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Asking for Too Much The Role of Corroborating Evidence in Asylum Proceedings in the United States and United Kingdom

Sarah Goodman*

*Fordham University School of Law

NOTE

ASKING FOR TOO MUCH? THE ROLE OF CORROBORATING EVIDENCE IN ASYLUM PROCEEDINGS IN THE UNITED STATES AND UNITED KINGDOM

Sarah R. Goodman *

INTRODUCTION

In 1998, Rui Yang, a citizen of the People's Republic of China ("PRC"), came to the United States to participate in a high school exchange program.[1] After completing the program,

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* J.D. Candidate, 2014, Fordham University School of Law; B.A., 2009, Brown University. I would like to thank Professor Gemma Solimene, whose guidance and input were invaluable, as well as the Volume XXXVI *Fordham International Law Journal*

Yang chose to remain in the United States to attend college.[2] In November 2001, Yang learned that his father was being persecuted by the Chinese government because of his support of Falun Gong, a spiritual discipline banned by the Communist Party of China in 1999.[3]

As a result of his father's imprisonment, Yang could no longer afford his tuition payments and was forced to drop out of college.[4] Shortly thereafter, Yang filed an application for asylum in the United States based on his fear of persecution from the Chinese government because of his association with Falun Gong.[5] To support this contention, Yang explained that he had mailed his parents pro-Falun Gong materials, and he feared the Chinese government knew that he had been the one who sent them.[6] According to Yang, his parents distributed these materials to other Falun Gong supporters in China, and the discovery of these activities was what caused the Chinese authorities to arrest Yang's father in the first place.[7]

Although Yang was interviewed not long after applying for asylum in 2001, his case was not adjudicated until seven years

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Board. I dedicate this Note to my father, Harold Goodman, whose support has been unwavering and who will always be my inspiration as a lawyer.

1. *See* Rui Yang v. Holder, 664 F.3d 580, 581 (5th Cir. 2011) (explaining that Yang arrived in the United States on September 2, 1998, on a J-1 visa to participate in a high-school exchange program).

2. *See id.* (noting that Yang's visa was changed to an F-1 student visa in January, 2002, so that he could attend college).

3. *See id.* at 582 (indicating that Chinese authorities beat Yang's father and detained him for a year in connection with his support for Falun Gong); *see also* Anne S.Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong*, 13 PAC. RIM L. & POL'Y J. 1, 2 (2004) (explaining that Falun Gong is a spiritual discipline that was banned by the Communist Party of China in 1999 and noting that tens of thousands of Falun Gong supporters had been detained by Chinese authorities by the end of 2002).

4. *See Rui Yang*, 664 F.3d at 582 (finding that Yang dropped out of college because he no longer had the money to afford it).

5. *See id.* (noting that Yang applied for asylum, withholding of removal, and protection under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") on November 28, 2001).

6. *See id.* (mentioning that Yang sent pro-Falun Gong materials to his parents and explaining that he believed the Chinese government knew "that he transmitted pro-Falun Gong materials to his parents because the police would have found envelopes containing Yang's return address when they searched the house of Yang's family").

7. *See id.* (explaining that Yang testified at his asylum hearing that the pro-Falun Gong materials he sent to his parents, who then publically distributed them, resulted in his father's arrest).

later.[8] At his asylum hearing on October 27, 2008, Yang testified in front of an immigration judge ("IJ") that he feared Chinese authorities would arrest and harm him if he returned to China.[9] Yang did not present corroborating evidence to support his testimony, but his fears were confirmed by a US State Department country report documenting the harsh treatment of Falun Gong supporters in China.[10] The IJ denied Yang's application for asylum, citing his failure to provide corroborating evidence as the basis for the decision.[11] No specific finding was made about Yang's credibility.[12]

The Board of Immigration Appeals ("BIA") affirmed the IJ's decision, stating that Yang's application "did not provide sufficient documentation to corroborate his claim."[13] Specifically, the BIA determined that statements from Yang's family members were "reasonably obtainable" and, thus, it was "reasonable to expect such evidence to corroborate the material

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8. *See id.* at 583 (noting that Yang was interviewed shortly after he filed his application, but did not receive a final decision until October 31, 2008). While the law provides that "in the absence of exceptional circumstances, final adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed," Yang did not receive a decision in his case for more than four years. Immigration and Nationality Act, 8 U.S.C. § 1158(d)(5)(A) (2012).

9. *See Rui Yang*, 664 F.3d at 582 (characterizing Yang's testimony and citing his belief that the Chinese authorities would harm him because of his support of Falun Gong).

10. *See id.* at 583 ("While Yang did not corroborate the specific aspects of his story, his testimony was corroborated in general terms by the State Department's country report on China, which details a 'crackdown' on Falun Gong and cites reports of 3,000 members of Falun Gong dying from torture in the last decade in China."); *see also* BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, *Human Rights Reports for 2008 [Human Rights Report 2009], China (includes Tibet, Hong Kong, and Macau)*, (2009), *available at* http://www.state.gov/j/drl/rls/hrrpt/2008/eap/119037.htm (detailing the harsh treatment of Falun Gong practitioners and followers, and noting that mere possession of Falun Gong materials has often served as the basis for arrest and detention in China).

11. *See Rui Yang*, 664 F.3d at 583 (summarizing the immigration judge's ("IJ") decision, which specifically cited Yang's failure to produce documentary evidence pertaining to his father's arrest as the basis for the denial).

12. *See id.* at 587 (noting that the IJ did not make a determination about Yang's credibility in his decision); *see also* S-M-J-, 21 I. & N. Dec. 722, 729 (Bd. of Immigr. Appeals 1997) (noting that denial of an application for asylum can be based on the absence of reasonably available corroborating information for the applicant's testimony, even if there is no reason to believe that the applicant lacked credibility).

13. *Rui Yang*, 664 F.3d at 583 (restating the Board of Immigration Appeal's ("BIA") rationale for affirming the IJ's decision).

aspects of [his] case."[14] The BIA, like the IJ below, neglected to address Yang's credibility.[15] The US Court of Appeals for the Fifth Circuit affirmed, holding that the BIA could reject an asylum application for failure to provide corroborating material even if the applicant's testimony is otherwise credible.[16]

For Yang, the absence of documentary evidence to corroborate his claim crushed his hope of securing asylum.[17] Yet, his story is not unique.[18] Rather, it reflects the evidentiary challenges that applicants routinely face in asylum proceedings in both the United States and the United Kingdom.[19] These challenges especially arise when applicants try to establish that they meet the international definition of a "refugee" that both the United States and the United Kingdom have adopted.[20]

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14. *See id.* (detailing the types of documentation, including statements from both his parents and his uncle, that Yang could have provided in support of his asylum application).

15. *See id.* at 586 ("The BIA did not make a determination regarding Yang's credibility.").

16. *See id.* (concluding that the asylum applications can be denied based solely on failure to provide corroborating evidence, and holding that "[b]ecause the BIA's interpretation permits it to deny applications for asylum based solely on their failure to provide reasonably available corroborating evidence, we would elevate form over substance if we required the BIA to make a credibility determination when it decides that an applicant failed to provide reasonably available corroborating evidence"); *see also* Reyes-Mercado v. Holder, 486 F. App'x 415, 416 (5th Cir. 2012) (affirming the BIA's determination that an asylum application should be denied for failure to submit corroborating evidence).

17. *See Rui Yang*, 664 F.3d at 586 (affirming the denial of Yang's asylum application based on the absence of documentary evidence).

18. *See* Mitondo v. Mukasey, 523 F.3d 784, 788 (7th Cir. 2008) ("Most claims of persecution can be neither confirmed nor refuted by documentary evidence. Even when it is certain that a particular incident occurred, there may be doubt about whether a given alien was among the victims. Then the alien's oral narration must stand or fall on its own terms."); *see also* Liu v. Ashcroft, 372 F.3d 529, 532–33 (3d Cir. 2004) (describing the challenges that asylum applicants face in securing documentary evidence).

19. *See Mitondo*, 523 F.3d at 788 (concluding that most claims of persecution cannot be supported by documentary evidence); *see also Liu*, 372 F.3d at 532 ("[A]sylum applicants can not always reasonably be expected to have an authenticated document from an alleged persecutor."); ST (Corroboration-Kasolo) Ethiopia v. Sec'y of State for the Home Dep't [2004] UKIAT 00119 (acknowledging that "asylum claimants often have difficulties in providing documentation to support their accounts"); MARK SYMES & PETER JORRO, ASYLUM LAW AND PRACTICE 76 (2d ed. 2010) ("It might well be dangerous to expect a person in fear of their life or freedom to gather and carry documentary evidence during their stay in the country of origin.").

