voice records the formalities.[50] This is highly unusual in Germany because judges are required to make a record of the hearing as discussed in Chapter 2 ('What are Asylum Appeals?'). During the half-hour-long hearing the judge consistently brought the questioning round to the ability of the appellant to support himself financially, rather than about his fears of the separatist group. Even when the separatist group was discussed, the judge 'listens to the appellant but doesn't seem to care'. At one point the appellant made an impassioned speech about his fears, but the fieldnotes record that the judge spoke a single sentence into the voice recorder: 'the appellant makes comments on the situation in the country', drastically reducing what the appellant had said about the threat he faced.

After the hearing, the judge asked Nicole if she had any questions. She asked about why he did not probe more deeply into the appellant's case. 'There was no point in going into detail,' the judge said,

47 Fieldnotes, Germany, 2019, Nicole Hoellerer.
48 Fieldnotes, Germany, 2018, Nicole Hoellerer.
49 It is also problematic to draw assumptions as to sexual orientation from parental status.
50 Fieldnotes, Germany, 2019, Nicole Hoellerer.

> Because BAMF has already examined everything. They [referring to the appellant] just keep making application after application after rejection. I guarantee you this appellant will file another application once more, and I will probably see him again in a couple of years.

Nicole also asked why the judge did not record what the appellant had said. 'I question the purpose of recording a transcript,' the judge replied.

> It's just the burden on clerical staff … In cases like today there is no reason to have a twenty-page transcript. This may not apply to all countries, but in most Nigerian cases it is not necessary at all.

By using the phrase 'most Nigerian cases', the judge's remarks appear to generalise from previous cases he has experienced to a whole country of origin. While the judge should draw on his expertise, we were concerned that his use of past experiences of Nigerian cases as a justification for treating current cases differently from other countries of origin runs the risk of confirmation bias, which refers to the tendency to search for and recall information that confirms one's prior beliefs or values.[51] In short, the judge seemed so convinced that the case was pointless that it had little chance of success.

The judge's prioritisation of minimising the clerical workload of transcribers and court clerks over the primary function of the hearing also seemed inappropriate. In this case, it was the questions that the judge *did not ask* that were problematic, such as probing the appellant's fear of the threat from the separatist group. Overall in Germany, we noted (through our quantitative data set) that cases concerning Nigeria were shorter and judges asked significantly fewer questions than average (15 on average for Nigerian cases in comparison to 36 on average for the whole sample).[52]

Global Northern Worldviews

We also became aware of judges sometimes asking questions that embodied a Global Northern worldview. An example of ethnocentricism came in the form

51 For confirmation bias at courts, see e.g. Lidén, Moa (2018) *Confirmation bias in criminal cases*. PhD thesis, University of Uppsala. Lidén, Moa, Minna Gräns and Peter Juslin (2019) 'Guilty, no doubt': Detention provoking confirmation bias in judges' guilt assessments and debiasing techniques. *Psychology, Crime & Law* 25 (3): 219–247.

52 From 2014 to 2020, the overall protection rate for Nigerian asylum seekers at BAMF level was on average 10% (data on BAMF decisions via the website of Pro Asyl. Available at: https://www.proasyl.de/thema/fakten-zahlen-argumente/statistiken/ [accessed 31 March 2021]). At appeal, the protection rate for Nigerian appellants was even lower, at an average 7% over the same time-span (data on court decisions from various sources, available [in German] at: https://dip.bundestag.de/ [accessed 31 March 2021]).

of the apparent orientalism[53] of one of the judges we observed. They had travelled to India as a tourist and, although the appellant was from Afghanistan, they persistently used India as their yardstick of likelihood in relation to the appellant's story. At one point in the discussion, the appellant explained how he sped away from what he referred to as 'assassins', but the judge objected:

> But in rush hour in [the Afghan city in question] this is completely impossible. In India there is so much traffic that it would be impossible even to speed up … in India [the street] was always full![54]

As Nicole noted at the time, the judge's 'measure of things' seemed to be India. 'Often these comparisons seem inappropriate and ill-informed'.

Other judges seemed to overlook the differences in levels of economic development between their own countries and the countries of origin of appellants. One (male) judge expressed disbelief that two men from a country with a low average income had sex after one of them had 'collected garbage all day', for instance. 'That's not very appetising,' the judge commented, 'I can imagine that after a day of work, without a shower, and without a change of clothes … at a landfill site … that this is not particularly nice. I find this hard to believe.' The judge's remarks may not only have been heteronormative, but also appeared to take for granted a plentiful supply of water for showers and similar standards of 'appropriate' hygiene.[55]

The socio-cultural power of male family members in many contexts in the Global South also seemed to be underestimated at times.[56] Judges sometimes seemed to expect female appellants to have questioned the decisions of patriarchs more forcibly than they had, or to be able to explain the reasoning of male family members for taking decisions that affected them. In one case, a young female Afghan appellant faced a judge who was incredulous that she might have been prevented from going to university without a reasonable explanation. She had found out later that the father had been worried about her safety, but at the time she had not been told that. 'If your father didn't

53 Orientalism is most prominently defined by Edward Said in his seminal work *Orientalism* (1978), referring to Global Northern representations, perceptions, doctrines, stereotypes and prejudices about the 'Orient' (defined as Middle East, Asia and the Far East), which creates an artificial distinction between the dominating and ruling 'Occident' (Europe and North America) and the 'inferior' 'Orient' that can be ruled and exploited (often through a process of 'othering'). Said, Edward (1978) *Orientalism: Western concepts of the Orient*. New York: Pantheon. Said, Edward (1985) Orientalism reconsidered. *Race & Class* 27 (2), 1–15.

54 Fieldnotes, Germany, 2018, Nicole Hoellerer.

55 Fieldnotes, Germany, 2019, Nicole Hoellerer.

56 Johannesson, Livia (2012) Performing credibility: Assessments of asylum claims in Swedish migration courts. Retfærd. *Nordisk Juridisk Tidsskrift* 35 (3/138): 69–84 discusses how 'informal presumptions about how gender, education, culture and religion determine individual asylum applicants' behavior play significant roles' (ibid.: 69) in asylum claim determination in Sweden.

tell you much about this threat, how did he justify to you to prevent you to go to university?' the judge asked. 'When my father said I couldn't go, I listened to him,' she replied. 'I did not question him,' but the judge looked unconvinced.[57]

The influence of patriarchal societies on men and boys was also dismissed by some judges. When one appellant explained that his uncle tried to pressure him to have his daughter undergo female genital mutilation (FGM), the judge replied: 'But you are a grown-up man! … How can it be that you couldn't stand up to an uncle and fight for your daughter?'[58] In another case, a male Sunni appellant was describing the threat from his Shia uncle which had caused him to flee. 'This seems extremely far-fetched,' the judge said. 'If I didn't want to have any relatives in my family of a different faith, I would ignore them, and not try to kill them.'[59] This line of reasoning appears to overlook a wealth of evidence about the reality of honour killings arising from family disputes.[60]

Returning to the young man from Iran who said that he had lost his passport that we discussed earlier, this appellant was a teenager when he left Iran at the direction of an authoritarian father who made decisions on his behalf. The judge wanted to know how a passport had been procured for the appellant to enable his departure from Iran, but the appellant was unable to tell the judge much about the arrangements.

Judge: So you can't make any statement about who organised the passport?
Appellant: No
Judge [in a cross, dismissive tone]: You were 16 years old! You are highly intelligent, and get shipped to a foreign country, and you want me to believe that you never asked any questions at all! … As if you were never curious. I really don't believe you at all.[61]

In our view, the judge showed little cultural sensitivity here. In some cultures, it is not appropriate to question what the father – the patriarch – says and it

57 Fieldnotes, Germany, 2018, Nicole Hoellerer.

58 Fieldnotes, Germany, 2018, Nicole Hoellerer.

59 Fieldnotes, Germany, 2018, Nicole Hoellerer.

60 For COI see e.g.: Immigration and Refugee Board of Canada (IRB) (2013) *Pakistan: Honour killings targeting men and women* [PAK104257.E]. Available at: https://www.ecoi.net/en/document/1249973.html. Human Rights Watch (2021) *'I thought our life might get better': Implementing Afghanistan's elimination of violence against women law*. Available at: https://www.ecoi.net/en/file/local/2057708/afghanistan0821_web.pdf. UK Home Office (2021) Country policy and information note Iran: Women fearing 'honour'-based violence. Available at: https://www.ecoi.net/en/file/local/2047815/Iran-Women_fearing_honour_crimes-CPIN.v2.0_March_2021_.pdf [all accessed 24 November 2021]. There is also a broad academic literature on honour killings. For a review see Elakkary, Sally, Barbara Franke, Dina Shokri, Sven Hartwig, Michael Tsokos and Klaus Püschel (2014) Honor crimes: Review and proposed definition. *Forensic Science, Medicine, and Pathology* 10 (1): 76–82.

61 Fieldnotes, Germany, 2019, Nicole Hoellerer.

is perfectly plausible that a father would not explain his plans or dealings to a 16-year-old boy. The lawyer in the case held the same view, and intervened:

Lawyer: Damn! He was a minor! He didn't know what to say! He was a child!
Fieldnotes: The judge simply shrugged and said in a dismissive tone: 'He was 16'.

Another appellant faced disbelief from a judge that her son had taken on the responsibility of earning money for the whole family at the age of 13 when his father (the appellant's husband) had died.[62] While unlikely in Europe, this story was arguably more plausible in the appellant's country,[63] which was not only highly patriarchal but also did not have a well-funded and inclusive welfare state.

We were also occasionally concerned that the pattern of questioning in hearings reproduced patriarchal gender structures. This was most obvious when men and women were questioned together, as often happened in family cases or cases that were otherwise linked.[64] Men typically spoke first in response to judges' questions, while women simply confirmed or elaborated upon men's responses. Sometimes this was understandable: in Germany we noted that asylum claims were often based on the husbands' or fathers' need for protection in family cases. In cases concerning Afghanistan, for example, it was mostly men who experienced threats by the Taliban, rather than their wives, at least according to the appellants' narratives during hearings. Therefore, it was not unusual for female appellants in family cases not to be questioned, or only questioned briefly by the judge, mostly to corroborate the husbands' narratives.

However, there were instances in which female appellants in such cases were clearly dissatisfied with their level of involvement. 'Only the man answers', Jessica noted in one joint case we observed in Paris.

> Mrs [Appellant] shakes her head and makes gestures and noises in response to some of the questions. She clearly has something to say, but [the male appellant] talks over her whenever she tries to speak. This is not commented on by the judge, interpreter or lawyer.[65]

Mainstream Christian Views

Cases involving religion and belief also revealed some problematic approaches among a minority of the judges we observed. Some judges were disinclined

62 Fieldnotes, Germany, 2018, Nicole Hoellerer.
63 Undisclosed for anonymity.
64 In our German sample, 16% were 'family' cases, or cases of spouses that were linked.
65 Fieldnotes, France, 2018, Jessica Hambly.

to take stories of witchcraft seriously, for example. One judge in Munich was questioning an appellant about why the powers of witchcraft do not work in Europe, and did a bad job of stifling a laugh as he was asking the question.[66] Whether a European believes in the supernatural aspects of witchcraft is to a large extent beside the point. It remains the case that social and cultural aspects of society are arranged according to these beliefs.

Judges also sometimes used the yardstick of religions with which they felt familiar to assess cases based on religious conversion.[67] In Germany, Austria and Switzerland there is a distinction between national churches such as Roman Catholic and Protestant Churches, which are public bodies that are organised territorially and financed via an official tax upon their members, and 'free churches', which are financed by voluntary donations, are more akin to associations, and have no specific catchment area. Most of the conversion cases we observed in Germany involved appellants who were members of free churches (including Evangelical-Lutheran, Free Protestant, Free Evangelical, Free Pentecostal and Presbyterian) rather than 'national' churches.[68] Several scholars have suggested that the way free Christian churches combine individual messages with communal organisation, and modernity with 'traditional moral values',[69] makes free churches particularly attractive to migrants from the Global South.[70] The fact that free churches often offer services in migrants' native languages can also be attractive.

We were concerned, however, that judges' expectations about conversion to free churches were informed by the requirements and norms surrounding conversion in national churches, which often mandate or expect a protracted, intellectualised period of theological exploration and reflection that involves familiarising oneself with the prayers, canons and edicts of one's new faith. When appellants described converting instantly or very quickly, judges' suspicions were therefore frequently aroused. 'If I truly converted to Christianity,' one judge said, 'I would introduce myself to and learn about all

66 Fieldnotes, Germany, 2018, Nicole Hoellerer.

67 See Hoellerer and Gill (2021) for an analysis of our findings on religious conversion cases in Germany and Austria.

68 Of our observations in six different German courts and one Austrian court, 14 concerned religious conversion. Of these 14 cases, 13 concerned conversions in free churches.

69 Akcapar, Sebnem Koser (2006) Conversion as a migration strategy in a transit country: Iranian Shiites becoming Christians in Turkey. *International Migration Review* 40 (4): 817–853: 840.

70 Akcapar (2006). Akcapar, Sebnem Koser (2019) Religious conversions in forced migration: Comparative cases of Afghans in India and Iranians in Turkey. *Journal of Eurasian Studies* 10 (1): 61–74. Petersen, Marie Juul and Steffen Bo Jensen (eds) (2019) *Faith in the system? Religion in the (Danish) asylum system*. Aalborg: Aalborg University Press. Stadlbauer, Susanne (2019) Between secrecy and transparency: Conversions to Protestantism among Iranian refugees in Germany. *Entangled religions: Interdisciplinary Journal for the Study of Religious Contact and Transfer* 8.

the denominations … you may want to explore if another denomination may be more fitting with your system of belief.'[71]

Conclusion

In this chapter we have examined questioning, characterising some of the different types of questions used as well as some common questioning tactics. We have shown how judges can use questioning to convey empathy and as part of a patient and reassuring approach to hearings. At the same time, questioning can also convey judicial biases that reflect stereotyping and implicit conceptions of what is 'normal' or likely, based on Global Northern, liberal and mainstream Christian points of view.

Although we had our reasons for generally not interviewing judges (see Chapter 3, 'Approaching Asylum Appeals') it would have been interesting to interview judges formally about their approaches to questioning, and this may be useful for subsequent studies. In particular, we are mindful that what the judge says during the hearing reflects only a fraction of their reasoning process and may be tactical or provocative in pursuit of the information they are seeking. In other words, there is an important distinction between what judges think and their verbalised reasoning during hearings.

Further research could also usefully reflect on the relationship between judicial gender diversity and questioning.[72] There was no guarantee that female judges were any more empathetic or reassuring to appellants. In fact, we noted that female judges in Germany often appeared more hard-nosed,[73] potentially as a reaction against cultural prejudices associating softness and acceptance with being female (we pick up this point again in Chapter 12, 'Judicial Styles'). One female judge told us that she had the feeling that, especially, older, male legal representatives do not take young, female judges seriously: that they try to 'take [female judges] for a ride',[74] which she thought could be the reason

71 Fieldnotes, Germany, 2019, Nicole Hoellerer. Also see Hoellerer and Gill, 2021.

72 Based on our survey, judges were 64% male in the UK (excluding detained fast track observations) and 55% male in Germany.

73 We surveyed some judicial behaviours and, while accepting that our observations may be subjective depending upon our interpretation of what we observed, they suggested some interesting differences between male and female judges. From our survey sample in Germany, for example, we noted that female judges smiled more rarely than male judges (65% vs 55% male judges – smiling rarely). They also raised their voice more frequently during hearings (34% vs 17% male judges – once and more than once); expressed signs of disapproval in response to the appellants' answers more often (58% vs 45% male judges – sometimes and frequently); and more frequently interrupted the interpreter before they finished their interpretation of what the appellant had said (39% vs 25% male judges – once and more than once).

74 In part, we can corroborate this. Lawyers in Germany were more likely to interrupt female judges (42% once and more than once) during hearings than their male counterparts (32%). We also noted that interpreters more frequently provided their personal opinion (without

why some female judges appear stricter.[75] However, our quantitative data from Germany show that female judges nevertheless engage in what can be deemed 'helpful' procedures relatively frequently.[76]

A nuanced view of the drivers of biases amongst the judiciary might usefully be extended to include the training and professional backgrounds of judges, the proportions of full and part time, their political affiliations and attitudes and their socio-economic circumstances. Beyond statistical analysis, more qualitative work could reflect on the attitudes of judges towards their questioning, as well as exploring perceptions and experiences of bias amongst legal representatives.[77]

Questioning is only one of a wide range of procedural features of appeals, which also include body language, the order and timing of cases heard and a whole range of tasks that judges complete outside the hearings themselves. In the next chapter we examine some of these factors, with a particular focus on the degree to which judges explained themselves during hearings, and their emotionality.

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being asked) with female judges (20% female judges vs 11% male judges) and interrupted judges as they were recording statements more often (34% female judges vs 20% male judges).