20. *See* Convention Relating to the Status of Refugees art. I(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention] (defining a

These evidentiary issues undermine the humanitarian ideals that underscore the US and UK commitment to asylum law.[21]

As Yang's quest for asylum demonstrates, the determination of whether an applicant is credible—and what, precisely, is required to satisfy the credibility threshold—plays a critical role in the success of asylum claims.[22] Refugees often have neither the time nor the prudence to collect evidence documenting

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refugee as any person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence [as a result of such events], is unable or, owing to such fear, is unwilling to return to it"); *see also* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2012) (defining refugee as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"); *cf.* Asylum and Immigration Appeals Act, 1993, c. 23 (U.K) (retaining 1951 Refugee Convention definition in UK domestic law). Section 2 of the Asylum and Immigration Appeals Act, 1993, states that "[n]othing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which could be contrary to the [1951 Refugee] Convention." *Id.* § 2.

21. *See* RICHARD CLAYTON & HUGH TOMLINSON, THE LAW OF HUMAN RIGHTS 3 (2000) (asserting that international human rights law developed as part of a new international order designed to ensure that atrocities of another world war would never recur); *see also* Charles B. Keely, *Changing International Refugee Policy and Practice: How International Regimes Emerge and Change*, 16 CENTER FOR MIGRATION STUD. SPECIAL ISSUES 37, 39 (2000) (remarking that human rights consciousness developed when Western States realized that forced repatriation was not a viable solution to the refugee crisis); 1951 Refugee Convention, *supra* note 20 (detailing the international treaty that was formed to address changing international circumstances that gave rise to growing numbers of displaced persons).

22. *See, e.g.*, Nikijuluw v. Gonzales, 427 F.3d 115, 121 (1st Cir. 2005) (discussing how important credibility determinations are in immigration proceedings); Diallo v. Ashcroft, 381 F.3d 687, 700 (7th Cir. 2004) ("Because direct authentication or certification of an alien's testimony is difficult, if not impossible to find, the credibility analysis is vital to determining the validity of an applicant's claim."); Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 129 (2006) (arguing that credibility is the most crucial component in an asylum case); Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessments in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 367 (2003) ("Credibility assessment is often the single most important step in determining whether people seeking protection as refugees can be returned to countries where they say they are in danger of serious human rights violations. Refugee applicants' cases often depend on the value of their word alone, since asylum-seekers can rarely specifically corroborate the central elements of their claims.").

their persecution, if such evidence even exists.[23] Due to the difficulty of obtaining evidence that corroborates a claim of past or future persecution, an applicant's personal testimony is sometimes the only evidence available during asylum proceedings.[24]

Is that enough? This Note analyzes this question by providing an overview of the current role of corroborating evidence in asylum proceedings in the United States and the United Kingdom. Part I describes the origins and purpose of corroborating evidence, and its role in asylum proceedings as envisioned by the United Nations High Commissioner for Refugees ("UNHCR"). Part II outlines the domestic laws in effect in the United States and the United Kingdom relevant to claims for asylum, and the role corroborating evidence plays in those proceedings. Part III compares how those laws have been applied in each country, and posits that while the United Kingdom has been generally compliant with international norms, the United States has not. This Note concludes by suggesting that the United States should reform its stance on corroboration in asylum proceedings to meet its international obligations.

I. *THE ROLE OF CORROBORATING EVIDENCE IN ASYLUM PROCEEDINGS*

Part I discusses the purpose of corroboration in asylum proceedings. Specifically, Part I.A explains the origins of

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23. *See* Abankwah v. INS, 185 F.3d 18, 26 (2d Cir. 1999) (emphasizing that "a genuine refugee does not flee her native country armed with affidavits, expert witnesses and extensive documentation"); Office of the United Nations High Comm'r for Refugees ("UNHCR"), Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees para. 196, HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter UNHCR Handbook], *available at* http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf ("In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.").

24. *See Mitondo*, 523 F.3d at 788 ("Asylum cases pose thorny challenges in evaluating testimony. Applicants regularly tell horrific stories that, if true, show past persecution and a risk of worse to come. But these stories rarely are susceptible to documentary proof, because persecutors don't publish records of their misdeeds."); *see also* Kagan, *supra* note 22, at 367 (asserting that refugees can often only support their asylum applications with their own testimony because of the dangers and challenges associated with gathering corroborating evidence).

corroboration and its application to refugee law. Part I.B then presents the UNHCR's stance on corroborating an asylum applicant's testimony.

A. *Corroboration*

Corroboration calls for the production of independent evidence that will support, strengthen, or confirm an initial statement.[25] The concept of corroboration in both the United States and the United Kingdom finds its origins in English common law from the mid-seventeenth century.[26] US courts, fueled by an inherent distrust of prosecutions based solely upon an accused's confession, first introduced the concept in criminal trials. [27] The underlying rationale behind requiring corroboration was, and remains, the search for the truth.[28]

Finding the truth in asylum proceedings can be challenging, as refugee applicants' cases often depend on their

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25. *See* Smith v. United States, 348 U.S. 147, 156 (1954) ("All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself . . . ."); *see also* United States v. Everett, 825 F.2d 658, 660 (2d Cir. 1987) ("Corroborating evidence is evidence that is not wholly disconnected, remote, or collateral to the matter corroborated."). *See generally* Virgil Wiebe, *Maybe You Should, Yes You Must, No You Can't: Shifting Standards and Practices for Assuring Document Reliability in Asylum and Withholding of Removal Cases*, IMMIGR. BRIEFINGS (West), Nov. 2006, at 2 (describing the corroboration standards and discussing document reliability).

26. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *267 (tracing the origins of the corroboration rule to English common law); *see also* Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 502 (2006) (recognizing that the impetus for the corroboration rule stemmed from a seventeenth-century English case, Perry's Case, which demonstrated the potential danger of uncorroborated confessions).

27. *See* Warszower v. United States, 312 U.S. 342, 347 (1941) (noting that confessions must be corroborated in order to promote justice and protect against wrongful convictions based on false confessions); *see also* Opper v. United States, 348 U.S. 84, 89–90 (1954) (explaining why confessions must be corroborated by independent evidence).

28. *See Opper*, 348 U.S. at 89–90 (noting that the initial purpose behind the corroboration rule was to obviate the danger of false convictions based solely on unconfirmed testimony); *see also Smith*, 348 U.S. at 153 (1954) (quoting *Warszower*, 312 U.S. at 347) ("Its purpose is to prevent 'errors in convictions based upon untrue confessions alone . . .' its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.").

word alone.[29] Applicants frequently struggle to corroborate their claims with specific independent evidence based on their experience fleeing from persecution.[30] Many asylum applicants flee their home countries under urgent circumstances, often running for their lives.[31] As a result, individuals escaping persecution frequently are unable to gather important documents that could be used to support their claim for asylum.[32] Oppressors, it hardly needs to be noted, seldom provide asylum-seekers with sworn affidavits specifically documenting the types of torture to which they may have been

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29. *See* Brian P. Downey & Angelo A. Stio III, *"Of Course We Believe You, But . . ." The Third Circuit's Position on Corroboration of Credible Testimony*, 48 VILL. L. REV. 1281, 1283 (2003) ("[M]any aliens and their counsel are now grappling with the issue of what evidence an alien must present to meet the burden of proving eligibility for asylum . . . ."); Kagan, *supra* note 22, at 367 (describing the inherent challenges faced by asylum applicants when they attempt to corroborate their claims).

30. *See* Lisa Getter, *Asylum in the 'Land of the Free:' A 642-Day Journey Through the American Immigration Courts*, 2 REFUGEES, no. 123, at 24–25 (2001) ("Most [asylum] applicants have little evidence to prove a well-founded fear of persecution. Often their only proof is the story they tell."). *See generally* Agata Szypszak, Clinical Essay, *Where in the World is Dr. Detchakandi? A Story of Fact Investigation*, 6 CLINICAL L. REV. 517 (2000) (describing how difficult it was for two law students working at an asylum law clinic to corroborate a claim).

31. *See* Dawoud v. Gonzales, 424 F.3d 608, 612–13 (7th Cir. 2005) ("[Asylum applicants] often have nothing but the shirts on their backs when they arrive in this country. To expect these individuals to stop and collect dossiers of paperwork before fleeing is both unrealistic and strikingly insensitive to the harrowing conditions they face."); Tania Galloni, *Keeping It Real: Judicial Review of Asylum Credibility Determinations in the Eleventh Circuit After the Real ID Act*, 62 U. MIAMI L. REV. 1037, 1045 (2008) (noting the extreme circumstances and conditions encountered by refugees fleeing their countries of origin); *see also* Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 548 (2009) (discussing the limited financial resources of asylum applicants).