75 Fieldnotes, Germany, 2018, Nicole Hoellerer.

76 From our survey sample in Germany, we noted that at the start of hearings, female judges more frequently ensured that the names of appellants were correctly pronounced (13% vs 5% male judges); checked whether the appellants and interpreters understood each other (76% vs 49% male judges); introduced themselves (41% vs 34% male judges); advised appellants about the recording procedure with the dictaphone (63% vs 48% male judges); and presented the facts of the case (62% vs 56% male judges). Female judges also asked more questions on average (40 vs 33 male judges) and were more likely to take notes during the appellants' testimonies (78% vs 54% male judges – 'sometimes' and 'frequently'). This aligns with findings reported in Gill, Nick, Rebecca Rotter, Andrew Burridge and Jennifer Allsopp (2018) The limits of procedural discretion: Unequal treatment and vulnerability in Britain's asylum appeals. *Social and Legal Studies* 27 (1): 49–78.

77 See Büchsel, Teresa (2021) *De-mystifying asylum adjudication – Judicial perspectives on law and experience in German administrative courts*. PhD Thesis: University of Oxford; and Thomas (2011).

11 Judicial Styles

Like other frontline workers, judges can utilise a wide variety of ground-level powers and manoeuvres to shape their working environments and ease or thwart the passage of members of the public through their domains.[1] Questioning, which we discussed in the previous chapter ('Judicial Questioning during Hearings'), is an important aspect of this discretionary potential, but it is by no means the only one. During our fieldwork we noticed a wide variety of areas of judicial discretion, including judges' uses of country-of-origin information (COI),[2] the different approaches judges employed when dealing with interpreters and their openness to negotiation and settlement before or during a hearing. We also observed the different approaches they used to record the hearings, the stringency with which they adhered to rules about admitting late evidence, the giving of advice during hearings and the allowances they made for appellants' mental health difficulties. Sometimes discretion made itself known when practices stood out against what we normally observed. In Germany for example, most judges would not allow a legal representative who was conversant in the language of the appellant to interpret for them, insisting that the interpreter does so. When one judge in Berlin allowed a legal representative to do exactly this,[3] the judge's discretionary power became particularly evident.

We are acutely aware, however, that our view of judges' discretion is limited, owing to the methods we used which relied largely on in-person court observations to assess judicial practice (see Chapter 3 'Approaching Asylum Appeals'). The weighing of evidence, the approach to paperwork and time management, the degree to which judges consult with colleagues and the way they deliberate using multiple sources of information were each largely outside

1 Lipsky, Michael (2010) *Street-level bureaucracy: Dilemmas of the individual in public service*. New York: Russell Sage Foundation.

2 See Chapter 6, 'Assembling Appeals' on COI. See also Feneberg, Valentin, Nick Gill, Nicole IJ Hoellerer and Laura Scheinert (2022) 'It's not what you know, it's how you use it': The application of country of origin information in judicial refugee status determination decisions – A case study of Germany. *International Journal of Refugee Law* 34 (2): 241–267.

3 Fieldnotes, Germany, 2018, Nicole Hoellerer.

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our purview, for example.[4] The preparation of judges for hearings also seemed to be an important influence over how hearings progressed, but although we were able to infer about their preparation at times on the basis of the knowledge judges displayed of files and cases, we did not have direct insight into their pre-hearing activities.

For this reason, we focus on what we call judicial *style*s here. Style is a broad concept referring to the observable in-hearing manner of the judge, and encompassing their apparent emotionality, transparency and tactics, the manner of their interactions, their reactions to events in the hearing as it proceeds, and the extent and nature of their attempts to direct or conduct proceedings. Style can be performed via speech, voice, body language and facial expressions among other factors.

We begin by introducing two ingredients of judicial style that we treat as central in this chapter, namely, the displayed emotion of judges and the extent and manner of their orchestration of hearings. In each case, demeanour offers a useful window onto these ingredients, and we set out what we mean by demeanour in more detail below. We then proceed to combine these ingredients in different ways to identify four judicial styles that were prominent in our observations. The remainder of the chapter explores each in turn, including 'inside out', 'schoolmaster and schoolmistress-like', 'detached' and 'simmering' styles.

Judicial Emotions

Lower-level courtrooms can be sites of intense emotion among litigants.[5] Such emotions are 'usually negative',[6] and include fear, hostility, anger, frustration, embarrassment and intimidation. Judges in lower courts must interact with these raw emotions, and Roach Anleu and Mack identify a series of types of emotional labour that this requirement demands.[7]

First, judges must deal practically with the powerful emotions that litigants experience, which can sometimes result in unmediated behaviours that involve them shouting, swearing and crying. Judges therefore need to be able to manage emotions, by, for example, demonstrating sympathy, keeping a cool head, and sometimes using breaks or regulating questioning to allow participants to cool off or recover.

4 See Büchsel, Teresa (2021) *De-mystifying asylum adjudication – Judicial perspectives on law and experience in German administrative courts*. PhD Thesis: University of Oxford; and Thomas, Robert (2011) *Administrative justice and asylum appeals: A study of tribunal adjudication*. Oxford: Hart Publishing, for work that draws on interviews with immigration judges.

5 Roach Anleu, Sharyn and Kathy Mack (2005) Magistrates' everyday work and emotional labour. *Journal of Law and Society* 32 (4): 590–614.

6 ibid.: 590.

7 ibid.

Second, judges are often concerned about the type of experience that litigants will take from their courts. Judges may consequently seek to ensure that litigants feel satisfied that justice has been done, which may require them to project and display certain attributes such as diligence, attentiveness, sympathy and neutrality.

Third, judges must manage their own emotions. As we have outlined in earlier chapters, asylum appellants sometimes recount horrific experiences. The effect of 'seeing absolute misery passing in front of you day in day out, month in month out, year in, year out'[8] can be profound in terms of 'stress, job burnout, exhaustion, and undermining an employee's sense of professionalism'.[9] Judges can face a difficult choice: either 'you're going to remain a decent person and become terribly upset by it all'[10] or 'you're going to grow a skin as thick as a rhino', which can result in depersonalisation and 'emotional distance'.[11]

Rebecca noted in the UK that 'judges differed greatly in terms of their demeanour', expressing

> a range of emotions throughout hearings, such as concern, discomfort, boredom, impatience, frustration, anger, relief, pleasure and satisfaction. Some are extremely jovial and chatty, engaging in friendly conversation or banter with the parties; some are polite, calm and sympathetic; some are pleasant but say very little and convey little sense of their personality; and some are stern and authoritative.[12]

Alongside emotions themselves, judges must also carefully manage their 'displays of feeling'.[13] Appearing emotionless may help to elicit certain desired behaviours from litigants, such as 'conforming to courtroom decorum, deference to the [judge], or respect for, and ultimately compliance with, judicial or legal authority'.[14] Judges may also choose to project emotions that they do not necessarily feel. Some litigants may be more forthcoming in response to an engaged, concerned judicial manner, for instance.[15] Other displays of emotion

8 Ibid.: 611.
9 Ibid.: 612.
10 Ibid.: 612.
11 Ibid.: 613.
12 Fieldnotes, UK, 2014, Rebecca Rotter.
13 Roach Anleu and Mack, 2005: 614.
14 Roach Anleu, Sharyn and Kathy Mack (2017) *Performing judicial authority in the lower courts.* London: Palgrave, page 130.
15 Stone, Maryann, Angela Overton, Cassandra McDade, Kyshawn Smith and Elizabeth Monk-Turner (2014) Rush-hour traffic: Self-presentation of defendants in speedy traffic court cases. *Criminal Justice Studies* 27 (4): 439–456.

may be more likely to elicit remorse or shame.[16] Even anger can have its uses in maintaining a disciplined court.[17]

The multifarious influences over judges' emotions sometimes meant judges displayed conflicting emotions at the same time. Our fieldnotes are full of examples of seemingly incongruous emotions recorded side by side: 'friendly and stern',[18] for example, or smiling, mocking, sarcastic and friendly all at once. Sarcasm is noteworthy in this respect because it allowed judges to project both a formal persona – via the words they spoke, which might enter the formal record of the court – and a hint of what they really feel – via their tone of voice and intonation (which do not normally get recorded). We perceived sarcasm in judges' voices and expressions frequently.

During our observations we also noticed various instances of slippage between what we thought was the genuine emotional condition of the judge and the condition that they projected for the sake of the appellant and others present in the courtroom, although we are mindful that they may have projected emotions for our benefit too. On the one hand, for example, we noted many judges who adopted a stern, dispassionate and even unfriendly façade throughout the hearing, only to suddenly drop this exterior when the hearing had finished, or during a break, becoming light-hearted and jovial. 'She is what I call a "Jekyll and Hyde" judge', Nicole wrote in relation to one judge. 'I found her slightly mean-spirited during the hearing, but once the appellant left, she is very nice. She smiles a lot, and jokes with me and the interpreter'.[19]

Although we sometimes found rapid switching between demeanours a little disconcerting, we also noted that young female judges sometimes adopted this strategy, and speculated that their projections of sternness were an attempt to counteract the social stereotype of softness and empathy often associated with their gender ('perhaps unnecessarily strict', Nicole wrote in one case, 'young female judge trying to make a point?',[20] also see Chapter 10, 'Judicial Questioning'). Young-looking judges could also be very stern and we got the impression that they sometimes felt they had to act extra tough to minimise the perceived risk of disrespect. 'Some appellants look at me and think it will

16 Booth, Tracey (2012) 'Cooling out' victims of crime: Managing victim participation in the sentencing process in a superior sentencing court. *Australian & New Zealand Journal of Criminology* 45 (2): 214–230.

17 Maroney, Terry A. (2012) Angry judges. *Vanderbilt Law Review* 65 (5): 1205–1286.

18 Fieldnotes, Germany, 2018, Nicole Hoellerer.

19 Fieldnotes, Germany, 2018, Nicole Hoellerer.

20 Fieldnotes, Germany, 2018, Nicole Hoellerer.

be easy for them, and try to make a fool of me,' one young-looking male judge in Germany told us,[21] 'but I won't have it, and I get a bit nasty with them.'[22]

During hearings, we became aware that judges were occasionally intentionally provocative in order to elicit a response from the appellant. 'I sometimes provoke with my questions, to get emotions out of the appellant,' one judge told us. 'It is not easy to sit here and listen to these stories three times a week … therefore I like provoking with my questions.'[23] This quote highlights the extent to which judges can intentionally manipulate or influence the emotions of the appellants during the hearing, yet it also throws into question the intended aim of doing so as, in this quote, the judge notes that this is more for their benefit than for the purpose of reaching a fair conclusion.

We also sometimes noted a disconnection between the facial expressions of judges and the content of their questioning. At times judges seemed to smile more and become more friendly at exactly the point in the hearing when they were closest to catching the appellant out or were posing the hardest and most challenging questions.[24] They were seemingly warm and empathetic 'whilst at the same time asking very tough questions and pointing out discrepancies'[25] (see the discussion of inside-out judging, below).

Degree of Orchestration

Another element of style that was highly variable among judges was the degree to which they attempted to orchestrate and control hearings. Scholars have identified the choreographic power of judges by pointing, for example, to the propensity of some judges to embellish the prescribed opening remarks at the start of hearings into an 'expansive and detail-rich opening script [which] can transform perfunctory and obligatory institutional scripts into interactions that fit appellants' needs and which readjust asymmetries of power'.[26] Full explanations could include comments on the recording process (in e.g. Germany),[27]

21 In Germany, there are no age requirements for administrative court judges. To become a judge, it is necessary to be a German citizen, complete a degree in law, a two-year legal internship (*Rechtsreferendariat*) (followed by an exam), and up to five years' probation as a trainee judge (*Richter auf Probe*). From https://www.anwalt.org/richter/ [accessed 10 January 2022].

22 Fieldnotes, Germany, 2018, Nicole Hoellerer.

23 Fieldnotes, Germany, 2018, Nicole Hoellerer.

24 See Blanck, Peter D. (1996) The appearance of justice revisited. *Journal of Criminal Law and Criminology* 86 (3): 887–927 who studied judicial facial expressions and mannerisms and noticed that it was often those judges who eventually found against the defendant who were 'warmer in relating to trial participants' … 'arguably attempting to appear fair' (ibid.: 899).

25 Fieldnotes, Germany, 2018, Nicole Hoellerer.

26 Lens, Vicki, Astraea Augsberger, Andrea Hughes and Tina Wu (2013) Choreographing justice: Administrative law judges and the management of welfare disputes. *Journal of Law and Society* 40 (2): 199–227, page 211.

27 For a discussion of recording in Germany, see Chapter 2 'What Are Asylum Appeals?'

the interpretation, the purpose of the hearing and the role of the judge. They might also entail a statement on the judge's independence, an introduction to everyone in the room and their roles, the various decisions available to the judge, legal considerations for the case, and a summary of the facts of the case.[28]

Some judges were not at all forthcoming with explanations however – either of process or their reasoning about the case. Appellants could be pitched into hearings without any preamble, and judges would undertake lines of questioning without context or explanation, risking making the hearing feel disorientating and disjointed.

For example, Figure 11.1 shows how often judges in Germany conducted certain procedures and explanations at the start of the hearing (from our German sample[29]).[30]

When hearings were underway, orchestration took many forms, although it varied according to the norms of individual countries. Judges would sometimes specify where people should sit, for example, when people should speak, when questions about particular topics began and ended, what should be allowed to pass unchallenged and what should be challenged, and what sort of behaviour was permissible from the participants.

A high degree of orchestration could be particularly effective in making the hearing easy to follow and helping appellants understand the role and approach of judges. Judges could also use explanations of what they were doing to justify intrusive questioning and acknowledge its awkwardness. 'I ask you these uncomfortable questions because we need to know everything,' one judge explained in a soft tone of voice.[31] 'I am sorry if I have to ask you a financial question in relation to your wife,' another judge stated, 'but I have to find out how you were situated economically.'[32] By offering brief explanations like these during a hearing, the judge empathised with the appellant's position and, in a small way, showed them respect.

Another aspect of orchestration concerned the degree of signposting and structure provided to the appellant in relation to the questions that were being posed to the appellant. Some judges would offer an estimate of the amount of time the whole hearing would take, a breakdown of the topics for discussion, and reminders and recaps in relation to this structure when a new topic or

28 In France, this role fell to the rapporteur and in other countries no summary was provided.

29 See Hoellerer, Nicole and Nick Gill (2021) ASYFAIR Germany dataset: Asylum adjudication in Germany (2018/19). Dryad, Dataset. Available at: https://doi.org/10.5061/dryad.sxksn032f [accessed 27 April 2024].

30 See Gill, Nick, Rebecca Rotter, Andrew Burridge and Jennifer Allsopp (2018) The limits of procedural discretion: Unequal treatment and vulnerability in Britain's asylum appeals. *Social and Legal Studies* 27 (1): 49–78, which is available open access, for discussion of the quantitative data from our British sample.

31 Fieldnotes, Germany, 2018, Nicole Hoellerer.

32 Fieldnotes, Germany, 2018, Nicole Hoellerer.

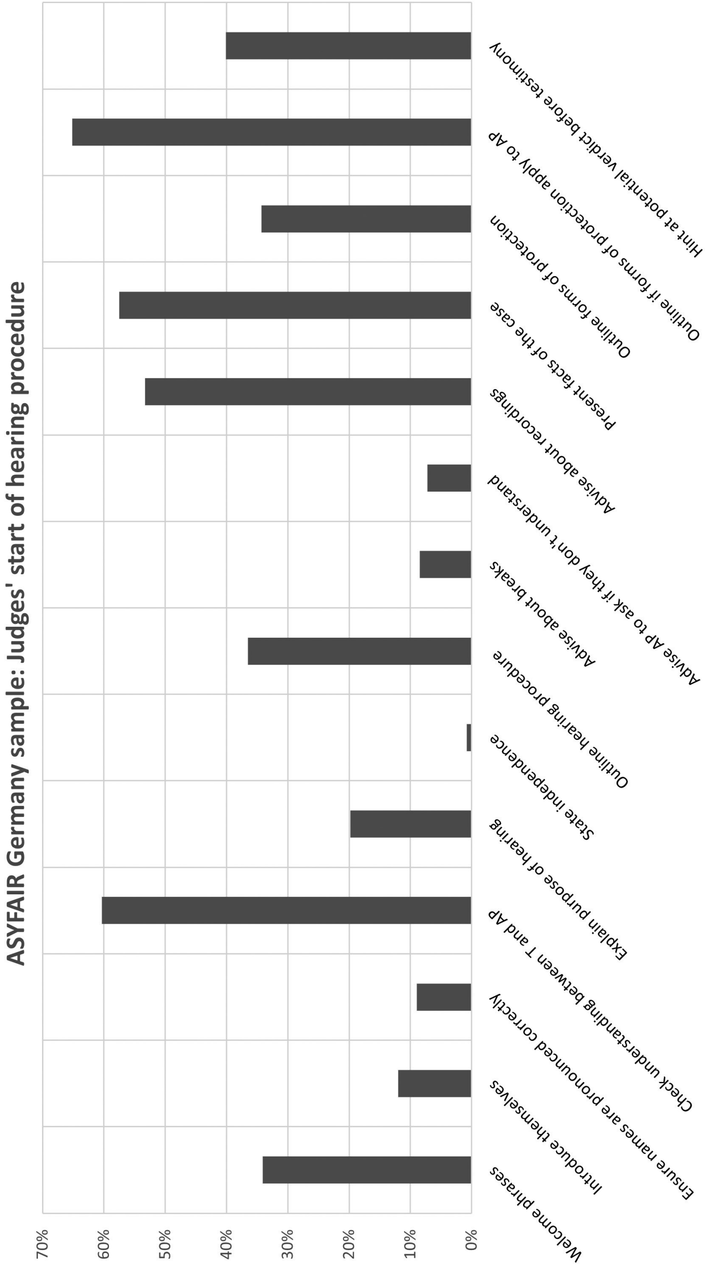

Figure 11.1 Judges' Start-of-Hearing Procedure, ASYFAIR Germany Sample (graph by Nicole Hoellerer) T = interpreter; AP = appellant

segment of the hearing was reached. In particular, it was sometimes very helpful to explain to appellants the order of questions and that there would be an opportunity to go over points in more detail at a later stage (if, indeed, there was such an opportunity, avoiding the surprise and disappointment at hearings ending abruptly outlined in Chapter 7, 'The Politics of Speed'). In other circumstances though, topics would alter without notice or explanation, and the appellant was simply expected to change direction along with the judge or the legal representatives.

Aside from explaining procedures, some judges also outlined their reasoning in relation to appellants' cases and arguments at the start, in an attempt to steer the conversation that was to follow towards points that they considered the most salient. In general, this seemed to be constructive, allowing appellants to respond to the specific concerns of the judge. It could also help to manage expectations at the start of hearings, helping appellants to be realistic about what the hearing was likely to achieve. At times, though, we had mixed feelings about judges revealing their positions. Some judges would set out their reasoning so fully and forcefully at the start of hearings that we got the feeling that nothing was at stake in the hearing itself and that the exchanges between the judge, appellant and legal representatives were foreclosed and slightly pointless. The risk was that appellants would feel like this too and become overwhelmed or disheartened to the point that they did not engage as fully in the hearing as they otherwise might have done.

Observing Styles: The Lens of Demeanour

We found that the demeanour of judges could be a useful indicator of their style. Demeanour can be understood as concerned with display, performance and self-presentation. In their detailed and revealing study of judicial performance, Roach Anleu and Mack note that 'delivery is critical'[33] and define demeanour as 'the location where skills and qualities that [judges] identify as important, such as courtesy and patience, are performed or not'.[34] Demeanour can serve to show respect, demonstrate engagement, illustrate that people are being listened to, show fairness and impartiality, and emphasise the gravity and solemnity of proceedings. There is a 'wider range of demeanours than is

33 Roach Anleu and Mack, 2017: 116.

34 Roach Anleu and Mack, 2017: 112. They also cite Goffman's definition: 'By demeanour I shall refer to that element of the individual's ceremonial behaviour typically conveyed through deportment, dress, and bearing, which serves to express to those in his [sic] immediate presence that he [sic] is a person of certain desirable or undesirable qualities' (Goffman, Erving (1956) The nature of deference and demeanor. *American Anthropologist* 58 (3): 473–502, page 489).

conventionally understood', Roach Anleu and Mack suggest,[35] and the performance of judicial demeanours is an important 'practical craft of judging'.[36]

While speech is important of course, so are 'a variety of verbal and nonverbal behaviours, such as tone of voice, gestures, and facial expressions'.[37] We often found facial expressions noteworthy, for example, such as frowning, grimacing, smiling and raising eyebrows. We were struck by the role of eye contact as well, such as persistently looking away, staring intently, being distracted (e.g. by repeatedly looking at the clock on the wall) and rolling of the eyes to signify disbelief or exasperation. We also noticed the importance of tone of voice such as mumbling or using a monotone or loud voice.[38]

Body language is a particularly complex and varied facet of demeanour. We saw judges convey scepticism via lip biting, deep sighing and arm-crossing, for instance; annoyance via rubbing of face and eyes with both hands; boredom by cleaning fingernails; impatience through fidgeting; indifference via shrugging and yawning; and calmness via hand waving (e.g. both palms down, hands in front, moving up and down). Certain judicial body language stood out for us, such as a male judge who struck a 'strange macho pose … grinning and leaning back heavily in the chair, placing his arm on the back of the chair next to him … a very casual, alpha-male gesture, which we perceived as being rude'.[39] Other body language was central to orchestration, such as pointing or using the hands to signify that someone should speak or fall silent.

Objects can play a significant role in demeanour, from playing with earrings (conveying inattention), to pointing with pens in an accusatory way, throwing down glasses or pens in a gesture of annoyance, fiddling with mobile phones conveying detachment, and judges who involve their own hair in body language, such as firmly putting their hair behind their ears with two hands 'to signify a certain finality, as if you are "done with something"'.[40] One judge even employed a box of chocolates expressively, putting chocolates into her mouth with a deep sigh and leaning back heavily in her chair to convey annoyance at challenging points during the hearing, as if the chocolates could help her through each frustrating episode.[41]

Style Types

The combination of emotionality and orchestration as two important and varying elements of judges' observable behaviour during hearings provides a

35 Roach Anleu and Mack, 2017: 135.
36 Ibid.: 115.
37 Ibid.: 119.
38 Roach Anleu and Mack (2017: 131) emphasise the importance of 'lower', 'louder' and 'firm' voices too.
39 Fieldnotes, Germany, 2019, Nicole Hoellerer.
40 Fieldnotes, Germany, 2018, Nicole Hoellerer.
41 Fieldnotes, Germany, 2018, Nicole Hoellerer.

rich terrain on which to identify and juxtapose differing judicial styles. In what follows we discuss four styles: 'inside-out', 'schoolmaster or schoolmistress-like', 'detached' and 'simmering'. Our purpose is to generate a way to bring out the differences in style we detected in the course of our fieldwork. We do not wish to suggest that all judges we observed neatly fitted into one of these four categories. The titles we have created, and discuss in more detail below, describe in-situ judicial behaviours rather than particular judges, and could be momentary or emerge only part-way through hearings. There were also judges who defied classification. Indeed, we saw a good deal of style-switching in the cases we observed, in response to the development of the conversation as well as the behaviour of the appellant and the other parties.

In this sense, the four styles correspond to what Cowan et al., in their discussion of judicial decision-making strategies, refer to as 'ideal-types':[42] abstractions that represent judging, not specific judges, serving the primary function of providing an analytical device to render more visible and understandable the sometimes complex and contradictory judicial approaches that we observed. We are not alone in employing such a device, and in what follows we make reference to the overlaps between our findings and some of the existing typologies of judicial approaches in the literature.[43] It is also worth noting that the titles we have ascribed to each style were not used by our interviewees or any of the participants in our hearings. Rather, they have been arrived at via examination of our data.

Inside-Out Judging

Inside-out judging involved displaying a high proportion of the internal thoughts and feelings of the judge and was therefore seemingly the most transparent style that we encountered. Judges employing this style were usually extremely expressive both verbally and nonverbally, wanting to let all the participants know how they preferred cases to run, as well as how they felt about the hearings, the appellant, and the arguments being presented. Judges employing this style would orchestrate the proceedings intensely and allow a good deal of their personalities into the hearings. Typically judges employing

42 Cowan, Dave, Sarah Blandy, Emma Hitchings, Caroline Hunter and Judy Nixon (2006) District judges and possession proceedings. *Journal of Law and Society* 33 (4): 547–571, page 547.

43 Consider for example Roach Anleu and Mack (2017: 119–20) who distinguish five types of demeanour, including 'welcoming or good-natured'; 'patient/courteous'; 'routine/business-like/impersonal'; 'impatient, rushed, inconsiderate or bored'; and 'harsh, condescending or rude'. Lens, Augsberger, Hughes et al. (2013: 199) also distinguish between 'bureaucratic' and 'adjudicatory' judging and Conley and O'Barr distinguish between judges they describe as strict adherents, law makers, mediators, authoritative decision-makers and proceduralists in Chapter 5 of Conley, John M and William M O'Barr (1990) *Rules versus relationships: The ethnography of legal discourse*. Chicago: University of Chicago Press.

this style would speak clearly, provide detailed introductions and directions, set out why they were confused or sceptical about aspects of the appellant's story, and respond with displays of emotion to happenings during the hearing. One got the feeling (or, at least, was perhaps supposed to get the feeling) that very little was concealed 'backstage' in these hearings by the judge, both in terms of their opinions and their preferences on how the hearing should proceed.

We saw judges looking upset, concerned, outraged at the content of cases, as well as pleased with themselves or irked depending on the course that the proceedings took. In some cases, judges gave the courtroom a clear insight into their experience of judging. For instance, Nicole observed one judge being 'very friendly and soft-spoken', smiling frequently and nodding a lot, engaging in a good deal of eye contact and using highly expressive facial and arm gestures. Nicole recorded that the judge created 'a positive and jovial atmosphere' and presented himself as 'good-natured'. Nicole also knew from earlier conversations with the judge that he was new to asylum law, having spent most of his professional career working on labour law. One feature of labour law cases in Germany, he said, was that they very rarely have witnesses and he could not hide his delight at the involvement of a witness during the case.

Judge at legal representative with a grin: Your witness, Mrs. [X]!
Fieldnotes: The judge laughs a lot, saying: 'I only know this from TV, I always wanted to say it!' Everyone laughs. [44]

Later, when paraphrasing the testimony of the witness for the purposes of the recording, the judge had to ask the witness to repeat themselves. As he explained to them: 'You just said this so beautifully, and I listened so intently, that I cannot remember the exact wording now …'

Often this style came across as warm and humanising. Judges could appear friendly, for example, often greeting the room at the outset of the hearing. One judge at a German court created a 'joking, friendly atmosphere', for instance:

> The judge is very expressive, both verbally and with hand gestures. He often laughs – very loud, and whole-heartedly. He acknowledges what participants are saying by vigorously nodding, and with verbal expressions like 'hm-hm', 'okay', 'got it'. [45]

This technique of displaying receptivity and acknowledgement of what the appellant and the legal representatives were saying was common when judges adopted this style. Considerable research has established how a respectful

44 Fieldnotes, Germany, 2018, Nicole Hoellerer.
45 Fieldnotes, Germany, 2018, Nicole Hoellerer.

judicial demeanour, which extends to listening and indicating understanding, improves regard for legal authority and the legitimacy of decisions.[46] One judge in Germany seemed 'extremely concerned to understand', speaking calmly and looking at the appellant frequently. The judge also employed plenty of verbal expressions of attentiveness (e.g. 'hm-hm') as well as nodding often. 'Because this appellant speaks freely and for a long time', the fieldnotes record, 'the judge demonstrates that she listens intently, and is interested. She sometimes has her finger on her lips, and often repeats what the interpreter has said, to ensure that it is correct'.[47]

This approach could be effective in showing empathy and encouraging appellants to tell difficult stories. We recorded instances of judges showing understanding and reacting compassionately when appellants were upset, for example. Typically, this involved a lowered, soft tone of voice.

Judges employing this approach also often seemed emotionally affected by the evidence shared in the hearings. When one appellant showed photographs of the military training they underwent in Syria 'the judge seemed visibly shaken by the photos that she was seeing. Her eyes were wide and she gazed at them. At one point she remarked "my God".'[48] Some judges seemed genuinely concerned about the welfare of family members mentioned by appellants, too, even if they were not central to the case, asking if the people involved were alright now. Some judges expressed horror and revulsion at the violence that appellants had endured.

The power of an inside-out approach was also sometimes evident when the hearing was not going well for the appellant. In one case, the judge had created an atmosphere that was 'exceptionally friendly, and jovial. The judge smiled a lot and was very friendly and he often acknowledged what the appellant said by saying "hm-hm", or nodding'. After the hearing though, Nicole noted that

> I must mention that the hearing didn't go well for the appellant: the judge pointed out several discrepancies, and it seemed fairly obvious that the judge will not re-consider the Federal Office for Migration and Refugees (BAMF) decision. However, the judge was very neutral, professional and somehow friendly. The judge never raised his voice, nor was he sarcastic or otherwise rude when pointing out discrepancies.[49]

46 E.g. Tyler, Tom R. (2003) Procedural justice, legitimacy, and the effective rule of law. *Crime and Justice* 30: 283–357; Lind, E. Allan and Tom R. Tyler (1988) *The social psychology of procedural justice*. New York: Plenum Press.

47 Fieldnotes, Germany, 2018, Nicole Hoellerer.

48 Fieldnotes, Germany, 2018, Nicole Hoellerer.

49 Fieldwork updates, Germany, 2019, Nicole Hoellerer.

We nevertheless suspected that some seemingly transparent judges were selectively emotional. ‘It’s interesting that a judge can be positively emotional but avoid negative emotions’, Nicole observed in one case. The judge was very friendly, soft-spoken, patient and smiled a lot. Although the case he dealt with had its fair share of frustrations, he continued to look around at all participants with a big smile, as if he was determined to maintain a positive atmosphere during the hearing.[50] This imbalance in judges’ emotional reactions sometimes made us think that judges were intentionally making the process as warm and upbeat as possible to compensate for the scant protection that the law could offer to appellants. In this respect we concur with Lens et al.’s concerns that some judges ‘used the humanizing aspects of due process, including an opportunity to be heard and to be treated with dignity and respect, as a salve and substitute for the limits of the law and its insufficiency in the face of dire need’.[51]

Other judges, however, were unable to accomplish this combination of emotional warmth and control. In their study of lower court judges in the United States, Lens et al. describe some judges as self-described ‘social workers’ who want to help people and who can be viewed as being weak, and ‘too nice’ to appellants by other judges.[52] Roach Anleu and Mack similarly quote a magistrate who thought that ‘being courteous and polite and tactful is very, very important but not if it means that others are actually running your court’.[53] In line with these concerns, we noticed at least some friendly and empathetic judges struggling with constant interruptions from appellants and legal representatives and in numerous instances we speculated about whether ‘nice’ judges found bold and outspoken legal representatives difficult to handle.

Judges who wore their hearts on their sleeves in hearings also regularly revealed frustration, which could manifest in frowning, a furrowed brow, impatience, eye-rolling and incredulity. At times judges would show or express anger at the responses of appellants, such as when they appeared to be changing their stories, not answering questions, or providing only vague answers. In one case, the appellant had lost contact with their family and the judge was trying to ascertain why and how this had happened. The appellant remained vague in their responses and the judge, who was initially calm, grew more and more frustrated as the hearing progressed, employing pained facial expressions and issuing sighs and tutting sounds after the interpreter had spoken. At one point the judge asked whether the appellant was in touch with anyone in their country of origin and the appellant gave a vague and non-committal answer.

50 Fieldnotes, Germany, 2018, Nicole Hoellerer.
51 Lens, Augsberger, Hughes et al. 2013: 226.
52 Ibid.: 220.
53 Roach Anleu and Mack 2017: 132.

> The judge throws his pen on the desk after hearing the appellant's response, frowns and addresses the appellant with a raised voice: 'So after 2015 your wife and children – the people most important to you, to anyone – cannot be found anywhere. I would do whatever I could to find out where they are. This is such nonsense, that I won't bother asking any further questions'.[54]

Later in the hearing however the judge returned to the subject and got angry again:

Judge: But my question was: if I could not reach my family, would you not try to contact other relatives to find out what happened to them!
Fieldnotes: The appellant says that he deleted all phone numbers.
Judge [in frustrated tone, throwing his hands on the table]: And I should believe that? That you just deleted all phone numbers, or what?!

Judges sometimes implored appellants for more details (*which* threats, what *specifically* was said, etc, as discussed in Chapter 10, 'Judicial Questioning'). Judges who were adept at orchestrating their courts and expressive in their approach were usually skilled in setting out what sort of information they wanted. If, however, they were also emotional in court, the lack of similar, reciprocal precision from the appellant could agitate them. The very clarity with which judges set out their requests for the information that they desired sometimes contributed to their frustration when the desired information was not forthcoming. In one case in Paris, a judge was questioning a nervous appellant who persistently gave what the judge found to be general answers rather than answers with the desired specificity. The fieldnotes record that the judge went to unusual lengths to communicate to the appellant the sort of answers she needed:

> The judge really tries to explain exactly what she is asking by referring to and reading out excerpts from the French Office for the Protection of Refugees and Stateless Persons (OFPRA) interview. She reiterates that she is not asking 'yes' or 'no' questions. She looks and speaks directly to the appellant. She interrupts him several times to ask him to be more specific by saying 'monsieur, monsieur, monsieur!'[55]

The lengths to which the judge went to communicate the need for specific answers from the appellant highlights one of the main challenges that judges face, namely that short generic answers can indicate both a lack of credibility and also likelihood of extreme vulnerability and an inability to disclose

54 Fieldnotes, Germany, 2018, Nicole Hoellerer.
55 Fieldnotes, France, 2018, Jessica Hambly.

difficult circumstances, thoughts and emotions. Eventually however, despite these attempts to orchestrate the appellant's responses, when the responses became no clearer, the judge

> gives the impression that she is a little bit exasperated at having to repeatedly ask a question. Her eyelids flutter – I am not sure if this is tiredness or to show the appellant she wants him to get on with things. Again she interrupts the appellant: '*Monsieur*, HOW did you escape? Please respond!'. She says this in a stern way. Her patience seems to be fading.

Expressive and apparently open judges who became sceptical of appellants' accounts during hearings would also sometimes send signals of their disbelief. 'It is obvious, that the judge does not believe the appellant', Nicole wrote of another judge.