32. *See* Y-B-, 21 I. & N. Dec. 1136, 1152 (Bd. of Immigr. Appeals 1998) (Rosenberg, dissenting) (describing how difficult the process of obtaining documents from refugee camps can be); Michele R. Pistone, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 8 (2001) ("[R]ecords may take months or years to compile because refugees usually leave them behind, and the documents may be available only in the country from which the refugee has fled.").

subjected.[33] Consequently, much of the evidence introduced during asylum proceedings is testimonial.[34]

Despite the difficulties and unique challenges surrounding an asylum applicant's plight, applicants are often expected to corroborate their claims with personal identification documents, background and medical records, evidence of past persecution, transportation receipts, documentation from time spent at refugee camps, and statements from friends and family members.[35] This evidence is valued, even if offered in a self-serving manner, because it helps to substantiate and bolster an applicant's claim.[36] Country condition reports, which detail the

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33. *See* Bolanos-Hernandez v. INS, 767 F.3d 1277, 1285 (9th Cir. 1984) ("Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."); *see also* Virgil Wiebe et al., *Asking for a Note from Your Torturer: Corroboration and Authentication Requirements in Asylum, Withholding and Torture Convention Cases*, IMMIGR. BRIEFINGS (West), Oct. 2001, at 1 (discussing in detail the corroboration requirements for asylum seekers in the United States).

34. *See* Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984) (noting that an asylum applicant's own testimony may be the only evidence available regarding past persecution or fear of future persecution); DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES § 3.3 (5th ed. 2012) ("International and domestic authority emphasize the special weight that must be given to an applicant's testimony, since it is often the principal, if not the only, evidence he or she can produce.").

35. *See* Zuh v. Mukasey, 547 F.3d 504, 509 (2008) (recognizing that "numerous courts—including this one—have relied on such documents [letters from family] when considering claims of asylum applicants"); Casillas, 22 I. & N. Dec. 154, 157 n.3 (Bd. of Immigr. Appeals 1998) (noting that according to the BIA, relevant corroborating evidence "would include such items as . . . correspondence, and photos, as well as letters or affidavits from family, friends, or acquaintances"); S-M-J-, 21 I. & N. Dec. 722, 725 (Bd. of Immigr. Appeals 1997) (holding that it is reasonable to expect corroboration of birthplace, accounts of large demonstrations, evidence of publicly held office, and documentation of medical treatment); UNHCR Handbook, *supra* note 22, para. 196 ("In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents."); *see also* Cianciarulo, *supra* note 22, at 122–23 ("[M]any asylum seekers arrive from countries that lack infrastructure, adequate communication systems, and sometimes even a functioning government. Obtaining documents, even ones as relatively common as a birth certificate or medical report, can therefore involve logistical impediments that often prove insurmountable . . . In many cases, therefore, the more legitimate the persecution, the less likely it is that the asylum seeker will have the required proof."); Wiebe et al., *supra* note 33, at 12 (encouraging practitioners to produce as much corroboration as possible to support their client's asylum application).

36. Murphy v. INS, 54 F.3d 605, 611 (9th Cir. 1995) ("Testimony should not be disregarded merely because it is . . . in the individual's own interest."); Acosta, 19 I. & N. Dec. 211, 218 (Bd. of Immigr. Appeals 1985) (disagreeing with the IJ's "conclusion that the respondent's testimony should be rejected solely because it is self-serving"),

human rights conditions in an applicant's country, are also often relied on to corroborate a refugee's claim.[37] Requiring corroboration in asylum proceedings helps to assuage fears about fraudulent claims, and presumably helps judges separate true refugees from individuals who are falsifying their stories and seeking to take advantage of the system.[38]

B. *UNHCR's Benefit of the Doubt Standard*

The UNHCR recognized the unique corroboration challenges discussed above and other emerging issues in refugee and asylum law in the Convention relating to the State of Refugees ("1951 Refugee Convention"), which was later amended by the 1967 Protocol to the Convention ("1967 Protocol").[39] Following the success of the 1951 Refugee Convention and 1967 Protocol, the UNHCR published its Handbook on the Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ("Handbook"), which provides guidelines for implementing international refugee law at a national level.[40] As of April 1, 2011, 144 nation

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overruled on other grounds by Mogharrabi, 19 I. & N. Dec. 439 (Bd. of Immigr. Appeals 1987).

37. *See* ANKER, *supra* note 34, § 3:25 (noting the relevance of country condition information in the proper adjudication of asylum proceedings); Susan Kerns, *Country Conditions Documentation in U.S. Aslum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOBAL LEGAL STUD. 197, 197 (2000) ("Documentation related to a country's political situation and human rights record is relevant, and often crucial, evidence regarding the objective reasonableness of an asylum seeker's subjective fear of persecution."); UNHCR Handbook, *supra* note 23, para. 42 (discussing the importance of country condition evidence).

38. *See* Mitondo v. Mukasey, 523 F.3d 784, 788 (2008) ("How is an immigration judge to sift honest, persecuted aliens from those who are feigning?"); *see also* Wiebe et al., *supra* note 33 ("The evidentiary bar has been rising in the asylum context, as the INS and courts express greater concern about the possibility of fraudulent claims. The response on an individual case level is nothing very novel: corroborate, corroborate, and corroborate.").

39. *See* 1951 Refugee Convention, *supra* note 20; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol] (removing both temporal and geographical restrictions from the 1951 Refugee Convention).

40. *See* 1951 Refugee Convention, *supra* note 20; UNHCR Handbook, *supra* note 23; Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1, 13 (1997) ("The Convention and Protocol neither create a centralized status determination body nor prescribe detailed guidelines for implementation of refugee

states were signatories to the 1951 Refugee Convention and 147 nation states were signatories to the 1967 Protocol.[41] The treaty forbids states from returning refugees to a country where they may be persecuted on account of one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.[42]

The legal doctrine advocated by the UNHCR is modeled after developments in international human rights law.[43] According to the UNHCR, refugees applying for asylum should be afforded a more lenient standard when it comes to meeting evidentiary standards.[44] Recognizing that the applicant does carry the burden of proving that he or she meets the definition of a refugee, the UNHCR encourages countries to consider an applicant's individual circumstances as well as the inherent evidentiary limitations they may face.[45]

The Handbook suggests that asylum applicants should be evaluated under a liberal credibility standard, which affords

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law by national states. To promote greater uniformity in national practice and to ensure that fundamental refugee protections are respected, the UNHCR issued the Handbook on Procedures and Criteria for Determining Refugee Status (Handbook) in 1979.").

41. *UNHCR: State Parties to the Convention and Protocol*, U.N. HIGH COMM'R FOR REFUGEES (April 1, 2011), http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf.

42. *See* 1951 Refugee Convention, *supra* note 20; UNHCR Handbook, *supra* note 23, at paras. 66–86 (detailing the requirements for demonstrating a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion).

43. Brian Gorlick, *Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status*, 15 INT'L J. REFUGEE L. 357, 358 (2003) (describing the influence international human rights law has had on refugee law); U.N. High Comm'r for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* para. 4 (April 2001) [hereinafter High Commissioner Interpretation], *available at* http://www.refworld.org/docid/3b20a3914.html (noting that the aim of the 1951 Refugee Convention was to incorporate human rights values into the identification and treatment of refugees).

44. *See* UNHCR Handbook, *supra* note 23, para. 196 (advocating for a more flexible approach to corroboration where applicant testimony is credible); *see* Gorlick, *supra* note 43, at 359–60 ("[T]he humanitarian nature of international refugee law and the obligation of states to make good on the protection of refugees *a fortiori* requires that the refugee definition and determination procedures should be interpreted and applied in a liberal manner.").

45. UNHCR Handbook, *supra* note 23, paras. 196–97 ("The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.").

asylum seekers the benefit of the doubt when they are unable to meet specific evidentiary burdens.[46] This standard is, however, only applicable when an examiner is satisfied that the applicant's testimony is "coherent and plausible" and does not "run counter to generally known facts." [47] In establishing the facts, an examiner should "[a]ssess the applicant's credibility and evaluate the evidence (if necessary giving the applicant the benefit of the doubt), in order to establish the objective and the subjective elements of the case."[48]

The benefit of the doubt rule creates a presumption that uncorroborated testimony by refugee claimants alone can satisfy the refugee definition.[49] The intention behind this rule is to prevent individuals who fear persecution from being refused protection based solely on their inability to access evidence.[50] The Handbook also stresses that, in light of the "difficulty of proof inherent in the special situation in which an applicant for refugee status finds him or herself," evidentiary burdens should not be strictly construed.[51] The UNHCR, therefore, calls for giving an asylum seeker the benefit of the doubt when he appears to be generally credible but is unable to provide

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46. *See id.* para. 203 ("After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements . . . . It is therefore frequently necessary to give the applicant the benefit of the doubt."); *see also* GUY GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 40 (3d ed. 2007) ("If the applicant's statements in regard to his or her fear are consistent and credible . . . little more can be required in the way of formal proof.").

47. UNHCR Handbook, *supra* note 23, paras. 196, 197, 203, 204; Joanna Ruppel, *The Need for A Benefit of the Doubt Standard in Credibility Evaluation of Asylum Applicants*, 23 COLUM. HUM. RTS. L. REV. 1, 31–32 (1991) ("Consistent with the humanitarian aims of the Convention and Protocol, the UNHCR Handbook states that the applicant should be given the benefit of the doubt in asylum adjudication. Paragraph 196 states that the applicant should be given the benefit of the doubt when the applicant cannot support his claim by documentary or other proof, but his account appears credible. Paragraph 197 reiterates the directive that the evidentiary burden should not be applied too strictly. Paragraphs 203 and 204 echo paragraphs 196 and 197, again suggesting that if the claim is credible, the applicant should be given the benefit of the doubt, and paragraph 205 once again notes that the examiner should give the applicant the benefit of the doubt.").

48. UNHCR Handbook, *supra* note 23, para. 205(b)(ii).

49. *Id.* paras. 196, 203, 204.

50. *Id.*

51. *Id.* para 197. The Handbook also notes that the only available evidence may be an applicant's oral testimony. *Id.*

extrinsic documentary evidence.[52] The adjudicator presiding over the asylum proceeding is charged with making the credibility determination.[53] The burden of proof is on the asylum seeker to prove that he or she falls within the definition of a refugee.[54] Accordingly, there is a clear link between how evidence is assessed in asylum proceedings and the ultimate determination of whether or not an applicant is deemed credible.[55] Under the Handbook, "[c]redibility is established where the applicant has presented a claim that is coherent and plausible and does not contradict generally known facts and is therefore, on balance, capable of being believed."[56] This framework for establishing credibility requires flexibility, stresses the importance of considering all aspects of an asylum applicant's case, and does not require corroboration.[57]

II. *THE ROLE OF CORROBORATING EVIDENCE IN THE UNITED STATES AND THE UNITED KINGDOM*

Part II describes the general asylum systems utilized in the United States and the United Kingdom, with a specific focus on their corroboration requirements. The law of asylum in both the United States and the United Kingdom derives from the 1951

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52. *See* Gorlick, *supra* note 43, at 366 ("It is worth emphasizing that a key element in its proper use is to ensure that the applicant is deemed credible.").

53. *See* UNHCR Handbook, *supra* note 23, para. 195 ("The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.").

54. 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

55. *See* ANKER, *supra* note 34, § 3.3 (noting that the applicant's testimony is the crux of an asylum credibility determination); Kagan, *supra* note 22, at 368 (explaining that because asylum applicants often struggle to corroborate their stories with documentary evidence, establishing credibility is the "single biggest substantive hurdle" for asylum applicants).

56. *See* Gorlick, *supra* note 43, at 371.

57. UNHCR, AN OVERVIEW OF PROTECTION ISSUES IN WESTERN EUROPE: LEGISLATIVE TRENDS AND POSITIONS TAKEN BY UNHCR VOL. 1 NO. 3, at 84 (1995) ("Given the potential seriousness of an erroneous negative decision and because objective evidence will frequently be unavailable or inaccessible, assessing whether the applicant has proved a 'well founded fear' should be approached flexibly . . . ."); *see* Gorlick, *supra* note 43, at 372 (expressing concern over heightened evidentiary standards being imposed on asylum applicants, and noting that burdensome evidentiary requirements undermine the humanitarian concerns at the heart of refugee law).

Refugee Convention and the 1967 Protocol.[58] Both the 1951 Refugee Convention and 1967 Protocol are silent on how nations must internalize their provisions procedurally, and different countries have developed various mechanisms to decide asylum claims.[59] As a result, member nations often use different processes to achieve the same goal: providing protection to refugees.[60]

Both the United States and the United Kingdom have a long history of welcoming refugees, a trend that continued after World War II.[61] As the number of asylum seekers increased, however, both countries began to fear that terrorists would attempt to infiltrate their borders by seeking asylum.[62] Both

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58. 1951 Refugee Convention, *supra* note 20 (adopted to address refugee problems in Europe after World War II, but geographically limited to Europe and temporally limited to events before 1950); 1967 Protocol, *supra* note 39 (incorporating the basic principles of the 1951 Refugee Convention by reference, but including a definition of refugee without geographical and temporal limitations); Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2012) (defining refugee as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"); Asylum and Immigration Appeals Act, 1993, c. 23 (U.K) (retaining the 1951 Refugee Convention definition in UK domestic law). Section 2 of the Asylum and Immigration Appeals Act, 1993, states that "[n]othing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which could be contrary to the [1951 Refugee] Convention." *Id.* § 2.

59. *See* 1951 Refugee Convention, *supra* note 20 (outlining protections to be afforded to refugees by member states without including specific requirements for how to implement these protections); 1967 Protocol, *supra* note 39 (same); *see also* UNHCR Handbook, *supra* note 23, para. 192 (noting the unlikelihood that the same procedures work for all member states); Gorlick, *supra* note 43, at 358–59 (stating that member nations have developed varied asylum procedures that serve the same purpose).

60. *See infra* notes 63, 70, 117 and accompanying text (explaining how the United States and the United Kingdom have each developed procedures for handling internal asylum claims).

61. *See* DALLAL STEVENS, UK ASYLUM LAW AND POLICY: HISTORICAL AND CONTEMPORARY PERSPECTIVES 221 (2004) (describing the increase in asylum applicants during the 1980s); *see also* Inna Nazarova, Comment, *Alienating "Human" from "Right": U.S. and U.K. Non-Compliance with Asylum Obligations Under International Human Rights Law*, 25 FORDHAM INT'L L.J. 1335, 1339–40 (2002) (noting that both the United States and the United Kingdom welcomed refugees after World War II).

62. *See* Keely, *supra* note 21, at 42 (describing the international concern about large-scale asylum movements including terrorists trying to infiltrate borders); *see also* W.R. SMYSER, REFUGEES: EXTENDED EXILE 42, 93 (1987) (discussing the implications of terrorism on asylum adjudications).

countries also became concerned that individuals were misusing their asylum systems for their own economic benefit rather than for humanitarian relief.[63] In response to these concerns, both the United States and the United Kingdom set up complex procedures with detailed credibility requirements to ensure that asylum claims were properly screened and handled.[64] Part II.A discusses the refugee adjudication process in the United States. Part II.B then explains how asylum claims are managed in the United Kingdom.

A. *The United States*

The United States incorporated many of the provisions from the 1951 Refugee Convention and Handbook into the 1980 Refugee Act in order to comply with its international obligations.[65] In enacting the 1980 Refugee Act, Congress adopted the 1951 Refugee Convention and 1967 Protocol's standards for the protection of refugees.[66] Additionally, the US

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63. *See* Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of Haitian Asylum Seekers*, 7 GEO. IMMIGR. L.J. 1, 4 (1993) (noting that Haitians seeking asylum in the United States are considered to be "economic migrants" who hope to improve their financial condition, rather than true refugees); *see also* C. Randall, *An Asylum Policy for the UK*, *in* STRANGERS AND CITIZENS, A POSITIVE APPROACH TO MIGRANTS AND REFUGEES 202, 212–13 (Sarah Spencer ed., 1994) (contending that many Haitian and Central American aliens are economic migrants using asylum to gain illegal entry into the United Kingdom).

64. *See* Nazarova, *supra* note 61, at 1339–40 (noting that in response to concerns about the misuse of the asylum process, the United States and the United Kingdom each set up intricate systems for making asylum determinations); *see also* Keely, *supra* note 21, at 37–51 (discussing what motivated the Western world to adopt more elaborate and constricting asylum systems).

65. *See* The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.) (adopting the 1951 Refugee Convention's definition of a refugee in 8 U.S.C. § 1101(a)(42) as someone with a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"); s*ee also* S. Rep. No. 96-256, at 141 (1979) ("[The Refugee Act] reflects one of the oldest themes in American history — welcoming homeless refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns . . . ."); *see also* S. Rep. No. 96-590, at 1 (1980) (noting that the Refugee Act "reaffirms the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands").

66. *See* INS v. Cardozo-Fonseca, 480 U.S. 421, 436–37 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States

Supreme Court has repeatedly upheld the persuasive authority of UNHCR documents, including the Handbook, though they are not binding on US courts.[67]

In the United States, there are two main ways to seek asylum.[68] Applicants can apply for asylum affirmatively with the United States Citizenship and Immigration Services ("USCIS") and at ports of entry.[69] Alternatively, applicants can seek asylum defensively before an IJ during a removal proceeding or after an affirmative application to the USCIS is denied.[70] Non-US-citizens are permitted to seek asylum under federal law if they can establish that they have a well-founded fear of persecution in another country or have suffered past persecution based on one of the five aforementioned specified grounds.[71]

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refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . which the United States acceded in 1968"); *see also* H.R. Rep. No. 96-781, at 72–73 (1980) ("The objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.").

67. *See Cardozo-Fonseca*, 480 U.S. at 439 n.22 (noting that the United States is a party to the Refugee Convention and that US courts have looked to the Handbook as persuasive authority); *see also* Rodriguez-Palma, 17 I. & N. Dec. 465, 468 (Bd. of Immigr. Appeals 1980) (highlighting the role the Handbook has played in helping construe the 1967 Protocol).

68. *See* 8 C.F.R. §§ 208.2, 208.9 (2012); *see also* ANKER, *supra* note 34, § 1.8 (explaining that, in the United States, asylum can be sought either affirmatively or defensively).