> The judge often frowns, crosses his arms, taps his shoes together, and leans his head on his hand. The judge often responds to the appellant's responses by sighing. During the testimony, he ignores some of the appellant's responses, and replies to other answers from the appellant in a very sarcastic tone.[56]

Open, transparent, 'emotional' and expressive judging can have different effects upon the hearing depending on the specific emotions they project. On the one hand the display of emotion can humanise them and, by extension, the whole process. On the other hand, 'humanising' a process that is supposed to be neutral and dispassionate can expose the hearings to the vicissitudes of moods and immediate emotional reactions.

Judging Like a Schoolmaster or Schoolmistress

Some judges were fully engaged in orchestrating hearings and directing the flow of questions but, unlike inside-out judging, imbued their performances with very little emotion. Such judging was frank and informative about the roles that participants were expected to fulfil, the legal options, and the strengths and weaknesses of cases as the judge saw it, but tended to be flat and grey in emotional terms. Judges employing this style combined intellectual engagement with emotional detachment. In this sense, they appeared like stereotypical, old-fashioned schoolmasters and schoolmistresses, reserved and somehow 'above' the court – or at least inscrutable in terms of emotion – but fully immersed in court management, which extended to etiquette and order. We use the slightly more formal and old-fashioned terms 'schoolmaster' and 'schoolmistress', rather than teacher, here, to emphasise their strictness and

56 Fieldnotes, Germany, 2019, Nicole Hoellerer.

interest in rules and procedure (contemporary teachers we understand to be generally trained to be less formal and aloof). We also make this word choice to reflect the fact that we are not making reference to judges' interest in teaching, pedagogy or didacticism, but to the manner in which they govern the courtroom and the interaction between parties.

The judge's 'language, tone of voice, facial expressions, gestures and look reminds me of a strict school-teacher', Nicole wrote of one judge who employed such an approach.

> Her tone is very serious, but somehow also conveys some understanding and patience. In comparison to other judges I observed, she is authoritative, and her demeanour demands respect and attention from everyone in attendance – I definitely feel like I am in high school again and notice that I sit more upright. But she is not angry or adversarial at all, although she rarely smiles (if at all).[57]

Of all the styles we discuss in this chapter, judges who adopted this approach appeared to be most in control; not only were they active in orchestrating hearings, but their lack of apparent emotional investment in cases also reduced the likelihood of them becoming flustered or perturbed. They were generally cool and considered. We noted, for example, how composed they seemed under pressure: words like 'calm' and 'serene' featured frequently in the fieldnotes to describe their dispositions. Body language helped to generate this effect: relaxed shoulders, a neutral and unperturbed expression even when disagreements boiled over, and employing unhurried gestures to conduct participants during the staging of the hearing (such as 'stretching out the right hand, palm up, meaning to continue with the testimony').[58]

The risk that participants were underinformed and therefore unable to play their roles in the hearing to the best of their ability – as can happen when a detached judicial approach is adopted (as we discuss below) – were also reduced. Judging like a schoolmaster or schoolmistress involved full introductions, clear signposting and sometimes-forceful curtailment of speakers but with the effect that hearings generally proceeded effectively and intelligibly. Such judges also had the ability to be stern when legal representatives or even appellants did not conform to the rules and norms that had been laid out by the judge. They usually did not stand for any interruption, talking out of turn, getting too far ahead of the flow of the conversation, or going over old ground.

Additionally, judging like a schoolmaster or schoolmistress involved a high degree of interaction with the appellant, including plenty of questions and responses that let the appellant know that the judge was listening. In contrast

57 Fieldnotes, Germany, 2018, Nicole Hoellerer.
58 Fieldnotes, Germany, 2018, Nicole Hoellerer.

to inside-out judging, however, these responses were less likely to also constitute reactions. Via a combination of speech, intonation and body language a simple 'yes' or 'um um' would confirm the attentiveness of a judge without giving away their feelings. It was in this way that judges of this type managed to appear neutral and calm on the one hand, but also attentive and engaged on the other.

Indeed, neutrality was a common word used in our field diaries to describe judges who employed this approach. 'The judge is generally neutral in both verbal and physical expressions', Nicole noted in one case.

> He betrays little emotions or his own views when talking with appellants and legal representatives but is in no way appearing unfriendly. He is one of the few judges that doesn't chat with legal representatives and others (e.g. the interpreter) in between or before/after cases – this seems to be very strict business.[59]

Neutrality, then, entailed a certain degree of distance from all the parties. This is not the same as detachment (because judges employing a schoolmaster- or schoolmistress-like demeanour were highly engaged with hearings), but it did involve a strong awareness of, and maintenance of, the emotional separateness of judges and others involved in the hearing. This could create a distinct demarcation between 'front' and 'back' stage (unlike the impression we got from inside-out judging). Just as a school pupil would not enter the staff room in a traditional school, judges who were akin to schoolmasters and mistresses would separate themselves from the others present in waiting areas and corridors for example. This gave hearings an air of formality and gravity that can be lacking when an inside-out approach is used, since these involved a higher degree of casualness and familiarity with the judge.

There were, nevertheless, drawbacks of adopting this style. Judges employing this approach sometimes used formal and convoluted language when speaking to participants, for example. This may have been part of the distancing that came with this type of demeanour, but it could come across as stuffy and awkward, and risked being confusing and patronising. Judges who spent a long time explaining the process and establishing the roles of the parties could also appear as sticklers for the rules, too 'strict',[60] whose insistence on processual rules might obscure the judge's important capacity to make idiosyncratic procedural exceptions in the context of individual cases for the wider purposes of justice.

Conley and O'Barr have discussed the pitfalls of 'obsessive attention to procedure'[61] in court settings, including how it 'confuses and frustrates liti-

59 Fieldnotes, Germany, 2018, Nicole Hoellerer.
60 Conley and O'Barr, 1990: 85.
61 ibid.: 101.

gants'.[62] We, too, had the sense that sometimes strictness could make hearings more alienating and lifeless. During one case in Germany, for example, an appellant arrived at the hearing and 'unpacks a one-litre tetra pack of juice and plastic cups. He offers everyone (including visitors) something to drink, and pours juice into the plastic cups'. When the judge arrived though, he interrupts almost immediately, telling off the appellant: 'Can you take the drinks off the table?! This is not a restaurant', so the appellant got up and packed the tetra pack and plastic cups away. 'This seems slightly inconsiderate of the judge', Nicole's fieldnotes recall. 'I don't see the issue with this at all. This is an over-exaggeration of court etiquette'.[63]

We also sometimes observed in this style of judging the limits of engaging in an apparently emotionless way. During numerous hearings judges remained serious, flat and professional in tone while the appellant revealed horrendous and harrowing evidence, which gave rise to what we called 'painful neutrality'. In one case, the judge made a much bigger show of ticking off items on the list in front of her, doing so with grand theatrical gestures, than responding to the disturbing evidence of the appellant, as if to convey the primacy of the process over the traumatic content of the case.[64] In another case, we noted at the outset that the judge was 'quite forceful when talking with the appellant, but nevertheless explains everything clearly and in detail. He never raises his voice, but his tone is not particularly friendly'. As the hearing progressed, however, this emotionlessness seemed increasingly at odds with the content of the case which involved domestic abuse, kidnap and torture. 'He never smiles', Nicole recorded, 'not even at the interpreter or me. He remains almost painfully neutral and sober throughout the hearing, even when the appellant starts crying'.[65]

Admittedly, it might be extremely difficult to know how to react to human misery, and some of the judicial standoffishness we observed could be attributed to awkwardness. In one case in Germany, for example, the judge 'seemed a bit uncomfortable that the appellant is crying throughout the whole hearing',[66] and it may have been possible to attribute their 'calm, very neutral and professional' demeanour to their discomfort. Proceduralism and formality may also be defence mechanisms for judges who find it hard to navigate challenging emotional cases. We were, nevertheless, concerned about how extreme dispassion might be experienced by appellants. The sternness that judges who adopted a schoolmaster- or schoolmistress-like disposition often displayed could feel inappropriate in the context of the power asymmetry between the judge and the appellant, for example. At times, judges would seemingly tell

62 ibid.
63 Fieldnotes, Germany, 2018, Nicole Hoellerer.
64 Fieldnotes, Germany, 2018, Nicole Hoellerer.
65 Fieldnotes, Germany, 2018, Nicole Hoellerer.
66 Fieldnotes, Germany, 2018, Nicole Hoellerer.

appellants off. During one case in Germany the judge 'puts down his pen and folds his hands in front of him in a stern gesture – not unlike a school-teacher who prepares to give a naughty student a speech on behaviour'.[67] This sort of body language can be condescending and intimidating.

Detachment

The third judicial style we identified was detached both in the emotional sense and in terms of the degree to which judges conducted or explained the hearings. As Lens notes in her investigation into the distinctions between adjudicative and bureaucratic judging, although judges have the discretionary power to be proactive and forthcoming during hearings, sometimes 'even highly skilled professionals who hold positions of relative power within the bureaucratic hierarchy will choose not to exercise that power'.[68] This speaks of a certain passivity that we found to be common among judges across our sample of countries. Given the adversarial nature of British court proceedings, which proscribes a more detached role for the judge (see Chapter 2, 'What are Asylum Appeals?' and Chapter 10, 'Judicial Questioning'), we were unsurprised that detached judging was the most common style in UK. Nevertheless, we came across a significant number of German and French judges who also asked very few questions and directed the proceedings only minimally. Typically, such judges would be focussed on their notes or screens, or on making the recording, rather than on playing an active part in proceedings, so much so that they might not look up at all from their desks for extended periods of time. 'When asking questions, he hardly looks up from his notes or the computer screen', Nicole observed about one judge, 'his tone remaining dismissive throughout'.[69]

It is important to rationalise some forms of judicial detachment. Roach Anleu and Mack's work reveals the value that some judges place on 'an inexpressive demeanour',[70] which can be associated with 'dignity and composure'.[71] Judges may 'put a mask on' or wear a 'poker-face',[72] not because they are disinterested, but because they do not want to appear biased and see the maintenance of 'social distance and impersonality'[73] as productive to judicial neutrality and

67 Fieldnotes, Germany, 2018, Nicole Hoellerer.
68 Lens, Vicki (2012) Judge or bureaucrat? How administrative law judges exercise discretion in welfare bureaucracies. *Social Service Review* 86 (2): 269–293, page 291.
69 Fieldnotes, Germany, 2018, Nicole Hoellerer.
70 Roach Anleu and Mack, 2017: 113.
71 ibid.
72 ibid.
73 ibid: 115

objectivity. Judicial authority and legitimacy can be buttressed by carefully partitioning the adjudicator from the parties.[74]

Like us, Roach Anleu and Mack found that a detached judicial style was the most common in their studies, describing it as 'routine, impersonal, or businesslike'.[75] An 'impersonal demeanour', they suggest, shows that judges 'are implicitly adopting an institutional conception of legitimacy that values detachment as the appropriate performance of impartiality'.[76]

Emotional detachment combined with procedural standoffishness, however, became problematic in some of the cases we observed. For example, it sometimes gave the impression of being rushed such as not introducing hearings and not waiting for interpretations before ploughing on with the next question (we discussed rushed hearings in Chapter 7, 'The Politics of Speed'). It sometimes allowed unhelpful practices between participants too, such as being interrupted, using an aggressive tone of voice and employing leading or convoluted questions (also see Chapter 10, 'Judicial Questioning').

It also sometimes conveyed boredom. 'The appellant makes an emotional plea via the interpreter', Nicole recorded during a case.

Appellant: I lost my parents, lost my brother. I need protection here.
Judge, in a dismissive tone, slightly bored: That's why we sit here today.[77]

In another case the appellant seemed emotional, and said he blamed himself for the threats his family received, after his faith was revealed. The judge 'does not seem to care – she plays with her hair, looking out of the window with a bored facial expression. She doesn't take any notes'.[78]

Fidgeting also sometimes spoke volumes. 'I never had a judge who looks so bored, almost as if she doesn't care at all', Nicole noted during one hearing. 'Most of the time she plays with her short hair (hair in her left hand, flicking or turning it in between her fingers). She often touches her face as well,[79] stroking her eyebrows, rubbing her eyes, and leans back heavily on occasions'.[80] During another case, the judge, who was looking out of the window a lot and

74 For a more detailed discussion see Roach Anleu, Sharyn and Kathy Mack (2013) Judicial authority and emotion work. *Judicial Review* 11 (3): 329–347.
75 Roach Anleu and Mack, 2017: 120.
76 ibid.: 122.
77 Fieldnotes, Germany, 2019, Nicole Hoellerer.
78 Fieldnotes, Germany, 2018, Nicole Hoellerer.
79 Self-picking, too, played a role. 'The judge starts to pick his ear', Nicole noted during another case that involved a distraught appellant, 'looking at his finger and at what he pulls out, when asking the questions … this is just absolutely gross' (fieldnotes, Germany, 2018, Nicole Hoellerer).
80 Fieldnotes, Germany, 2018, Nicole Hoellerer.

leaning back heavily in his chair, started to play with a rubber band in his free hand.[81]

Judges who spoke with us during our fieldwork identified boredom as a challenging issue. At one point Nicole was part of a conversation between two judges in Germany on the issue:

Judge 1: I do get bored with asylum hearings sometimes, and it makes you careless … There was a time when I didn't want to hear any more about threats by the Taliban in Afghanistan.
Judge 2: … that's why I changed chamber – I needed something new. Now I do Somalia … it's like a breath of fresh air. The new country information, the new insights, and new stories appellants tell us … it keeps you focused.
Judge 1: Yes, when – as a judge – you notice this boredom, it's best to change chamber or country of origin, if possible. Because otherwise you get dangerously close to being prejudiced.[82]

Despite its potential advantages in maintaining impartiality then, the detached approach often put us in mind of what Lens refers to as a 'bureaucratic'[83] judicial style. This approach to judging is less responsive than others to the specific needs of appellants, and thus more likely to mirror the initial governmental approach to decision-making by viewing it as something to be concluded quickly within a narrow and rigid interpretation of the rules. Scholars have identified the risk that certain styles of choreographing of hearings can convey 'distaste'[84] and even the sense that judges are 'biased against appellants'.[85] To be sure, we were not party to the judge's decision-making and thought processes, and many judges who employed a detached demeanour might well in fact have been highly engaged and attentive, including during other parts of the process. To even give the impression of boredom and indifference, though, could have been damaging to the ability of appellants and others to take full and active part in proceedings because of its dispiriting effect, as well as the risk of denting perceptions of a fair hearing.

Simmering

A fourth judicial style that we observed combined the emotionality of the inside-out style with the dearth of explanations typical of a detached judge. Simmerers' key characteristic was that they displayed emotion but did not provide any clear explanation or clue about the reasons for that emotion. The

81 Fieldnotes, Germany, 2018, Nicole Hoellerer.
82 Fieldnotes, Germany, 2018, Nicole Hoellerer.
83 Lens, 2012: 289.
84 Lens, Augsberger, Hughes et al, 2013 : 220.
85 ibid.

result was displayed judicial emotions that were inexplicable, at least to us as observers.

Sometimes judges seemed entertained or exuberant when there was nothing apparent in the courtroom to have prompted these emotions. 'The judge laughs a lot', Nicole noted in one case 'often at inappropriate moments (I feel) – whether this is out of inexperience (the judge looks very young), or nervousness I dare not guess'.[86] The judge 'sometimes laughs at inappropriate times', the fieldnotes in another case record, 'which seems to me as if he thinks this whole procedure is a light-hearted and easy affair'.[87] Sometimes the disconnection between judicial emotions and the incomprehension of the rest of the room could lead to awkwardness. 'The judge asks the next question grinning', Nicole noticed during one case, 'looking around as if he has made a joke and is waiting for everyone to laugh (but no one does)'.[88]

A common emotion that judges displayed was anger, or at least frustration, such as via a grim face, clenched jaw, hard staring and snappy comments or answers. Without making it clear what was causing the emotion (in contrast to the transparency of judges who employed the inside-out style), the atmosphere became more tense and the participants tentative.

It could be assumed under these circumstances that the reason for irritability had to do with the case itself – the paperwork perhaps, or inconsistencies between the paperwork and the oral testimony of the appellant. At times, however, we had an insight into the potential reasons for judges' short-temperedness which would not have been evident to the appellant, or the other participants present, and these insights revealed a wider range of possible causes for irritability. Nicole was left alone with the judge at the end of one religious conversion case, for example, in which the judge had thrown down their pen and shouted in response to the appellants' answers. 'This was my first conversion case in years,' the judge said. 'How do you think I did? Any feedback?'[89] The way he asked these questions conveyed self-consciousness, nerves and insecurity, which, we felt, went some way towards explaining what had seemed like rather erratic judicial behaviour during the hearing.

The physical environment of hearing rooms might also have played a part in causing some judges to lose their tempers. In one case, Nicole wrote in relation to the judge's sudden snappiness that 'I wonder if this is also a result of the room being exceptionally stuffy and hot'.[90] In another case, 'the judge seems annoyed at times, especially when pointing out discrepancies, or when the appellant doesn't respond "sufficiently" to questions … Perhaps this is due

86 Fieldnotes, Germany, 2018, Nicole Hoellerer.
87 Fieldnotes, Germany, 2018, Nicole Hoellerer.
88 Fieldnotes, Germany, 2018, Nicole Hoellerer.
89 Fieldnotes, Germany, 2019, Nicole Hoellerer.
90 Fieldnotes, Germany, 2018, Nicole Hoellerer.

to the previous case [which had been long and acrimonious], and not having had a lunch break'.[91]

Whatever the reason for judges' unexplained emotional displays, they could have a significant influence over the atmosphere of hearings. During one case in Germany a judge snorted loudly when looking at the appellant's paperwork, but provided no explanation for doing so.