69. *See* §§ 208.2, 208.9 (providing that persons eligible to apply affirmatively for asylum are those who have entered the country lawfully or those who have entered illegally but evaded detection).

70. 8 C.F.R. § 208.14 (2012); *see* Simona Agnolucci, *Expedited Removal: Suggestions for Reform in Light of the United States Commission on International Religious Freedom Report and the Real ID Act*, 57 HASTINGS L.J. 619, 623–24 (2006) (expanding on the process of applying for defensive asylum in the United States).

71. *See* 8 C.F.R. § 1208.13(b) (2012) ("The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution."); *see also* § 1208.13(b)(1) (explaining that if an applicant proves past persecution, a rebuttable presumption arises that the alien has a well-founded fear of future persecution); § 1208.13(b)(2) (noting that an applicant can affirmatively demonstrate a well-founded fear of persecution if his fear is subjectively genuine and objectively reasonable in light of credible evidence); *Cardoza-Fonseca*, 480 U.S. at 427–28 (identifying the five protected grounds as race, religion, nationality, membership in a particular social group, or political opinion); Abankwah v. INS, 185 F.3d 18, 22 (2d Cir. 1999) (noting that if an individual is able to prove past persecution, a rebuttable presumption of a well-founded fear of future persecution arises); Melgar de Torres v. Reno, 191 F.3d 307, 311 (2d Cir. 1999) (explaining that a well-founded

Persecution is not statutorily defined, but courts generally require that the suffering or harm in question be severe.[72] To establish a well-founded fear of future persecution, an applicant for asylum must show a "reasonable possibility" of suffering persecution if returned to his or her home country.[73] To make such a showing, applicants must establish that a reasonable person in their circumstances would fear persecution.[74]

An IJ's asylum determination is reviewable by the BIA.[75] The agency reviews an IJ's findings of fact under a "clearly erroneous" standard, while other legal aspects of the case are reviewed de novo.[76] A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing Board member or panel is left with the definite and firm conviction that a mistake has been committed.[77] The BIA's rulings, in turn, may be appealed to federal appellate courts, which review agency factual determinations under a substantial evidence

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fear of future persecution requires credible testimony of a subjective fear that is also objectively reasonable).

72. *See* Japarkulova v. Holder, 615 F.3d 696, 699 (6th Cir. 2010) (remarking that the Immigration and Nationality Act does not define persecution nor has the BIA defined the term); *see also* Li v. Gonzales, 405 F.3d 171, 177 (4th Cir. 2005) ("Persecution involves the infliction or threat of death, torture, or injury to one's person or freedom, on account of one of the enumerated grounds in the refugee definition."); Nagoulko v. INS, 333 F.3d 1012, 1016 (9th Cir. 2003) (defining persecution as "the infliction of suffering of harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive").

73. 8 C.F.R. § 1208.13(b)(2)(i)(B).

74. *See, e.g.*, Chen v. U.S. INS, 195 F.3d 198, 202 (4th Cir. 1999) (noting that the asylum applicant must objectively show that a reasonable person in a similar setting would face oppression); *see also* Kasinga, 21 I. & N. Dec. 357, 366 (Bd. of Immigr. Appeals 1996) (asserting that the burden of proof that an asylum applicant must discharge is showing that a reasonable person in their circumstances would fear persecution).

75. 8 C.F.R. § 1003.1(b)(2012).

76. *See* § 1003.1(d)(3)(i) ("The Board will not engage in de novo review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.").

77. *See* Anderson v. Bessemer City, 470 U.S. 564, 565 (1985) (noting that if the lower court's interpretation of the evidence is conceivable, the appellate court must not disturb their factual findings even if they, acting as the fact finder, would have evaluated the evidence differently); United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (defining the "clearly erroneous" standard and noting that the role of appellate courts is not to review the lower court's factual determinations).

standard.[78] An IJ's factual findings are rarely found to be clearly erroneous, and thus are typically affirmed.[79]

Asylum proceedings, which qualify as administrative proceedings and are not bound by the Federal Rules of Evidence, have broad evidentiary standards.[80] Because the Federal Rules of Evidence generally do not apply in administrative proceedings, evidence is considered admissible so long as the agency excludes "irrelevant, immaterial, or unduly repetitious evidence."[81] Under these more lenient rules, administrative courts may, without nullifying the proceedings, receive evidence that a non-administrative court would regard as legally inadequate.[82] Hearsay evidence, for example, is typically permitted in administrative proceedings.[83]

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78. *See* Immigration and Nationality Act, 8 U.S.C. § 1252(b)(4)(B) (2012) (indicating that the agency's findings of fact are "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"); Martinez-Buendia v. Holder, 616 F.3d 711, 715 (7th Cir. 2010) (reviewing the BIA's "determination of facts . . . for substantial evidence").

79. *See* INS v. Elisa-Zacarias, 502 U.S. 478, 481 (1992) (explaining that factual findings are only reversed "when the evidence is so compelling that no reasonable factfinder could fail to find the requisite fear of persecution"); *see also* Veena Reddy, *Judicial Review of Final Orders of Removal in the Wake of the Real ID Act*, 69 OHIO ST. L.J. 557, 588 (2008) (arguing generally that in its current state, judicial review of an IJ's findings of fact under the clearly erroneous standard is extremely limiting).

80. *See* 8 U.S.C. § 1158(b)(1)(B); Niam v. Ashcroft, 354 F.3d 652, 659 (9th Cir. 2004) ("[A]dministrative agencies are not bound by the hearsay rule or any other of the conventional rules of evidence, but only by the looser standard of due process of law.").

81. *See, e.g.*, Anim v. Mukasey, 535 F.3d 243, 256 (4th Cir. 2008) (stating that the Federal Rules of Evidence do not apply in immigration proceedings); Ezeagwuna v. Ashcroft, 325 F.3d 396, 405 (3d Cir. 2003) ("[The] Federal Rules of Evidence do not apply in asylum proceedings."); ANKER, *supra* note 34, § 3:1, n.4 (suggesting asylum applicants can provide evidence from a variety of sources because they are not bound by strict evidentiary rules).

82. *See* Martinez v. Mukasey, 260 F. App'x 834, 843 (6th Cir. 2008) (discussing that evidentiary challenges in asylum proceedings go to the weight of the evidence rather than its admissibility); *see also* Navarette-Navarrette v. Landon, 223 F.2d 234, 237 (9th Cir. 1955) (noting that certain types of evidence that would not be permitted in a traditional legal proceeding, such as hearsay evidence, may be used in asylum proceedings and other administrative tribunals).

83. *See* Gray v. U.S. Dep't. of Agric., 39 F.3d 670, 676 (6th Cir. 1994) (noting that hearsay evidence is not automatically excluded in administrative proceedings); *see also* Calhoun v. Bailar, 626 F.2d 145, 148 (9th Cir. 1980) (observing that hearsay evidence is permitted in asylum proceedings so long as it is probative and fundamentally fair).

Determining whether an asylum applicant is credible is central to the asylum application process in the United States.[84] 8 C.F.R. § 1208.13(a) provides that the "testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."[85] Nonetheless, while an applicant's testimony standing alone may be sufficient to achieve asylum, the BIA has steadily heightened the corroboration requirements for asylum applicants.[86]

In 1987, the BIA ruled that, although every effort should be made to obtain corroborating evidence to support a claim for asylum, absence of corroboration alone would "not necessarily be fatal" when the applicant's own testimony was "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis" for the applicant's fear.[87] However, two years later, the BIA subsequently moved in a different direction, clarifying that *Mogharrabi* does "not stand for the proposition that the introduction of supporting evidence is purely an option with an asylum applicant in the ordinary case."[88] Because it would be difficult to evaluate the "plausibility and accuracy" of a claimant's story without corroboration, the BIA held that such evidence should be provided if available,

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84. *See* 8 C.F.R. § 1208.13(a) (2012) ("The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."); *see also* Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 TEX. INT'L L.J. 185, 186–87 (2008) (arguing that credibility is the most important substantive element of an asylum applicant's case).

85. 8 C.F.R. § 1208.13(a).

86. *See* Rui Yang v. Holder, 664 F.3d 580, 586 (5th Cir. 2011) ("In effect, the BIA's interpretation reads an additional clause to the language of 8 C.F.R. § 1208.13(a): 'The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration, *but only if corroboration is not reasonably available to the applicant.*'"); Cianciarulo, *supra* note 22, at 123–28 (charting the development of the role of corroboration in asylum proceedings and concluding that they have become increasingly more burdensome over time).

87. Mogharrabi, 19 I. & N. Dec. 439, 445–46 (Bd. of Immigr. Appeals 1987) (holding that in light of the difficulty asylum seekers often face in obtaining corroborating evidence to support their claims, an applicant's testimony, standing alone, will satisfy their burden of proof so long as the testimony is credible, detailed and specific).