> There is silence in the room. The lawyer looks at their bundle as well, but the appellant looks very nervous. He looks from the interpreter to the lawyer and back again as the silence hangs in the air.[92]

Some judges even seemed to have a grudge against the appellant. In the UK, a small number of judges scoffed at appellants, belittled them, and took the side of the Home Office representative unreservedly, without giving any explanation to the appellant or anyone else in the court.[93] In one case, Rebecca observed that:

> The whole dialogue seems to be the immigration judge trying to find arguments against the appellant – it's frantic, prejudiced, unrelated arguments all put against the appellant, not logically and calmly going through points. It seems as though the judge is happy as long as he can accept the account, but as soon as anything is questionable he gets angry and argumentative.[94]

Similarly, Nicole wrote of one judge in Germany:

> She often interrupts the appellant and doesn't let her speak. This hearing is frustrating to watch, as the judge is interrupting the appellant again

91 Fieldnotes, Germany, 2018, Nicole Hoellerer. For a discussion of the potential impact of hunger on judicial decision-making see e.g. Danziger, Shai, Jonathan Levav and Liora Avnaim-Pesso (2011) Extraneous factors in judicial decisions. *Proceedings of the National Academy of Sciences* 108 (17): 6889–6892; or Bublitz, Christoph (2019) 'What is wrong with hungry judges? A case study of legal implications of Cognitive Science.' In Waltermann, Antonia, David Roef, Jaap Hage and Marko Jelicic. *Law, Science and Rationality*. The Hague: Maastricht Law Series 14: 1–30. However, other research suggests that the impact of hunger on adjudication may be exaggerated, see Glöckner, Andreas (2016) The irrational hungry judge effect revisited: Simulations reveal that the magnitude of the effect is overestimated. *Judgment and Decision-making* 11 (6): 601. Also see Chapter 8, 'Barriers to Communication'.

92 Fieldnotes, Germany, 2018, Nicole Hoellerer.

93 See Gill, Nick, Jennifer Allsopp, Andrew Burridge, Daniel Fisher, Melanie Griffiths, Jessica Hambly, Jo Hynes, Natalia Paszkiewicz, Rebecca Rotter and Amanda Schmid-Scott (2020) *Experiencing asylum appeal hearings: 34 ways to improve access to justice at the first-tier tribunal*. Exeter University and the Public Law Project. Available at: https://publiclawproject.org.uk/resources/experiencing-asylum-appeals/ [accessed 27 April 2024].

94 Fieldnotes, UK, 2014, Rebecca Rotter.

> and again and won't even let her finish a sentence. She is shrugging, and often throws her hands up slightly, and throws the pen on the table, in a gesture of either being at a loss, or making a point. I don't feel like this is particularly 'fair' or 'standard' procedure. It seems to me that the judge has made up her mind, and now just 'batters' the appellant, almost as if she wants to punish the appellant for filing a case for an oral hearing in the first place.[95]

These types of cases stood out among those that involved a simmering style, because not only was it unclear why the judge was treating the appellant in the way they did, but there was also nothing that could have been revealed to justify such treatment. These judges corresponded most closely to the 'harsh, condescending and rude' judicial demeanour that Roach Anleu and Mack identify.[96]

Unexplained emotional displays by judges could be particularly disorientating when they marked a significant break with the previous demeanour of the judge. Sometimes hard and irritable judges appeared to 'soften' for some reason that was not clear during the hearing. While doubtless welcome from the appellant's perspective, there was an ensuing sense that the softening was fragile and could be reversed for equally inscrutable reasons, and that participants had to walk on eggshells as a result. Conversely, friendly and empathetic judges could suddenly become hard and impersonal without warning. In one case in Germany, a judge seemed to 'lose his cool' at the crucial point of questioning the credibility of the appellant:

> Until now he was calm, friendly, smiled frequently and seemed to be courteous. Now, however, he raises his voice several times, frowns and even looks angry. His demeanour becomes authoritative, and he gesticulates wildly with his hands. This is even visible in the way he takes notes: he writes fast and more agitated, dotting with force, so it becomes audible when the pen touches the paper. In one instance, he even throws the pen onto the desk after taking notes, so the pen starts rolling away and almost drops off the other side of the desk. The judge grabs it again, however, his brows very deep over his eyes.[97]

Despite the fact that 'self-control and poise remain central to the embodiment and application of law',[98] judges did occasionally seem to lose their composure. In these situations, the simmering emotions that the judge may have been struggling to keep in check erupted into the hearing, sometimes in spectacular

95 Fieldnotes, Germany, 2018, Nicole Hoellerer.
96 Roach Anleu and Mack, 2017: 120.
97 Fieldnotes, Germany, 2018, Nicole Hoellerer.
98 Roach Anleu and Mack, 2017: 130.

fashion. It was most common for appellants to precipitate such outbursts with vague or evasive responses, but it could also be that legal representatives were responsible for the judge's loss of control. One lawyer in Germany, for example, persistently questioned the quality of the interpretation during the initial asylum interview of his client, despite the judge thinking that the translation was of reasonable quality. After several exchanges, the lawyer brought the topic up again, mentioning the example of BAMF firing interpreters (which was in the German news in 2018[99]) and that one interpreter in Germany faked his CV by saying he had a Bachelor of Science degree, which was untrue. The return to the topic proved to be too much for the judge:

> The judge is at the end of her tether and starts yelling: 'I do not reply to hearsay. If you have evidence of the interpreter at BAMF not doing his job, then you have to present evidence! Otherwise why do we have a debate now for 30 minutes? Let's end this excruciating topic!'[100]

Legal representatives could also wind judges up by insisting that they follow rules closely, which judges could interpret as being pedantic. We saw one lawyer interrupt a judge during their recording to accuse the judge of recording something wrong. The judge suddenly became intensely angry and started shouting about 'ridiculous details that are not necessary'.[101]

In summary, the figure of the simmering judge reminds us of the difficulty of the emotional work that judges are required to do, and some struggled to keep control of their emotions. It also illustrates the subordinate position of the other participants, often having to guess what mood judges would be in and what their different moods meant. In particular, angry outbursts of judges could intimidate appellants, and jeopardise their ability to continue to participate in the hearing. Furthermore, it is a reminder of all the extraneous pressures bubbling below the surface of the hearing, including the everyday life stresses that all participants, including judges, carry with them into the courtroom.

Conclusion

In this chapter we have discussed judicial styles, an aspect of judicial discretion concerned with displayed judicial emotion in court as well as judges' activities to orchestrate court processes. We have used demeanour as a lens onto judicial styles, taking into account a range of aspects such as tone of voice,

99 See e.g. in German https://www.sueddeutsche.de/politik/asyl-warum-2100-dolmetscher-nicht-mehr-fuer-das-bamf-arbeiten-duerfen-1.3954387 [accessed 11 January 2022].

100 Fieldnotes, Germany, 2019, Nicole Hoellerer.

101 Fieldnotes, Germany, 2019, Nicole Hoellerer.

facial expressions, body language and the expressive use of props and objects to build a picture of judges' differing stylistic approaches.

The four styles we have discussed are not exhaustive but represent some of the most striking from our data. Judges sometimes employed different styles during the same hearing or across hearings, so we are not intending to label people or judges via our analysis. Nevertheless, we think these styles are useful in bringing out some of the different approaches to conducting hearings that judges employed. 'Inside-out' judging tends to be forthcoming, transparent (at least this was the impression) and communicative, both emotionally and in orchestrating hearings. Schoolmaster- or schoolmistress-like judging entails considerably more emotional distance between the judge and the participants but maintains a high degree of orchestration such as through giving instructions and responding to appellants' testimonies. We call judging that is both emotionally and procedurally minimal and standoffish, 'detached' judging. Judging that involves emotions that are not easy to interpret, and come with no clear explanation or cause, produce what we called a 'simmering' style.

It is not our intention to recommend a particular style in this chapter, because styles generally come with both pros and cons. Instead, our focus on judicial styles is to encourage reflexivity in the courtroom by considering the role and effect of judicial behaviour and displays of emotion on other participants in the hearing. In the policy and practice compendium at the end of this part of the book, therefore, entries corresponding to various different styles are to be found.

In terms of the frequency of observations of particular styles in our data, our impression is that the detached approach was the most common. In terms of correlations with judicial attributes, however, aside from our impression that young and female judges sometimes tended to be less inclined towards warm and friendly personas in Germany (see Chapter 10, 'Judicial Questioning'), and that detachment was particularly common in the UK's adversarial system, we cannot provide firm indications of differences and patterns. Most of the styles in our sample seemed equally likely to emerge in larger and smaller courts, and among judges who formed parts of panels as well as those who heard cases individually.

Judges are not the only participants to have different styles. Legal representatives (for both parties) varied enormously, for example, and, if it were not for space constraints, we could have provided an analysis of their styles at least as detailed as the analysis in this chapter. Appellants too had differing styles,[102] as did interpreters and even court writers where they were present.

102 Our reasons for not discussing appellants' styles in more detail go deeper than space constraints and are related to the possible consequences of doing so. Detailing appellants' styles could be problematic if the account were likely to be read by prospective appellants as a guide on how to approach their hearing. Video guidance arising from the ESRC project that preceded the ASYFAIR project was produced for appellants in the UK for this purpose which

Although we have discussed judicial styles in isolation, the fact is that styles sometimes emerged interactively, shaped by the conversation, exchanges and atmosphere during hearings. Although we hope that previous chapters have already given a sense of the importance of interaction (in particular Chapter 8 on communication and Chapter 10 on questioning) the findings in this chapter should nevertheless be read with that caveat in mind.

The identification of different styles in our research illustrates the high degree of variability in judicial approaches to conducting hearings. Although some of this variability could have been outside of the control of judges, a large proportion of what we have described is under judicial discretionary control. As such, we are in agreement with other socio-legal scholars that 'discretion is not only something which operates at a formal level of legal doctrine, but also permeates the skin of the entire proceedings'[103]

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is, in our opinion, better suited to the task of providing a guide for appellants than academic writing, see https://www.asylumaid.org.uk/node/60 [accessed 27 April 2024].

103 Cowan, Blandy, Hitchings et al., 2006: 570–501.

Part IV
Policy and Practice Compendium

Our research raised questions about which values are prioritised at a system level when designing and implementing asylum appeal procedures. We have highlighted the mistakes and bureaucratic errors in first instance decision-making systems that were revealed during the appeal processes we observed, and suggested that these failings led to unduly heavy reliance on appeals as remedies. We have pointed to the breadth of factors that can disrupt effective communication, including but by no means limited to linguistic incomprehension. We have also underscored the variance in observable judicial styles adopted in the hearings we observed.

In this final policy and practice compendium, we present some key considerations relating to procedural design. Fairness, accuracy and timeliness require centring the dignity of all appellants, facilitating their inclusion and participation and avoiding alienation. Robust decision-making can also be impeded by unconscious biases and blind spots. Nevertheless, we offer some ideas about how asylum decision-making systems can better support initial decision-makers and judges to make high-quality, fairer and more impartial decisions.

Mistakes

Robust asylum procedures require resource investment across all stages of the determination process. In particular, first-instance decision-making must be adequately resourced to encourage high-quality initial decisions and avoid over-reliance on appeals to correct mistakes.

- Adequate resourcing entails in-built resilience and capacity to respond to rapid increases in the number of claims or appeals. Initial government decision-makers should be able to invoke emergency funds from government under conditions that are agreed in advance.
- Improving the safety and reliability of information and filing systems could drastically reduce mistakes arising from lost documents and bureaucratic errors.
- To minimise the risk of mistranslations and erroneous transcriptions leading to further or bigger mistakes, sufficient time and resources must be

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made available for adequate verification with the appellant. This is particularly significant where speech recognition software has been used.Using qualified and accredited interpreters at all stages of the determination process can help to reduce the risk of errors. Providing interpreters with a list of stock words that are routinely misunderstood and mistranslated during the initial government interview process, as well as during legal processes at court, could help to reduce translation errors.

- If the appeal procedure in question assumes an adversarial character, resourcing should be in place to encourage, as far as possible, representation on both sides. This may reduce the need for onward appeals or future challenges, if mistakes and errors are properly identified, raised and deliberated at the earliest opportunity.
- A holistic approach to accounting for the costs of refugee claim determination could help to avoid isolating initial decision-making units from the appeal process. By ensuring that accounting systems are able to take stock of the downstream costs of administrative and linguistic mistakes at the initial stage, the false economies of under-skilling in these areas can be identified and avoided.

Systematic and detailed data collection on decision-making (at both the initial and appeal level), and transparency regarding this data, can be a key component of ongoing quality control and monitoring.

- System designers may want to strengthen the opportunities judges have to give feedback to initial decision making bodies about the most frequent sorts of bureaucratic, linguistic and administrative mistakes they are uncovering at the appeal stage. Opportunities could be arranged for senior judges to meet or communicate with senior initial decision makers, and to feed into training.
- Performance measures of initial government decision makers could be linked not (only) to the number of decisions that they make within a certain timeframe, but to the frequency with which judges overturn their decisions on appeal.
- Better data can also help encourage institutional learning, by affording opportunities to identify and respond where things are going wrong.
- Making data available to researchers where possible and appropriate could also improve opportunities for dialogue, reflection and improvements.

Our research revealed how difficult it sometimes was for appellants to provide feedback to the court authorities after their hearing about things they had felt had gone wrong. In addition, we found mistakes occurred due to basic breakdowns in communication between asylum authorities/courts and asylum applicants/appellants.

- Installing accessible, free, and independent complaints procedures for asylum claimants can help enhance trust and confidence. These mechanisms

should be accompanied by the possibility of disciplinary measures where appropriate.
- Ensuring communication channels between applicants/appellants and decision-makers are open and functioning should be a key priority.

Recognising that mistakes in asylum decisions have the potential to cost a person their life, it is imperative that high quality, properly trained, competent personnel are recruited at all levels of decision-making processes. Such are the high stakes of decision-making in the context of asylum, that a culture of care and diligence needs to be systematically nurtured at both the initial and appeal stages of asylum claim determination.

- Adequate time and resources should be devoted to initial and ongoing training for personnel. This may need to be tailored to local needs, for example with court or region-specific programmes in place. Training programmes could be mandatory, and/or in-person.
- Government decision-making bodies could be expected to take greater responsibilities for their initial decisions, for example by requiring that they attend appeals more frequently. They could be required to pay a fee to the judicial authority when their decisions are overturned (especially if administrative or linguistic incompetence is found to have been significant). Minimum attendance rates at appeal could be agreed with judicial authorities. Attendance of the initial government decision-makers is preferable, and could be made mandatory in particularly complex cases.
- Measures could be taken to increase the opportunities for settlement before hearings go ahead, so long as this is done with the knowledge and consent of the appellant.
- The standard of some initial decisions from the government side reveals a need for greater attention to producing individualised, fully reasoned decisions. The overuse of 'copy and paste' and/or standardized refusals (according to nationality or type of claim) is poor practice and suggests that an application has not been considered on its own merits. Increased training and oversight in this area may be necessary.
- Asylum representatives need sufficient remunerated time for thorough preparation in advance of appeal hearings in order to identify mistakes. This can include meeting with the appellant(s) and preparing them for giving evidence, responding to questions, and correcting mistakes.
- To promote accurate and robust decisions, appeals must offer opportunities to respond to findings of inconsistency and lack of credibility where these relate to discrepancies with earlier interviews or evidence.

Judicial Questioning

Judicial styles that balanced flexibility and adaptability with a strong sense of what they wanted to get out of the hearing were seen to be highly effective. Judges who had considered which issues they wished to focus on in advance

of the hearing, yet remained flexible and were not constrained by script or formula, were generally observed to preside over efficient, yet thorough, appeals that made the most of court time with advocates and witnesses.

- Judges play a key role in the orchestration and choreography of hearings. It can be effective to explain the various roles played at the start of each hearing, give an estimation of timings, and a brief outline of how the hearing will proceed.
- Managing expectations at the start of the hearing, while not giving any false promises, can be an important way to put appellants at ease and ensure they understand what will happen in the appeal.
- Intermittent sign-posting, reminders and occasional recaps of information that has been exchanged over previous rounds of questions can be effective in keeping appellants engaged, informed and best able to participate fully throughout their hearing.
- It can be helpful for judges to explain why they are asking particular types of question and to put these in context (e.g. 'I ask because …'). When appellants understand why they are being asked a question, it can be advantageous to the judicial task as appellants may be more forthcoming with evidence and explanations. It is important to remember that appellants are not 'repeat players' in the hearing process and may not understand either the challenge to their credibility or which elements of their overall forced migration experience are relevant to judges deciding on their appeal. When appellants struggle to understand or answer questions, judges might be encouraged to elaborate and give the appellant time, rather than swiftly moving on.
- Judges could be encouraged to avoid complex or confusing construction of questions such as conditionals within questions (e.g. 'and if so …') or double negatives (e.g. 'there was not much point not talking was there?'). These can seem like a trap, intended to trip up the appellant rather than obtain information and insight about the asylum claim. A shift away from obfuscation and obscurity is especially important in a jurisdiction dependant on interpretation and clarification of highly complex, intertwined factual and legal issues. Leading questions should be avoided by all participants when asking the appellant questions.
- Sometimes it can be helpful to give examples of the kinds of answers being sought. However, this technique should be approached with caution so as not to overwhelm appellants, or to give a false impression that appellants need to fit their story into a particular narrative.