88. Dass, 20 1. & N. Dec. 120, 124–25 (Bd. of Immigr. Appeals 1989) (clarifying its holding in *Mogharrabi* and articulating a general rule for corroboration).

and, when unavailable, the applicant should be able to explain why it cannot be produced.[89]

In 1997, the BIA further narrowed its view on corroboration by interpreting 8 C.F.R. § 1208.13(a) as allowing an IJ to require corroboration, even when an applicant is otherwise credible.[90] Thus, "where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided." [91] Specifically, "material facts which are central" to an applicant's claim should be corroborated.[92] The absence of corroboration, the BIA held, "can lead to a finding that an applicant has failed to meet her burden of proof."[93]

The US Congress passed the REAL ID Act in 2005, which codified the existing BIA standards governing the adjudication of asylum claims.[94] Congress enacted the law in large part to create explicit evidentiary standards for granting asylum in the United States.[95] In particular, the statute codified 8 C.F.R. § 1208.13(a)'s provision that "[t]he testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration," but conditioned that guideline with the following caveat: "[w]here the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[96]

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89. *Id.* at 125.

90. *See* S-M-J-, 21 I. & N. Dec. 722, 729 (Bd. of Immigr. Appeals 1997) (holding that in cases where corroborating evidence is reasonably expected, it should be provided, and noting that if the applicant fails to present such evidence it could lead an IJ to determine that they have failed to meet their burden of proof—even if the applicant is found to be credible).

91. *Id.* at 725.

92. *Id.*

93. *Id.* at 725–26.

94. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, §§ 302–323 (codified as amended in scattered sections of 8 U.S.C. and 49 U.S.C. (2006)); *see also* Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B) (2012).

95. H.R. Rep. No. 109-72, at 160–61, 166–68 (2005) (explaining that the REAL ID Act was enacted to provide adjudicators with uniform credibility guidelines to apply in asylum cases).

96. 8 U.S.C. § 1158(b)(1)(B)(ii). The REAL ID Act also enacted an additional provision regarding the way credibility determinations should be handled in appeals. *See* § 1158(b)(1)(B)(iii) ("There is no presumption of credibility, however, if no

The asylum-related provisions of the REAL ID Act are only applicable to asylum applications filed after the date of the statute's enactment, May 11, 2005.[97] Asylum cases filed prior to May 11, 2005, continue to be governed by the standards developed by the BIA, and federal appellate courts are divided over whether an IJ considering those cases must make a credibility determination before demanding corroborating evidence.[98] Two circuits—the Second and Seventh—require the agency to make a credibility determination.[99] By contrast, three other circuits—the Third, Fifth, and Sixth—do not require a credibility determination and regularly uphold denials of asylum based on failure to submit corroborating evidence despite the agency's failure to decide whether the applicant was credible.[100]

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adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.").

97. *See* Real ID Act § 101(h)(2), 119 Stat. at 305 (indicating that asylum-related provisions apply to "applications for asylum, withholding, or other relief from removal made on or after such date" of enactment).

98. *See, e.g.*, Jia Yan Weng v. Mukasey, 272 F. App'x 98, 99 (2d Cir. 2008) (holding that an IJ must make an explicit determination whether an asylum applicant's testimony is credible without relying exclusively on the lack of corroborating evidence); *see also* Ikama-Obami v. Gonzales, 470 F.3d 720, 725 (7th Cir. 2006) (holding that denial of an asylum claim based on lack of corroboration is not warranted absent an explicit adverse credibility finding); *cf.* Rui Yang v. Holder, 664 F.3d 580, 586–87 (5th Cir. 2011) (remarking that the BIA is not required to make an explicit finding about an applicant's credibility if corroborating evidence was reasonably available to that applicant but not presented); Maklaj v. Mukasey, 306 Fed. App'x 262, 264 (6th Cir. 2009) (affirming denial of asylum for failure of the applicant to provide corroborating evidence and despite the fact that the BIA "did not indicate whether [applicant] was believable or whether her story provided adequate detail to support her application"); Toure v. Att'y Gen., 443 F.3d 310, 326 (3d Cir. 2006) (remarking that the Third Circuit has held, on several occasions, that when an IJ or the BIA does not make an explicit credibility finding, credibility is presumed).

99. *See Weng*, 272 F. App'x at 99 (noting that the lack of an explicit credibility finding frustrated appellate review of the case, and remanding to the agency in order for it to make an explicit credibility finding); *Ikama-Obami*, 470 F.3d at 725 (holding that corroboration is not required if an IJ believes an applicant's testimony, and noting that "before denying a claim for lack of corroboration, an IJ must: (1) make an explicit credibility finding; (2) explain why it is reasonable to have expected additional corroboration; and (3) explain why the petitioner's reason for not producing that corroboration is inadequate").

100. *See Yang*, 664 F.3d at 585 (holding that asylum applicants can be required to supplement their claims with corroborating evidence even when their testimony is perceived to be credible); *Maklaj*, 306 F. App'x at 264 (noting that because Maklaj failed to provide corroboration that was "reasonably available" to him, his testimony was insufficient to establish past persecution); *Toure*, 443 F.3d at 323 (discussing the

Under the REAL ID Act, corroboration is always required unless the applicant is deemed credible, persuasive, and specific, or if the applicant cannot reasonably obtain such evidence.[101] This standard places a more arduous burden on asylum applicants to corroborate their claims.[102] Currently, courts are still grappling with the implications of the REAL ID Act's increased evidentiary requirements.[103] But one thing is clear: the need to obtain and produce corroborating evidence has become the norm, not the exception.[104]

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requirement of corroboration in asylum cases, and noting that such evidence is expected to be produced when it is reasonably available).

101. *See* 8 U.S.C. § 1158(b)(1)(B)(ii) ("The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.").

102. *See* Gregory Laufer & Stephen Yale-Loehr, *Straining Credibility: Recent Developments Regarding the Impact of the REAL ID Act on Credibility and Corroboration Findings in Asylum Cases*, 12 BENDER'S IMMIGR. BULL. 74, 74 (2007) (noting that the REAL ID Act gives asylum adjudicators "wider authority to require corroborating evidence as a discretionary matter"); Wiebe et al., *supra* note 33, at 3 ("[T]he basic corroboration rule can be boiled down to a couple of phrases: If you can get corroborating evidence to support your claim, you must present it. If you reasonably should be able to get corroborating evidence about central facts in your claim, but do not produce it, you had better have a good reason for why you don't have it.").

103. Specifically, federal courts of appeals are divided over whether the plain text of the REAL ID Act requires IJs to provide asylum applicants with specific notice and a meaningful opportunity to respond before denying an asylum application for failure to provide corroborating evidence. *See* Liu v. Holder, 575 F.3d 193, 198 (2d Cir. 2009) ("Though we require an IJ to specify the points of testimony that require corroboration, we have not held that this must be done *prior* to the IJ's disposition of the alien's claim"); *see also* Rapheal v. Mukasey, 533 F.3d 521, 529–30 (7th Cir. 2008) (holding that because the REAL ID Act includes a provision stating that corroboration may be required, it is unnecessary and unduly burdensome to additionally require that an IJ put an asylum applicant on notice that corroboration is needed); *cf.* Ren v. Holder, 648 F.3d 1079, 1090–93 (9th Cir. 2011) (holding that the plain language of section 1158(b)(1)(B)(ii) does require that an applicant be given notice of the need for corroborating evidence, as well as an opportunity to provide that evidence or why he cannot do so).

104. *See* James Feroli, *Evidentiary Issues in Asylum Proceedings*, IMMIGR. BRIEFINGS (West), Nov. 2010, AT 1 (arguing that aliens should always present corroborating evidence to support their claim, help discharge their burden of proof, and to bolster the credibility of their testimony); *see also* Wiebe et al., *supra* note 33, at 3 (encouraging

B. *The United Kingdom*

The United Kingdom's asylum laws reflect an effort to incorporate and mirror the international refugee definition found in the 1951 Refugee Convention and the 1967 Protocol.[105] Additionally, the Handbook is recognized as persuasive authority by the UK House of Lords.[106] The United Kingdom also adheres to the European Convention on Human Rights and Fundamental Freedoms, which includes a guarantee to protect individuals who face a real risk of exposure to torture, or inhuman and degrading treatment or punishment.[107] All immigration matters in the United Kingdom, including asylum, are governed by the UK Immigration Rules, which implement and reflect the United Kingdom's international commitments to refugee law.[108] In order to receive asylum, an alien must demonstrate a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[109] In the United Kingdom, asylum is a mandatory form of relief that will be granted to all applicants who satisfy its legal requirements.[110]

The UK Border Agency of the Home Office oversees the administrative and appellate procedures that govern the

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practitioners to produce as much corroboration as possible to support their client's asylum application).