Questioning should be trauma-informed and alert to the risks of creating further harm by, for example, asking appellants to return repeatedly to particular episodes or events. Judicial awareness of the effects of trauma may also explain why some details of the claim are vague, missing, or inconsistent.

Understanding the effects of trauma on memory and recall should be a central part of judicial training which itself could be mandatory, in-person and regularly updated.

- Silence or disengagement by appellants should not automatically lead to adverse credibility findings, as these behaviours can be related to trauma, mistrust, cultural unfamiliarity, or misunderstanding.
- It can help the appellant to access the hearing in a meaningful way if judges and representatives speak directly to, and look at, the appellant when asking questions, rather than speaking to the interpreter about the appellant.
- Showing empathy can be an important aspect of promoting feelings of safety, trust and generating effective communication during questioning. For example, demonstrating compassionate mannerisms and facial expressions, appearing unhurried, and showing appellants that they are being listened to, can help engender respect and trust in the integrity of the process as well as encourage appellant participation.

Interpreters need to be able to interpret accurately and precisely what has been said. If a judge does not allow an interpreter to finish what they are saying, this can be confusing and alienating for appellants.

- It is necessary for interpreters to undergo sufficient training and perform their role according to rigorous standards.
- Cutting off, interrupting, or constricting interpretation should not be used as a time saving device where this impedes appellants' full participation in their appeals.
- The use of formal language can have both positive and negative effects. While formal language may represent respect for the gravity of the legal process and parties, it can also be intimidating and confusing. Legal actors should be alert to this and provide additional explanations, or reassurances, where appropriate.

Guarding Against Bias

Judges should be appointed on merit and fulfil minimum qualification criteria that ensure they have the skills, experience and expertise to carry out this highly complex and demanding decision-making role. Appointment of asylum judges should be free from political interference. Even when these conditions are met, asylum judges inevitably bring their own worldviews and socio-cultural perspectives to decision-making, and they are often drawn from European/ Global North backgrounds. The use of problematic gendered and racialised assumptions was a feature in our data.

- Judicial education and training have a key role to play in guarding against bias. Structured, ongoing training on substantive legal issues as well as procedural matters – including around bias – could be obligatory. Judicial training can also furnish judges with tools necessary for undertaking the extremely demanding work of asylum adjudication. This could include increasing knowledge, awareness and understanding around, for example, mental health and well-being, emotions and emotion management, trauma-informed practice, cultural awareness and critical (self) reflection on unconscious social and cultural bias.
- Judicial panels, rather than single-judge procedures, can be an effective way of promoting fair and thorough consideration of asylum appeals, and protecting against 'cultures of disbelief' or judicial fatigue in relation to certain types of claims.[1]
- Judges risk reinforcing gendered cultural stereotypes where certain questioning practices are deployed. These may include allowing male appellants to speak over women or answer in place of women, or letting husbands speak for their wives rather than addressing women directly. Even though the judge may permit this as a way to save court time, such practices may prevent women from participating fully in their asylum procedure.
- Collecting data on judicial diversity and decision-making patterns (without necessarily identifying individual judges) can be an important safeguard against bias.
- It is good practice for courts and tribunals to facilitate knowledge-sharing and peer-to-peer learning between judges. This applies not only within a country's asylum system, but also internationally, for example via the International Association of Refugee Law Judges.
- Visible and/or audible signs of disapproval, anger or disbelief (such as tutting, sighing, shaking the head, eye-rolling) from the judge may undermine the perception of independence as this creates an atmosphere of scepticism. Appellants may perceive such mannerisms as an indication that the judge has already made their mind up.
- Where the state party exhibits poor conduct, poor administration, or makes basic errors and mistakes, it is incumbent on judges to uphold principles of independence and impartiality and ensure that such behaviour is not overlooked.
- Support systems should be in place for judges to help guard against secondary trauma, mental ill health and burnout. Where judges do experience these serious health problems as a result of their work, they should have access to treatment and therapy as required.

1 Hambly, Jessica, Nick Gill and Lorenzo Vianelli (2020) Using multi-member panels to tackle RSD complexities. *Forced Migration Review* 65: 32–35.

12 Conclusion

> All I want is a public discussion of a public grievance. Listen: I was arrested about 10 days ago, I laugh at the fact of the arrest itself, but that's not relevant here. I was ambushed in bed early in the morning … If I were a dangerous brigand, better precautions could not have been taken … It was not easy to remain calm. However, I managed it, and I asked the overseer entirely calmly – if he were here, he would confirm it – why I was under arrest. Now, what did this overseer answer, whom I still see before me sitting in the chair of the aforementioned lady, a display of the most obtuse arrogance? Gentlemen, he basically said nothing, perhaps he really knew nothing, he had arrested me and was satisfied with that.
>
> Extract from Franz Kafka, *The Trial*[1]

Kafka's novel describes the confusion and frustration of K., an innocent man who is arrested on his 30th birthday without knowing the reason for his arrest. He progresses through the legal system as the story unfolds, caught in a world of non-information, opacity, and infuriating functionaries who seem to be informed about the charges against him and the way that the legal system works, but never able or willing to enlighten him. The novel conveys how tiring and deflating it is to be caught within a legal system that one does not understand, despite spirited attempts to decipher its meaning and functions. It ends when K.'s resolve is eventually destroyed, and he submits himself to capital punishment without ever knowing what he was supposed to have done.

Parts of the asylum process, including the appeal process, seem 'Kafkaesque' – a widespread term with roots in the novel that refers to the nightmarishly complex, bizarre and illogical quality of a situation. The asylum processes we observed are indeed frequently extremely complex, protracted and contradictory, and the appellants we spoke to during our research often expressed their

1 Kafka, Franz (1925) *The Trial*. Verlag Die Schmiede. Available at: https://www.gutenberg.org/cache/epub/69327/pg69327-images.html [accessed 26 April 2024]. Translation from German: Nicole Hoellerer.

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perplexity and fatigue at systems and processes that they felt had never been fully explained to them.

Part of *The Trial*'s appeal is that it tells the story from a ground-level perspective: from the point of view of someone who is caught within the system but lacks an overall picture of its mechanisms and purpose. While *The Trial* is fictional, this technique of introducing the reader to the strangeness and shortcomings of a legal process as it is experienced on the ground is something that it shares with a legal ethnographic approach. It is our hope that *Inside Asylum Appeals* has revealed something of the confusion, improvisation, inconsistency, complexity and emotional turmoil inherent to the process of seeking refugee protection in Europe, underscoring the importance of attending to the social dynamics of legal processes and experiences, alongside doctrinal legal understandings. In this concluding chapter we begin by outlining the individual scholarly contributions of the chapters and the overall contributions of the book, before discussing their implications for policy and practice and the power relations within which the book is situated.

Chapter Contributions

Drawing on a geographically informed approach to court ethnography and building on insights and perspectives from socio-legal studies, this book has made multiple contributions to debates in migration studies, legal studies and the social sciences. After setting out the legal landscape and the methodological approaches we took in Chapter 2 ('What are Asylum Appeals?') and Chapter 3 ('Approaching Asylum Appeals'), in Chapter 4 ('Before the Hearing') we discussed waiting, identifying the complex relationship between memory and waiting, and the crucial influence that waiting can have over asylum claim determination. We dwelt on the politics of waiting, arguing that political and economic decisions have led to underinvestment in decision-making systems which have produced significant asylum backlogs. We argued that this period of stasis can greatly influence appellants' ability to engage effectively with legal processes, as appellants are afforded variable forms of support, social circumstances change over time, and connections to social networks can deteriorate.[2] Our observations in this chapter therefore underscored the important and complex relationship between migrant waiting and access to justice.

In Chapter 5 ('Arriving at Court') we foregrounded the space of the court, attending to the architecture and layout of court buildings, as well as the circulation of staff and appellants within them. Forced migrants' trust in host societies, and especially authorities like police and judges, is known to often be delicate, because they may have experienced mistreatment at the hands of officials previously, or encountered corruption. We argued that the process

2 Vianelli, Lorenzo, Nick Gill and Nicole Hoellerer (2021) Waiting as probation: Selecting self-disciplining asylum seekers. *Journal of Ethnic and Migration Studies* 48 (5): 1013–1032.

of arriving at court is a formative event in the development or erosion of appellants' trust in this context, but that the importance of the practical matter of arriving at courts is in danger of being overshadowed by perspectives that focus exclusively on the written law, or the judge and the hearing itself. A holistic understanding of court processes is necessary to mitigate this risk, pointing to the utility of ethnographic and appellant-informed research when designing and appraising court spaces, and to place-centred perspectives that can provide fresh outlooks on legal systems.

Our geographical perspective also highlights the importance of collecting evidence and material concerning the process of assembling together the actors necessary for hearings to occur at a specified place and time. In Chapter 6 ('Assembling Appeals') we showed how vulnerable these processes were to disruption. The result was frequent absences from the hearings, which made us reflect on the manifold reasons for missing evidence and non-attending participants at hearings. A critical perspective, that focuses on what is missing from hearings rather than on what is observable and present, can bring to the fore the practical challenges of participating in legal processes.[3] This perspective holds potential to capitalise on the material turn in legal studies and to afford new spatiotemporal ways to understand barriers to access to justice.[4]

Chapter 7 ('The Politics of Speed') concerned the speed of hearings and legal practice, in reference to the growing literature in legal studies on time and law. We demonstrated the depth to which a concern for speed affected the hearings we observed, influencing the rapidity of speech, the etiquette of the court and the ways hearings began and ended. A focus on speed also revealed the teleology of law as a flow, to be managed and maintained in a logistical way. Logistics often operate in the background, secondary to the 'main event' of the hearing itself. Our work, however, underscores the importance of critically attending to legal logistics.[5] Admittedly, we conducted our observations at a time of heightened pressure over asylum appeal courts, both in terms of the number of cases they had to determine, and public and governmental scrutiny refugee status determination procedures underwent. But what we

3 See also Gill, Nick, Jennifer Allsopp, Andrew Burridge, Dan Fisher, Melanie Griffiths, Jessica Hambly, Nicole Hoellerer, Natalia Paszkiewicz, and Rebecca Rotter (2020) What's missing from legal geography and materialist studies of law? Absence and the assembling of asylum appeal hearings in Europe. *Transactions of the Institute of British Geographers* 45 (4): 937–951.

4 Kang, Hyo Yoon and Sara Kendall (2019) 'Legal materiality.' In Stern, Simon, Maksymilian Del Mar and Bernadette Meyler (eds) *The Oxford handbook of law and humanities.* Oxford: Oxford University Press, 21–38. Graham, Nicole, Margaret Davies, and Lee Godden (2017) Broadening law's context: Materiality in socio-legal research. *Griffith Law Review* 26 (4): 480–510; Latour, Bruno (2010) *The making of law: An ethnography of the Conseil d'Etat.* Cambridge: Polity.

5 See also Gill, Nick, Nicole Hoellerer, Jennifer Allsopp, Andrew Burridge, Dan Fisher, Melanie Griffiths, Jessica Hambly, Natalia Paszkiewicz, Rebecca Rotter, and Lorenzo Vianelli (2022) Rethinking commonality in refugee status determination in Europe: Legal geographies of asylum appeals. *Political Geography* 98: 102686.

observed left us in no doubt that rushed hearings are qualitatively distinctive, and that speed itself changes the essence of what a hearing can be.[6] Our worry then, is that the logistical concern for efficiency, while supposedly secondary to the main event of hearing cases in courts, begins to dominate, warping and undermining the enactment of law itself.

In Chapter 8 ('Barriers to Communication') we argued for an interdisciplinary approach to understanding in-court communication. There is already fascinating literature that treats in-court communication linguistically,[7] and our observations bore out some of the challenges that this literature anticipates, such as the difficulties of finding appropriate interpreters, and managing the interpreters' influence over the translations they provide. There is also literature that addresses the challenges of interpretation for asylum claims specifically, and our findings corroborated the impact that cultural differences and trauma can have over effective communication.[8] Beyond these issues, though, our ethnographic perspective also revealed the practical challenges that hearing spaces pose to communication, including the influences of the public and the many distractions in hearing rooms and from corridors. Our work therefore points towards the value of cross-disciplinary work in the study of communication in legal contexts, combining legal, linguistic and spatial perspectives.

In Chapter 9 ('Mistakes and Incompetence') we turned to the issue of mistakes which had been made earlier in the asylum determination process and that became evident during the appeals we observed. Drawing on academic insights into the expediency of ineptitude and the profitability of unknowing in certain situations, we argued for a critical perspective on the roles that ignorance, an unwillingness or inability to learn, repeating the same mistakes, under-investment in capabilities, and slowness to adjust or take on new information, play in European countries' de facto border control processes. The evidence we uncovered of shortcomings in translation, typing skills, administration and legal reasoning pointed towards a willingness to expose people

6 See also Hambly, Jessica and Nick Gill (2020) Law and speed: Asylum appeals and the techniques and consequences of legal quickening. *Journal of Law and Society* 47 (1): 3–28

7 See, for example, Smith-Khan, Laura (2017) Telling stories: Credibility and the representation of social actors in Australian asylum appeals. *Discourse and Society* 28 (5): 512–534; Shuman, Amy and Carol Bohmer (2004) Representing trauma: Political asylum narratives. *Journal of American Folklore* 117 (466): 394–414; Maryns, Katrijn (2014) *The asylum speaker: Language in the Belgian asylum procedure*. London: Routledge; Dahlvik, Julia (2019) 'Why handling power responsibly matters: The active interpreter through the sociological lens.' In Gill, Nick and Anthony Good (eds) *Asylum determination in Europe: Ethnographic perspectives*. Cham: Palgrave Macmillan, 133–154.

8 Pöllabauer, Sonja (2004) Interpreting in asylum hearings: Issues of role, responsibility and power. *Interpreting* 6 (2): 143–180; Inghilleri, Moira (2005) Mediating zones of uncertainty: Interpreter agency, the interpreting habitus and political asylum adjudication. *The Translator* 11 (1): 69–85; Gibb, Robert and Anthony Good (2014) Interpretation, translation and intercultural communication in refugee status determination procedures in the UK and France. *Language and Intercultural Communication* 14 (3): 385–399

seeking asylum to institutional incompetence, understood here not in its pejorative sense, but as a result of managerial priorities resulting, ultimately, from countries' truculence with respect to their legal responsibilities towards refugees under international law. In light of the policy discourse of smart borders,[9] we see the exposition of the functionality of incompetence in border control as an important corrective for migration studies.

Our discussion in Chapter 10 ('Judicial Questioning') set out a variety of different types of questions judges ask, and pointed to some of the effects that means of questioning can have. We noted that some judges used their questioning in ways that supported the appellant through the appeal process, but that there were also instances of apparent bias revealed by our data. The questions that judges choose to ask, as well as the ways in which they ask them, are inseparable from judges' subjectivities and worldviews. This is to be expected to a degree, but sometimes meant that heteronormative, white, male, mainstream Christian and Global Northern standards of what is 'normal' or routine were employed to determine what was unlikely, unusual or suspect. By providing concrete insights into these tendencies our work contributes to scholarship on the practical challenges of refugee status determination.[10]

Chapter 11 ('Judicial Styles') emphasised the procedural discretion available to judges during hearings, drawing on our observations of judicial demeanour to underscore differences in the extent to which judges displayed emotion and attempted to orchestrate hearings. We used our observations to create a typology of in-hearing judicial styles which, while not exhaustive, conveyed some impression of the variety of judicial approaches to the challenges of conducting hearings. This work contributes to literature on procedural judicial discretion[11] by demonstrating its breadth at the ground level of legal implementation

9 European Commission (2017) Migration and Home Affairs – Smart borders: Background. Available at: https://home-affairs.ec.europa.eu/pages/page/smart-borders-background_en [accessed 18 July 2022]; European Commission (2024) Smart Borders. Available at: https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/smart-borders_en [accessed 28 April 2024]. For critical discussions see Amoore, Louise, Stephen Marmura, and Mark BB Salter (2008) Smart borders and mobilities: Spaces, zones, enclosures. *Surveillance & Society* 5 (2): 96–101; Topak, Özgün E, Ciara Bracken-Roche, Alana Saulnier, and David Lyon (2015) From smart borders to perimeter security: The expansion of digital surveillance at the Canadian borders. *Geopolitics* 20 (4): 880–899; Bigo, Didier, Sergio Carrera, Ben Hayes, Nicholas Hernanz and Julien Jeandesboz (2012) Justice and home affairs databases and a smart borders system at EU external borders: An evaluation of current and forthcoming proposals. *CEPS Papers in Liberty and Security in Europe,* No. 52. Available at: https://aei.pitt.edu/38961/1/No_52_JHA_Databases_Smart_Borders%5B1%5D.pdf [accessed 28 April 2024].