105. *See UNHCR: State Parties to the Convention and Protocol*, *supra* note 41, at 4 (noting that the United Kingdom Ireland ratified the 1951 Convention on March 11, 1954, and acceded to the 1967 Protocol on September 4, 1968). The United Kingdom enacted the Asylum and Immigration Appeal Act in 1993 to give effect to the 1951 Convention and 1967 Protocol. Asylum and Immigration Appeals Act, 1993, c. 23 (U.K).

106. Sepet & Anor v. Sec'y of State for Home Dep't [2001] EWCA Civ 681, [142] (noting that while the Handbook is not binding on member states, it is highly persuasive); Gorlick, *supra* note 43, at 359 n.4 (observing that the House of Lords has used the Handbook to help interpret the refugee definition and relevant asylum procedures).

107. *See* European Convention on Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

108 *See generally Asylum Policy Instructions*, U.K. BORDER AGENCY, http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/ (last visited August 13, 2013) [hereinafter *Asylum Policy Instructions*].

109. *Immigration Rules*, UK BORDER AGENCY, para. 334 (Dec. 2012) [hereinafter *Immigration Rules*], *available at* http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/.

110. *Id.* (noting that an asylum applicant "will be granted asylum in the United Kingdom" if certain conditions are met).

adjudication of asylum claims in the United Kingdom.[111] To seek asylum in the United Kingdom, an asylum application must be filed with the Secretary of State.[112] In the United Kingdom, the definition of persecution is based on the internationally-recognized framework of human rights.[113]

The asylum process in the United Kingdom has three basic hierarchical steps: submission of an asylum application, evaluation of that claim by the Home Office, and, if the decision is adverse, appeal of the Home Office's judgment to the Immigration and Appeal Tribunal.[114] The burden of proof an applicant must satisfy is whether there has been past persecution or if there is a "reasonable degree of likelihood" of future persecution.[115] Determining whether a well-founded fear of persecution exists involves consideration of past treatment and circumstances as well as the chance of future risk.[116]

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111. *See* STEVENS, *supra* note 61, at 221 (noting that asylum law is primarily implemented through the United Kingdom Boarder Agency of the Home Office's policies); ROBERT THOMAS, ADMINISTRATIVE JUSTICE AND ASYLUM APPEALS: A STUDY OF TRIBUNAL ADJUDICATION 21 (2011) (remarking that asylum decisions in the United Kingdom are primarily handled by the U.K. Border Agency of the Home Office).

112. *Immigration Rules*, *supra* note 109, paras. 328–29.

113. *See Asylum Policy Instructions*, *supra* note 108, para. 5.8 (instructing caseworkers to infer that pursuant to the Handbook "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution," and that serious violations of human rights would also constitute persecution).

114. *See* STEVENS, *supra* note 61, at 237–39 (detailing the asylum adjudication structure in the United Kingdom); *see also* Robert Thomas, *Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined*, 8 EUR. J. MIGRATION & L. 81–83 (discussing the asylum decision making process).

115. *See* R. v. Sec'y of State for the Home Dep't, *Ex parte Saravamuthu Sivakumaran* [1988] A.C. 958 (H.L.) (holding that the decision-maker must be satisfied that there is a reasonable likelihood of persecution or a real risk of ill-treatment upon return); *see also* STEVENS, *supra* note 61, at 268 (observing that *Sivakumaran* is one of the most significant cases in UK asylum law, and noting that asylum caseworkers are instructed by the UK Border Agency's Asylum Policy Instructions to consider whether there is a reasonable likelihood of the applicant being persecuted in their country of origin).

116. *See Asylum Policy Instructions*, *supra* note 108, para. 5.5 ("In assessing whether an applicant's fear is well-founded, the caseworker must be satisfied both that (i) the applicant has a subjective fear of persecution, and (ii) that objectively there are reasonable grounds for believing that the persecution feared may in fact materialise in the applicant's country of origin."); *see also* SYMES & JORRO, *supra* note 19, at 37–38 ("Most of those wanting to make a case for the grant of asylum must first establish a personal history that evinces a real fear of persecution. The question which confronts the decision-maker is not whether the individual is a witness of truth, but whether they

Credibility is a crucial component in many asylum cases in the United Kingdom.[117] Assessing credibility involves considering the evidence presented, weighing it, and viewing it collectively to determine whether an applicant is believable.[118] Multiple factors are taken into consideration when assessing credibility, including the consistency of the applicant's story, whether the applicant's story comports with relevant country condition reports, its plausibility, and the presence or absence of corroborating evidence.[119]

The United Kingdom Border Agency's Asylum Policy Instructions ("API") set out detailed procedures designed to minimize the role of subjectivity and "unfounded assumptions" in the asylum decision-making process.[120] These procedures suggest that case-workers should first assess the internal and external credibility of the applicant's story, and then decide whether to give them the benefit of the doubt.[121] Internal credibility means that the applicant's evidence must be "internally coherent and consistent with past written and verbal statements, and consistent with claims made by witnesses and/or dependents and with any documentary evidence submitted in support of the claim."[122] External credibility refers to the need for the applicant's account to be "consistent with generally

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possess a well-founded fear of persecution, and there will be occasions where an asylum seeker faces a risk on return to their country, notwithstanding an inability to put forward credible testimony regarding their own history.").

117. *See Immigration Rules*, *supra* note 109, paras. 339–44 (explaining the circumstances in which the UK Border Agency Home Office will deem an applicant to be lacking in credibility, and therefore subject to refusal); *see also* SW Somalia v. Sec'y of State for the Home Dep't (Adjudicator's questions) [2005] UKIAT 00037, para. 20 ("The issue of credibility may be the fulcrum of the decision as to whether the claim succeeds or fails.").

118. *See* SYMES & JORRO, *supra* note 19, at 40 ("An appropriate spirit with which to approach an asylum application might be to recognize that it is perfectly possible to accept a story because it all 'hangs together', there being no particular reason to suggest that any substantial part of it is not true."); *see also* THOMAS, *supra* note 111, at 140 (concluding that credibility assessments in asylum proceedings are subjective decisions made by judges after reviewing the entire record).

119. *See* STEVENS, *supra* note 61, at 282 (examining the relevant credibility considerations in asylum proceedings); THOMAS, *supra* note 111, at 140 (discussing the relevant factors a judge will take into account when assessing the credibility of an alien).

120. *See Asylum Policy Instructions*, *supra* note 108, para. 4.3.5.

121. *See id.* para. 4.3.

122. *Id.* para. 4.3.1.

known facts and country of origin information."[123] If a case-worker discovers that "there is objective country information that clearly contradicts the material facts, this is likely to result in a negative credibility finding."[124]

Though it can play a role in assessing credibility, corroboration is not typically required in asylum cases in the United Kingdom.[125] Under the immigration rules, when certain aspects of an applicant's claim are not supported by documentary evidence, corroboration need not be produced if several conditions are met. In determining whether to waive this evidentiary burden, the asylum decision-maker first looks to see if the applicant has made a genuine effort to substantiate his claim.[126] At this stage, all material facts at the applicant's disposal must have been presented, and the adjudicator must be satisfied with the applicant's explanation regarding the lack of other relevant material.[127] The personal credibility of the applicant is then considered, and if the applicant's statements are found to be coherent and plausible, corroboration will not be required.[128] Accordingly, where an applicant's account appears credible but is unsupported by other evidence, and that applicant has provided a viable explanation for why that

123. *Id.* para. 4.3.2.

124. *Id.* para. 4.3.1.

125. *See Immigration Rules*, *supra* note 109, para. 339L; ST (Corroboration-Kasolo) Ethiopia v. Sec'y of State for the Home Dep't, [2004] UKIAT 00119 ("Where aspects of an asylum claimant's statements are not supported by documentary or other evidence, those aspects will not need confirmation when all of the following conditions are met: (i) the applicant has made a genuine effort to substantiate his application; (ii) all material factors at the appellant's disposal have been submitted and a satisfactory explanation regarding any lack of other relevant material has been given; (iii) the applicant's statements have been found to be coherent and plausible and do not run counter to the available specific and general information relevant to the applicant's case; (iv) the applicant has made an asylum or human rights claim at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and (v) the general credibility of the applicant has been established."); *see also* Nazir v. Sec'y of State for the Home Dep't, [2002] S.C. 134, para. 21 (Scot.) ("[T]here was no requirement of corroboration as a matter of sufficiency of the evidence in support of the claim for asylum"); *see also* SYMES & JORRO, *supra* note 19 ("The circumstances of the asylum seekers are such that there can be no strict requirement that they produce corroborative evidence.").

126. *See Immigration Rules*, supra note 109, para. 339L(i).

127. *See id.*, para. 339L(ii).