10 Thomas, Robert (2011) *Administrative justice and asylum appeals: A study of tribunal adjudication*. Oxford: Hart Publishing; Good, Anthony (2007) *Anthropology and expertise in the asylum courts.* London: Routledge-Cavendish.

11 See, for example, Bone, Robert G. (2007) Who decides – A critical look at procedural discretion. *Cardozo Law Review* 28 (5): 1961–2024; Gill, Nick, Rebecca Rotter, Andrew Burridge and Jennifer Allsopp (2018) The limits of procedural discretion: Unequal treatment and vulnerability in Britain's asylum appeals. *Social and Legal Studies* 27 (1): 49–78.

and providing a new schema for interrogating its dynamics. It would also be interesting to examine how well our typology captures the dynamics of discretion in other public service roles.

As well as the contributions of our empirical chapters, *Inside Asylum Appeals* holds valuable methodological lessons for future research. 'Every research project is, in some way, a project of "first impression"', Schmidt and Halliday write,[12] 'a *de novo* attempt to find the world with a new slice or with a new lens'. Our project was experimental in various respects (see Chapter 3, 'Approaching Asylum Appeals'), and therefore offers the opportunity for learning with respect to future investigations. The project was relatively large, for instance, which functioned as both a strength and a weakness. On the one hand, the international comparative perspective we have developed in this book would have been much more difficult to achieve if a single researcher had been working alone, and the opportunity that a team offers for interdisciplinarity is conducive to original insights. On the other hand, the challenges of managing communication in teams, as well as developing a coherent and unified voice, should not be underestimated. In addition, as a team we were confronted by how different the appeals processes are in each of the research sites. Communicating these differences and understanding the context in which each researcher was working were major methodological tasks. Our project also grappled with difficult questions related to access, sampling, positionality and the emotional demands of working with stories of trauma for extended periods of time, and we hope that our experiences and reflections can be informative to future researchers working in similar ways.

Legal Fragility

Alongside these individual contributions, the book also affords the opportunity to reflect on legal fragility in a general sense. Fragility refers to the property of being easily destroyed or broken and is commonly applied to fragile

12 In Schmidt, Patrick and Simon Halliday (2009) 'Introduction: Beyond methods – Law and society in action.' In Halliday, Simon, and Patrick Schmidt (eds) *Conducting law and society research: Reflections on methods and practices.* Cambridge: Cambridge University Press, 1–13, page 5.

states,[13] financial and banking systems,[14] bones,[15] ecosystems[16] and infrastructure.[17] Some fragility is fairly predictable, such as the fragility that comes with extreme old age. A particularly noteworthy form of fragility, however, is fragility which is hidden behind projected sturdiness.

Law makes claims, implicitly and explicitly, of consistency, universality, independence and impartiality, as if rules and standards can be separated out from the everyday environments within which they are applied. Socio-legal studies have long questioned this separation, emphasising the importance of context, the interdependence of society and law, and the deep imbrication of sociological factors and legal processes and systems.[18] Socio-legal studies of lower courts, for example, have uncovered the 'incomplete fit between the conventional abstract image of judicial authority, emphasizing detachment and impersonality, and practical, day-to-day judicial work'.[19] Our findings offer a unique insight into the susceptibility of law to limitation, damage and differentiation on the ground. They highlight its vulnerability to delay, to the reticence of mistrust, to over-rapidity and to under-investment. Using 'up close' forms of research that involved in-person observations of hundreds of hearings, our analysis has revealed a series of forms of vulnerability that could easily be overlooked from a distance.

13 See for example Brock, Lothar, Hans-Henrik Holm, Georg Sorenson and Michael Stohl (2012) *Fragile states: Violence and the failure of intervention*. Cambridge: Polity. Grimm; Sonja, Nicolas Lemay-Hébert and Olivier Nay (2014) 'Fragile states': Introducing a political concept. *Third World Quarterly* 35 (2): 197–209.

14 See, for example, Bernanke, Ben and Mark Gertler (1990) Financial fragility and economic performance. *The Quarterly Journal of Economics* 105 (1): 87–114.

15 Fonseca, Hélder, Daniel Moreira-Gonçalves, Hans-Joachim Appell Coriolano and José Alberto Duarte (2014) Bone quality: The determinants of bone strength and fragility. *Sports Medicine* 44 (1): 37–53.

16 Nilsson, Christer and Gunnell Grelsson (1995) The fragility of ecosystems: A review. *Journal of Applied Ecology* 32 (4): 677–692.

17 Vespignani, Alessandro (2010) The fragility of interdependency. *Nature* 464 (7291): 984–985.

18 For a brief history of 'law and society', Schmidt and Halliday (2009: page 7 [footnote]) suggest the works Levine, Felice J (1990) Goose bumps and 'the search for signs of intelligent life' in sociolegal studies: After twenty-five years. *Law and Society Review* 24 (1): 7–33; and Garth, Bryant and Joyce Sterling (1998) From legal realism to law and society: Reshaping law for the last stages of the social activist state. *Law and Society Review* 32 (2): 409–472. For accounts of the development of sociolegal studies in the UK, Schmidt and Halliday (ibid.) suggest Thomas, Philip A (ed) (1997) *Socio-legal studies*. Dartmouth Publishing Company, 1997. Aldershot and Brookfield, VT: Dartmouth Publishing; and Twining, William (1995) Remembering 1972: The Oxford Centre in the context of developments in higher education and the discipline of law. *Journal of Law and Society*, 22 (1):35–49. For a general overview Schmidt and Halliday (ibid.) recommend Clark, David S (2007) *Encyclopedia of law and society: American and global perspectives*. Los Angeles, CA: Sage.

19 Roach Anleu, Sharyn and Kathy Mack (2017) *Performing judicial authority in the lower courts*. London: Palgrave, page 2.

These forms of vulnerability include the confounding effects of space and time, which can bend the law if it is too squeezed or rushed. They include the place of law: the architecture, setting, layout and configuration of hearing rooms and centres, which can interact powerfully with key components of hearings such as trust, legal consciousness and perceptions of fairness. They also include the scarcity and distribution of resources such as adequately qualified staff, expertise and estates, which are themselves products of the political and economic climates within which refugee law operates. They also extend to the linguistic challenges facing many legal processes, as well as the interpersonal atmospherics between repeat players involved in them, litigants, as well as the wider cast of ushers, secretaries and security personnel involved in their staging and management.

Taking seriously what Davies refers to as 'headscapes'[20] of law – the terrain of law that 'transgresses bodily and psychological boundaries'[21] and is 'psychologically and relationally enacted'[22] – the psychological dispositions of participants, including judges and appellants, are also inseparable from the functioning of law. Judges' ways of thinking, produced by their background, training and personalities, affect the styles that they adopt which profoundly influence the 'feel' and content of hearings. With respect to refugee law in particular, the trauma that appellants have often experienced in their countries of origin, during their journeys, and as a result of exclusionary border control measures and racism in destination countries, indelibly affects the way they and other participants engage with legal processes. Their backgrounds – professional, familial, ethnic, social and cultural – mean that appellants shape their own hearings in myriad ways. All of these factors render the refugee protection available via asylum appeals fragile: vulnerable to the vicissitudes of personal histories as well as political, economic, cultural and sociological currents.

States that have taken on obligations under international law to provide refugee protection strive to maintain an impression of refugee law as accessible and effective. They are, at the same time, under-incentivised to properly resource systems of refugee protection. Forced migrants are not usually voters in their destination countries, at least not at the point of arrival, and concerns over uncontrolled migration can mean that high numbers of arrivals are often politically damaging for incumbent governments. Therefore, a chasm opens-up between the projection of refugee law and the actual sturdiness of protection, giving rise to concerns about the illusory nature of protection[23] and the hypocrisy of high normative aspirations on paper, but noticeably lower levels

20 Davies, Margaret (2017) *Law unlimited: Materialism, pluralism, and legal theory*. London: Routledge, page 77.

21 ibid.: 81.

22 ibid.

23 Teitgen-Colly, Catherine (2006) The European Union and asylum: An illusion of protection. *Common Market Law Review*, 43: 1503–1566.

of action in practice.[24] Our analysis has explored the factors that contribute towards this disjuncture that can cause the enactment of law in practice to fall short of its projected ideals.

By focusing on fragility, then, this book has brought to light the multiple susceptibilities of refugee law to extrinsic disruption. The utility of doing this is threefold. First, we have established the interdependence of black letter refugee law with multiple cultural, political and economic systems and effects, revealing the principle of independence of refugee law from social interference as an aspiration rather than a concrete reality.[25]

Second, while we recognise that some of the factors that weaken refugee law in practice and render it fragile are outside of the immediate control of system designers and Member States, our analysis highlights the degree to which the robustness of the enactment of refugee law could be improved. We are wary of discourses in refugee studies that attribute differences in the outcomes of refugee claim determination to chance, or luck, because these are generally thought to be beyond human influence.[26] Metaphors like roulettes and lotteries can risk assuaging governments and other human systems of the responsibilities they bear for exposing people seeking asylum to risks, such as in-access to justice or inaccurate outcomes of legal processes.[27] Our work therefore highlights some of the multiple practical and realistic steps that could be taken to reduce the risks of injustice that appellants are currently exposed to.

Third, by revealing the contingency of refugee law in practice on social, cultural, economic and idiosyncratic factors, our research offers grounds for critiquing the notion of the commonality of refugee protection systems across Europe. Legal scholars have already established that the legislation surrounding refugee protection is diverse and uneven, despite the discourse of 'commonality' embodied in the Common European Asylum System (CEAS).[28] The International Association of Refugee and Migration Judges (IARMJ) has also highlighted some of the differences between Member States' legal systems, and the work of the EU's European Union Agency for Asylum (EUAA – formerly European Asylum Support Office [EASO]) – whose ultimate objective

24 Lavenex, Sandra (2018) 'Failing forward 'towards which Europe? Organized hypocrisy in the common European asylum system. *JCMS: Journal of Common Market Studies* 56 (5): 1195–1212.

25 The CEAS, too, has been seen by commentators as 'a work in progress rather [than] a legal reality' (Chetail, Vincent (2016) 'The Common European Asylum System: Bric-à-brac or system?' In Chetail, Vincent, Philippe De Bruycker and Francesco Maiani (eds) (2016) *Reforming the Common European Asylum System: The new European refugee law*. Leiden: Brill, 3–38, page 35).

26 Marshall, Emma (2021) *The Structure of luck: Navigating everyday injustice in the British immigration system: A case study of access to advice in the South West of England*. PhD Thesis, University of Exeter.

27 ibid.

28 Chatail, 2016; Lavernex, 2018; Teitgen-Colly, 2006.

is to achieve harmonisation among the Member States – has underscored the legal differences that exist.

Our research has revealed another order of magnitude of these differences. For the system of asylum appeals to be 'truly common' our findings imply that a whole series of ground-level changes would be required. Judges, for example, would have to be supported in more similar ways (such as by interpreters and clerks with the same qualifications), work with comparable technology, be expected to work at a more comparable rate per day or week, undertake similar training, be located in more comparable venues, be asked to review cases in the same way, and be presented with asylum cases in a uniform format. Such a degree of standardisation would represent an unprecedented EU influence over Member States' legal processes and might, therefore, be impossible to achieve.

Differences between Member States' policy and practices could reflect the real priorities of Member States' co-operation through the CEAS. While internal and protective policies and practices remain discordant, the CEAS has provided the bedrock for firmer external policies. '[T]he single goal Member States share is that asylum seekers and refugees are best kept from finding a way into Europe', Doomernik and Glorius write.[29] Meanwhile, genuine harmonisation of internal policies and practices remains something of a pipe-dream, a promised utopia that always exists in the future but never, it seems, in the present.[30]

Policy and Practice Implications

Via three policy and practice compendia at the end of each empirical section of the book, we have provided examples of practical, concrete suggestions for how asylum appeals might be improved, drawing on our ethnographic observations of what seemed to work well during our observations. These suggestions should not be seen as recommendations per se, because we are mindful that each country and court are different and what works in one court might not effectively transplant to another.[31] Rather, our aim has been to provide a

29 Doomernik, Jeroen and Birgit Glorius (2022) The future of the Common European Asylum System: Dystopian or utopian expectations?. *Social Inclusion* 10 (3): 1–3, page 1.

30 Vianelli, Lorenzo (2022) The never-ending road towards the CEAS: Utopia, teleology, and depoliticisation in EU asylum policies. *Social Inclusion* 10 (3): 48–57.

31 For a critique of the notion of legal transplantation, see Spencer, Liesel (2019) 'Comparative legal geography: Context and place in "legal transplants"'. In O'Donnell, Tayanah, Daniel F Robinson and Josephine Gillespie (eds) *Legal geography: Perspectives and methods.* Abingdon: Routledge, 149–166; and Kedar, Alexandre S (2014) 'Expanding legal geographies: A call for a critical comparative approach'. In Braverman, Irus, Nicholas Blomley, David Delaney and Alexandre Kedar (eds) *The expanding spaces of law: A timely legal geography.* Stanford, CA: Stanford University Press, 95–119. Spencer's intervention argues for an approach to comparative law that is sensitive to concrete social and geographical settings. See also Prince, Russell (2010) Policy transfer as policy assemblage: Making policy for the creative industries

menu of suggestions at the level of practice, that in situ policymakers and system designers can choose from in the light of their own requirements, or that relevant stakeholders can advocate for including.

The policy and practice compendia gave us significant pause for thought. Socio-legal scholars have highlighted the challenges facing non-legal investigators (as the majority of us are) when attempting to engage with legal practitioners and academic debates about law. Bruno Latour, for instance, emphasises the 'ignorance' of the ethnographer, while Banakar and Travers describe in detail the different modes of thought that are typical amongst lawyers and sociologists. 'Lawyers', they write, 'are socialized to think in a pragmatic and eclectic manner, focusing on individual cases … Sociology, on the other hand, is ultimately driven by sociologists' curiosity about social life as reflected in their attempts to explain and understand social reality'.[32] While our motivations extend beyond curiosity, to include a concern for social justice, the dissonance between modes of thought that Banakar and Travers describe is certainly familiar to us.

Dauntingly, some legal scholars have noted the mixed success of attempts by non-lawyers to engage in legal debates. Roberts, for example, distinguishes between 'genuinely legal research by legal system-insiders' and 'research about law by external observers from other disciplines',[33] using the analogy of foreign language competence to convey the variable success of the latter. 'Some people are genuinely bilingual', he writes, but, more commonly, even the most proficient foreign language speaker will retain 'a recognisable accent and may miss certain nuances of linguistic or linguistically encoded cultural meaning'.[34] '[F]urther down the ladder', he continues, one might encounter functional proficiency that can enable the outsider to 'get by on a day-to-day basis – perhaps assisted by a bit of miming and gesticulation'.[35] Still further down, other scholars hobble along with 'a few memorised words of greeting [that] hardly qualifies as speaking the language'.[36] For researchers with limited functional literacy in law, Roberts sees multi-disciplinary collaborations as possibly 'their best option'.[37] 'For those who know only a few broken phrases of another disciplinary language, however', he warns, 'the old adage about a

in New Zealand. *Environment and Planning A* 42 (1): 169–186 for a more general critique of policy 'transfer'.

32 Banakar, Reza and Max Travers (2005) 'Law, sociology and method.' In Banakar, Reza and Max Travers (eds) *Theory and method in socio-legal research*. Oxford: Hart, 1–26, page 12. See also Good, Anthony (2007) *Anthropology and expertise in the asylum courts*. London: Routledge-Cavendish, on the differences between anthropological and legal modes of thought.

33 Roberts, Paul (2017) 'Interdisciplinarity in legal research.' In McConville, Mike and Wing Hong Chui (eds) *Research methods for law*. Edinburgh: Edinburgh University Press, 90–133, page 96.

34 ibid.

35 ibid.

36 ibid.: 96–7.

37 ibid.: 97.

little knowledge being a dangerous thing may apply'.[38] '[O]utsiders sometimes think they understand legal doctrines or institutional practices, but their understanding may be skewed, imperfect or just plain mistaken'.[39]

There are certainly risks of misunderstanding, as well as being misunderstood, in multi-disciplinary work. We are very aware of our disciplinary positionality, and in some ways it would be easier – not to mention more usual for ethnographic work – to confine ourselves to detailed descriptions of the hearings we observed rather than outlining principles or possible improvements to practice. We see this practical aspect of our work as important, though. This is because of the obvious suffering and marginalisation that many of the appellants we observed had experienced, as well as the strong interest from judges we encountered during our fieldwork in how other judges and countries manage asylum appeal processes. Without the practical and constructive element to our work, there is a risk that we as researchers are reduced to engaging in a form of academic voyeurism, watching for the sake of curiosity alone.[40] In light of this risk, the inclusion of suggestions and improvements to practice in this book is one way we have attempted to guard against passive watching and academic consumption of the struggles of appellants. By including ideas for improvement in this book, we are attempting to avoid being 'simple reporter[s]',[41] and instead are aiming to highlight ways to reduce the risk of injustices that we observed during our research.[42]

Power

Power – and power dynamics – can be found almost everywhere. Our research has attended to these dynamics and how they both structure the appeal process and form the backdrop against which the hearings play out. We have been mindful of the balance of power within appeal hearings and how this balance affects appellants' access to justice. While the atmosphere in hearings was generally non-violent, the appeal processes we studied are part of a broader panoply of coercive border control practices and play a crucial role within them. In

38 ibid.

39 ibid.: 98.

40 Valentine, Gill (2005) 'Tell me about …: Using interviews as a research methodology'. In Flowerdew, Robin and David Martin (eds) *Methods in human geography: A guide for students doing a research project* (2nd edition). Harlow: Pearson, 110–127. Pratt et al., for example, have highlighted the 'pornography of horror' that occurs when witnesses produce testimony 'for the sake of the moral satisfaction of the liberal gaze' (Pratt, Geraldine and Philippines–Canada Task Force on Human Rights (2008) International accompaniment and witnessing state violence in the Philippines. *Antipode* 40 (5): 751–779, page 755).

41 Boltanski, Luc (1999) *Distant suffering: Morality, media and politics*. Cambridge: Cambridge University Press, page 43.

42 See also Kurasawa, Fuyuki (2009) A message in a bottle: Bearing witness as a mode of transnational practice. *Theory, Culture and Society* 26 (1): 92–111. Tait, Sue (2011) Bearing witness, journalism and moral responsibility. *Media, Culture and Society* 33 (8): 1220–1235.

the introduction to this book, we noted the relatively high rate of successful appeals (over a quarter successful between 2012 and 2021 among the EU-27) and it is perhaps tempting to focus on the protective function of appeals in this light. Indeed, many thousands of people avoid detention, destitution or removal as a result of successfully appealing negative initial asylum decisions in Europe every year. There are many more, however, whose exposure to these forms of harm are heightened by appeals that did not go their way, and it is vitally important to remember that, in such cases, the appeal process fulfils a function that is far from protective of appellants. On the contrary, when an appellant fails in their appeal, the appeal process legitimises both past and future state violence. This is because, once an appeal has failed, it allows border enforcement operatives to claim with impunity that subsequent coercion is fair and just. The problems associated with forceful border enforcement[43] and the social and legal exclusions that accompany low or no legal status are well documented. We should be under no illusion that behind the formal language and etiquette of the court, the appeal processes we have observed were the gateway to lives of insecurity and uncertainty for many appellants. It was easy to lose sight of this potentially violent edge to the hearings in the courts we visited and, from a legal point of view, it may even have been desirable to keep these consequences out of sight of the judges to prevent it from affecting their decisions. Potential state violence nevertheless haunted the hearings, glimpsed in the nervous shuffling, sweat-beaded brows and furtive glances that characterised them.

In this light, hearings functioned as performances of state and legal power. They asserted, in each case, not only the specific outcome, but also the authority to decide on what that outcome should be. They conveyed the legal imperative for ordering migrants and their claims for protection into those that should be granted refuge under national and international law and those that should not. Appellants were often cast as supplicants in this process. Again, it is easy to lose sight of this general effect among the day-to-day particularities of individual cases, and there is a depoliticising effect that emerges from constantly dealing with the technicalities of asylum claims and the problems of the asylum process as purely technical (legal) matters.[44] But the symbolic and performative function of asylum appeal courts plays a role in producing and underpinning sovereign power, which ultimately shores up the bordering systems of nation-states and the global hegemony of rich, high-income countries within it.

In a similar way, colonial histories shape the appeal processes we observed. The architecture, the typical countries of origin of appellants (many from

43 See for example Bosworth, Mary (2014) *Inside immigration detention*. Oxford: Oxford University Press on detention. For a review see Bibler Coutin, Susan (2015) Deportation studies: Origins, themes and directions. *Journal of Ethnic and Migration Studies* 41 (4), 671–681.

44 See Vianelli (2022) on this depoliticising effect of a technical approach.

former colonies of the countries of destination) and the linguistic and cultural dynamics of hearings illustrated this influence. Many times, we felt uncomfortable with the everyday performance of a configuration of current rights and privileges (including the right to grant entry and deny it), that undeniably rests on histories of colonial oppression, racism and exploitation. However, this issue remained mostly undiscussed in hearings. Only once did a judge in Germany exclaim that the British had a lot to answer for by 'starting a lot of the mess' in Afghanistan.[45] More commonly, the history of coloniality that produced the co-ordinates of power within which appeals operate remained unspoken, to the extent that we wondered at the audacious lack of self-awareness of some judges confidently and rapidly exercising sovereign power. Although 'empire continue(s) to underpin the logics of contemporary border politics',[46] the everyday operation of asylum hearings seemed to have the effect of burying and occluding this fact beneath mundane proceduralism.[47]

The violent and neocolonial subtexts that haunted asylum appeals made the exercise of appellants' agency during hearings particularly noticeable. It almost goes without saying that appellants were in a subordinate position to the judge and the legal representatives during the hearings, being least familiar with the proceedings, as well as being exposed to the scrutiny and legal decision-making power of the court. Appellants nevertheless often exerted agency in this difficult terrain. The very fact that an appeal was being staged reflected a conscious choice by appellants to mount an appeal, which can demand time, resources, legal understanding and tenacity. During the hearings themselves we often observed appellants slowing hearings down (such as by asking for explanations or saying that they did not understanding something), influencing the atmosphere, taking notes as a record of what had been said as a way to surveil judges and hold them to account, asking their own questions of the judge and others, and correcting accounts of their experiences from judges and legal representatives alike. Occasionally, we also saw appellants enquire about their rights, assert them during hearings, and refer to legislation and cases to help support their arguments. Some appellants also represented themselves, and we demonstrated in Chapter 7 ('The Politics of Speed') that appellants were sometimes important partners with judges in completing legal processes. So, while the relationships of power were generally tilted against the appellant and their agency was constrained during the hearings, there were important instances in which appellants could influence the way hearings unfolded.

45 Fieldnotes, Germany, 2018, Nicole Hoellerer.

46 Davies, Thom and Arshad Isakjee (2019) Ruins of Empire: Refugees, race and the postcolonial geographies of European migrant camps. *Geoforum* 102: 214–217, page 214.

47 See Mayblin, Lucy, Mustafa Wake and Mohsen Kazemi (2020) Necropolitics and the slow violence of the everyday: Asylum seeker welfare in the postcolonial present. *Sociology* 54 (1): 107–123 on relations between the everyday and postcoloniality in the present. See also Eades, Diana (2008) *Courtroom talk and neocolonial control*. Berlin: Mouton de Gruyter.

Taking Stock

The challenge of deciding fairly and with objectivity on the credibility of appellants' asylum claims often appeared to us as being an insurmountable one, and we were struck by the absurdity of what the asylum appeal courts were trying to achieve.[48] Attempting to use the long-past experiences of appellants and the potential (but ultimately uncertifiable) risks of harm to allocate migrants into a series of abstract and technical legal categories would be difficult enough[49] without the challenges that we have identified. When the challenges of incomprehension, frequent lack of evidence, mistrust, intercultural differences, mistakes, poor representation, trauma, imperfect knowledge of far-flung conflicts and non-disclosure are added into the mix, the impression we had was of a system often overwhelmed by the difficulties of the task it had set itself. The success of claims was often contingent on a seemingly innumerable series of unlikely events going right for the appellant and we frequently wondered about the efficacy of the overall system. The appeal processes we observed were so fragile and vulnerable to external disruption that we wondered if their primary purpose was, in fact, not actually justice at all, but to give the appearance of due process: to tick the box of fulfilling Member States' obligations. According to this view – and despite the hard work often on display by judges, legal representatives and appellants alike – the appeal process could be seen as being in place primarily to perform the liberal value of the right to redress for the benefit of the consciences of citizens of Europe. System designers are obliged in this circumstance to simply ensure that appeal processes exist, rather than to ensure that they operate particularly effectively, secure in the knowledge that concerned citizens would probably not look too hard.

During the later stages of our work, in 2022, Russia invaded Ukraine and, soon afterwards, the countries of the European Union (as well as Britain, eventually) announced that people fleeing Ukraine to Europe in 2022 would not have to go through the process of making an official individual asylum claim in the usual way to gain temporary protection.[50] In other words, it was clear to policymakers at the time that the burden of fulfilling the increasingly

48 See Carlen, Pat (1976) *Magistrates' justice*. London: Martin Robertson on legal processes and absurdity.

49 See, for example, Crawley, Heaven and Esra S Kaytaz (2022) Between a rock and a hard place: Afghan migration to Europe from Iran. *Social Inclusion* 10 (3): 4–14, who highlight the complications of distinguishing between 'forced' and 'voluntary' migration, as well as 'origin' and 'destination' countries in the context of the complexities of Afghan migration to Europe from Iran in the mid-2010s.

50 Costello and Foster note that, 'the EU has for the first time triggered its Temporary Protection mechanism, meaning most of those who have fled Ukraine enjoy a quasi-automatic temporary right to stay, work and social benefits, effectively in an EU Member State of their choosing' (Costello, Cathryn and Michelle Foster (2022) (Some) refugees welcome: When is differentiating between refugees unlawful discrimination? *International Journal of Discrimination and the Law* 22 (3), 244–280, page 245).

narrow definition of a refugee, or someone otherwise deserving of protection, was at odds with the moral demands of the situation at hand. This decision was welcome, but it is hard not to notice that similar decisions at the EU level could have been taken with respect to refugees from a variety of other conflict situations around the world (many of which European countries have had a hand in creating).[51] Costello et al. discuss the use of group-level asylum determination, noting how widespread it is in practice around the world, but also how understudied it is in scholarly literature.[52]

The decision to bypass the usual refugee claim determination process in the case of Ukrainians highlights not only the costs and burdens regular procedures impose but also the feasibility of suspending them. The appeal processes we observed required small armies of judges, lawyers and specialists, as well as infrastructure, and a supporting cast of logistical workers, from security personnel to ushers and secretaries. Having an individualised refugee-claim-determination process makes high demands on these resources. Defenders of the current system may argue that it is necessary in order to filter out 'bogus', opportunistic claimants, but it is patently clear that life as a low or no-status migrant in Europe is usually difficult and unattractive.

Uncertain Futures

Scholars of refugee law have offered various alternative configurations to the current system that would avoid or reduce demand for the resource-intensive, and yet error-prone, activities that we have spent time observing, including approaches that bestow immediate rights on nationals from certain countries or under certain circumstances.[53] While we have suggested a series of ground-level improvements to practice within the system that currently exists, it is widely held that the European asylum system also needs fundamental reform,[54]

51 See Costello and Foster (2022) on the discrimination issue that unequal treatment such as this raises.

52 Costello, Cathryn, Caroline Nalule and Derya Ozkul (2020) Recognising refugees: Understanding the real routes to recognition. *Forced Migration Review* 65: 4–7.

53 Cole, Georgia (2019) *Avoiding refugee status and alternatives to asylum*. Refugee Studies Centre Research in Brief 14. Oxford: University of Oxford. Available at: https://www.rsc.ox.ac.uk/publications/research-in-brief-avoiding-refugee-status-and-alternatives-to-asylum [accessed 12 September 2022].

54 See European Council and the Council of Europe (2022) EU Asylum Reform. Available at https://www.consilium.europa.eu/e n/policies/eu-migration-policy/eu-asylum-reform/ [accessed 6 December 2022] for a discussion of the state of the stalled (at the time of writing) process to reform the Common European Asylum System; and see ECRE (2022) Quo Vadis EU asylum reform? Stuck between gradual approach, (mini)-package deals and 'instrumentalisation': ECRE's analysis and recommendations on how to exit from perpetual reform of EU asylum law, and to prevent further erosion of standards. Available at: https://ecre.org/wp-content/uploads/2022/09/Policy-Parer-Quo-Vadis-EU-asylum-reform-September-2022.pdf [accessed 6 December 2022] for a discussion of the reasons for slowness and possible remedies. See also Chetail, Vincent, Philippe De Bruycker and Francesco Maiani (eds) (2016)

and we would stress that improvements to ground-level processes should not be seen as a substitute for far-reaching reforms at the highest level. ‘The prospect of improved asylum systems must not’, Cole writes, ‘lead to the indefinite deferral of principled advocacy for other options’.[55]

And yet, there is also a risk that fundamental reforms will end up impoverishing legal protections for migrants rather than strengthening them. At the time of going to press, the EU proposes to amend and reform CEAS, with the aim to further harmonise asylum and migration management frameworks and procedures, in order to ‘make the system more efficient and more resistant to migratory pressure’.[56] The package includes new screening regulations, updates of the fingerprint database (European Dactyloscopy – EURODAC), and updating the rules concerning force majeure situations. Overall, the aim of the new CEAS is to ‘eliminate pull factors as well as secondary movements’.[57] For now, it is still uncertain how this will impact appeals, but what is clear is that the EU seeks quicker and cheaper asylum and migration procedures. Therefore, in the current climate, our findings on the need for meaningful safeguards and rigorous appeal procedures are all the more important.

It is also important to note that migrants themselves may prefer alternative options to the formal asylum system. Asylum processes which are not only slow, but which also restrict movement, require substantial monetary and emotional sacrifices, cannot be relied upon to deliver the hoped-for status and benefits, and expose migrants to unwelcome forms of visibility, may very well not represent the most desirable options to many.[58] Migrants may choose to acquire alternative documents and go through different legal routes such as via student visas. Alternatively, they might go where the chances of attaining refugee status are lower but employment prospects are higher.[59] In short, the ‘act of avoiding’[60] the sort of asylum determination processes we have described here should not be interpreted as indicating that migrants lack valid claims, but that there may be rational reasons why not claiming makes sense.[61]

Reforming the Common European Asylum System: The new European refugee law. Leiden: Brill; and Beirens, Hanne (2018) *Cracked foundation, uncertain future: Structural weaknesses in the common European asylum system*. Brussels: Migration Policy Institute, 20-1. http://aei.pitt.edu/102715/1/migration_policy.pdf [accessed 16 September 2021].

55 Cole (2019): 4.

56 See European Council and the Council of Europe (2024) EU Asylum Reform. Available at https://www.consilium.europa.eu/en/policies/eu-migration-policy/eu-migration-asylum-reform-pact/ [accessed 31 January 2024].

57 ibid.

58 Cole, 2019.

59 ibid.

60 ibid.: 5.

61 ibid.

Zooming Out

We recognised in Chapter 3 ('Approaching Asylum Appeals') that our project reflects our own individual ways of 'seeing' the law, which is a function of our training and disciplinary backgrounds. Our Europeanness also doubtlessly influenced the project, through the observations that we made (and did not), the coding and analysis of data, and the way that we wrote up our findings. Asylum processes and procedures are also linked to, and embedded within, a state's distinct legal culture. Our focus on European appeals leaves open the question of the similarities and differences between our analysis and that of other rich, high-income countries around the world, whose appeal systems fulfil similar functions with respect to international law.

It also begs the question of how countries in the Global South approach asylum claim determination. Although legal frameworks surrounding refugee governance such as the 1969 *Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*,[62] and the 1984 *Cartagena Declaration on Refugees*,[63] are beyond the scope of this book, dialogues with experts outside rich, high-income countries can be mutually beneficial in designing fairer and more effective approaches at the ground level. We are also aware that a significant proportion of asylum claim reviews are carried out not via legal channels but via international organisations such as the United Nations High Commissioner for Refugees, and outside the remit of the Refugee Convention.[64] Deciphering what lessons can be learnt from our research to inform these processes would constitute an interesting future line of enquiry.

The perspective of 'inside' asylum appeals that appears in our title, has also arguably exerted an influence over the ways our project evolved. Without external references, there is a risk that the researcher who examines the 'inside' of phenomena does not appreciate the wider processes that give rise to them and frame them. Our study might, for example, have been strengthened by a more historically informed approach that accounted for the development and genesis of asylum appeals within the differing systems of administrative law that have evolved in the various European countries we researched.

Whilst taking an 'up close' perspective on asylum appeals entails losses and risks, however, it has also yielded a level of insight that other research methods

62 Organization of African Unity (OAU) (1969) *Convention governing the specific aspects of refugee problems in Africa* (OAU Convention). Available at: https://www.refworld.org/docid/3ae6b36018.html [accessed 22 September 2022].

63 Cartagena declaration on refugees, adopted by the colloquium on the international protection of refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia. (1984). Available at: https://www.unhcr.org/uk/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html [accessed 22 September 2022].

64 Costello, Nalule and Ozkul (2020).

are unlikely to have been able to replicate. Our work has exposed the extent of the inability of written law and rules to specify what actually happens during legal proceedings, for example. Written laws capture only a fraction of the interaction, social dynamics and linguistic complexity that characterise hearings. Indeed, they typically do not attempt to specify the minutiae of legal practice and are often written at a high level of generality. The CEAS is a case in point here: generality being necessary to the legislation to some extent in order to secure the assent of the various Member States.[65] Our work, then, offers a valuable insight into that grey zone of legal practice often labelled 'extraneous' or 'extra-legal', which exceeds the prescriptions and concerns of codified formal law.

Our analysis has also illuminated what law looks like under pressure. At the time of our fieldwork this pressure came from the political sensitivity of the subject matter as well as under-financing in the face of increasing caseloads and backlogs. We have revealed the stress, emotionality, frustration and social dynamics that can accompany these pressures, and pointed to the tangible ways in which they undermined the quality of justice. Our analysis and policy and practice compendia have therefore shown both what happens when law weakens and frays due to being under-resourced and what could be done to address these challenges.

65 See Gill, Hoellerer, Allsopp, et al. (2022).

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