128. *See id.*, para. 339L(iii).

evidence is unavailable, then he should be given the benefit of the doubt.[129]

Until 2004, the UK Parliament had not issued any rules regarding credibility assessment.[130] With the Asylum and Immigration Act of 2004, however, Parliament made clear that asylum decision-makers must consider several factors as undermining an applicant's credibility.[131] These factors include any behavior that the decision-maker thinks is designed to, or likely to, conceal information, mislead, or obstruct or delay the handling or resolution of a claim.[132] The policy rationale behind the enactment of this provision was deterrence of fraudulent claims, limiting exploitation of the system, and promoting consistency in decision-making.[133]

Per the immigration rules, if the available country-of-origin information does not directly corroborate an applicant's story, but does not contradict it either, the applicant may be given the benefit of the doubt.[134] Moreover, judges actually have the right to grant asylum despite significant inconsistencies in an applicant's testimony.[135] In fact, the immigration rules even

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129. *See* THOMAS, *supra* note 111, at 151 (discussing the notion of giving asylum applicants the benefit of the doubt); *see also* SYMES & JORRO, *supra* note 19, at 77–78 ("It might well be dangerous to expect a person in fear of their life or freedom to gather and carry documentary evidence during their stay in the country of origin. It is unsatisfactory for a decision maker to refute a claim on the basis that there is no 'evidence' to support the asserted facts, as the applicant's own statements constitute such evidence.").

130. *See* Asylum and Immigration (Treatment of Claimants, etc.) Act, 2004, c. 19, § 8 (U.K.) [hereinafter Asylum and Immigration Act]; *see also* THOMAS, *supra* note 111, at 140 (noting that credibility assessment was first discussed in the Asylum and Immigration Act of 2004).

131. Asylum and Immigration Act, § 8 ("In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behavior to which this section applies.").

132. *Id.*

133. *See* SYMES & JORRO, *supra* note 19, at 60–61 (discussing the role of dishonesty in the asylum process); THOMAS, *supra* note 111, at 157 (noting that the government believed that by requiring that these factors be taken into account as impeaching credibility, the provision would induce claimants to cooperate with the decision-making process).

134. *See Immigration Rules*, *supra* note 109, para. 339L.

135. *See* Secretary of State for the Home Dep't v. Chiver, [1997] INLR 212, UKIAT 10758 ("It is perfectly possible for an adjudicator to believe that a witness is not telling the truth about matters, has exaggerated his story to make his case better, or is simply uncertain about matters, and still has to be persuaded that the centre piece of the story

permit granting asylum to an applicant found to have acted in bad faith, so long as he is otherwise qualified for asylum.[136]

III. *GIVING CORROBORATING EVIDENCE THE BENEFIT OF THE DOUBT IN THE UNITED STATES*

As in other adjudicatory proceedings, assessing an applicant's credibility is crucial to ensuring that asylum claims are properly resolved.[137] Nevertheless, it is often very difficult to make accurate credibility determinations in asylum proceedings because of the very nature of the applicant's journey.[138] This difficulty stems from the frequent absence of corroborating evidence that could, if available, provide an IJ with objective proof of the persecution a claimant would face if he returned to his country of origin.[139]

Rather than recognizing the evidentiary challenges routinely faced by asylum applicants, current law in the United States requires that virtually all claims be corroborated.[140] These national policies widen the gap between the United States and the UNHCR's international standard, which calls for giving

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stands."); *see also* SYMES & JORRO, supra note 19, at 58 (concluding that dishonest testimony alone is not a reason to deny an asylum claim, and noting that these statements should be considered in light of the record as a whole).

136. *See* Danian v. Sec'y of State for the Home Dep't, [2000] Imm. A.R. 96 [122] (U.K.) (holding that the principle of bad faith had no relevance in asylum cases); SYMES & JORRO, *supra* note 19, at 59 (noting that evidence of bad faith is not a reason to deny an alien asylum).

137. *See* In re Acosta, 19 I. & N. Dec. 211, 215-16 (Bd. of Immigr. Appeals 1985) (noting that a prerequisite to a grant of asylum has always been the need to ensure that the events applicants allege in support of their claims actually happened); Somalia v. Sec'y of State for the Home Dep't (Adjudicator's questions), [2005] UKIAT 00037, para. 20 (noting that "the issue of credibility may be the fulcrum of the decision as to whether the claim succeeds or fails").

138. *See supra* notes 22, 31–35, 38 and accompanying text (discussing the difficulties refugees face when fleeing persecution, and noting how difficult it can be to gather evidence in these circumstances).

139. *See supra* notes 22–24 and accompanying text (describing the frequent absence of corroborating evidence in asylum proceedings, and noting the credibility issues that this creates).

140. *See supra* notes 84–86 and accompanying text (noting that corroboration requirements in the United States have steadily heightened over time such that asylum claims can now be denied based solely on an applicant's failure to provide reasonably available corroborating evidence).

applicants the benefit of the doubt.[141] As demonstrated by the United Kingdom, implementation of a policy that gives the refugee the benefit of the doubt is not an impossible feat, but rather one that would further the humanitarian objectives of the 1980 Refugee Act and the United States' commitment to the 1951 Refugee Convention and 1967 Protocol.[142] An ideal way for the United States to at least begin bridging the divide would be to require that IJs put asylum applicants on notice of the exact corroboration that is needed to substantiate their claim and provide them additional time to produce such evidence.[143]

Part III.A returns to Rui Yang's asylum claim, and evaluates how it would have been decided if the benefit of the doubt standard had been applied. Part III.B then recommends that the United States embrace and implement that standard, thereby adopting a more lenient approach to requiring corroboration in asylum proceedings.

A. *Evaluating* Yang v. Holder *under the UNHCR's Benefit of the Doubt Standard*

Yang's quest for asylum in the United States illustrates the gap between corroboration requirements in the United States and international standards.[144] On its face, the REAL ID Act does seem to at least contemplate giving an applicant the benefit of the doubt by providing that an applicant's testimony, standing alone, may be sufficient to satisfy the refugee definition.[145] Unfortunately, the practical effects of the REAL ID

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141. *See supra* note 46 and accompanying text (discussing the UNHCR's benefit of the doubt standard).

142. *See supra* note 125 and accompanying text (discussing the United Kingdom's approach to corroboration).

143. *See supra* note 103 and accompanying text (discussing whether the REAL ID Act requires IJs to provide asylum applicants with specific notice and a meaningful opportunity to respond before denying an asylum application for failure to provide corroborating evidence).

144. *Compare supra notes* 99–104 (explaining the essential role corroborating evidence plays when an applicant applies for asylum in the United States), *with supra* notes 45–55 (noting that the benefit of the doubt standard creates a presumption that uncorroborated testimony by refugee claimants can be enough to prove that they meet the refugee definition).

145. *See supra* note 101 and accompanying text (discussing the specific statutory language of the REAL ID Act).

Act's heightened corroboration requirements make this largely a fiction.[146]

Whether corroboration is necessary under the REAL ID Act hinges on an applicant's credibility, persuasiveness, and the specificity of their testimony.[147] Despite not being required so long as an applicant is deemed credible, persuasive, and specific, corroboration has become the rule, rather than the exception, in the United States.[148] The circumstances under which applicants receive the benefit of the doubt have thus become severely attenuated.[149] Corroboration is accordingly required of asylum applicants more frequently,[150] which places a greater strain on asylum applicants because this evidence is often so difficult to obtain.[151] This increased burden could be alleviated if the United States began to give asylum applicants the benefit of the doubt regarding the production of corroborating evidence.[152]

If the evidence supporting Yang's claim had been evaluated under the UNHCR's benefit of the doubt standard, it is quite likely that he would have received a different result and been granted asylum.[153] Nor would just the result have been different:

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146. *See supra* notes 102, 104 (contending that the current asylum system in the United States virtually requires an applicant to corroborate each element of their story).

147. *See supra* notes 101–02 (detailing the corroboration requirements included in the REAL ID Act).

148. *See supra* notes 101–02, 104 and accompanying text (noting that in the United States, asylum applicants are expected to corroborate their claims, and contending that claims supported only by credible, persuasive, and factual testimony will no longer succeed if the applicant fails to produce corroborating evidence deemed reasonably available by the adjudicator).

149. *See supra* notes 101-02, 104 (noting the practical consequences of the heightened corroboration requirements in the United States).

150. *See supra* note 104 (noting that documentary proof is essentially a prerequisite for filing an asylum application in the United States).

151. *See supra* notes 22–24, 29–35 and accompanying text (detailing the challenges refugees facing in gathering corroborating evidence to supplement their asylum claims).

152. *Compare supra* notes 22-24, 29-35 (detailing the difficulties refugees face in the United States when attempting to collect evidence that corroborates their persecution), *with supra* notes 44–55 (noting that the rationale behind the benefit of the doubt standard is to prevent true refugees from being refused protection based solely on their inability to produce evidence to corroborate their claims).

153. *Compare supra* notes 10–12 and accompanying text (summarizing the IJ's decision in Yang's case, which cited Yang's failure to produce documentary evidence as the basis for the denial, but did not question his credibility), *with supra* notes 52–55

the determination process itself would have been altered. Under this standard, an IJ would first assess the credibility of Yang's testimony, only after which turning to evaluate the evidence.[154] Assuming that Yang's testimony was considered truthful and credible, the evidence he produced would then be reviewed in light of his fear of persecution from the Chinese government based on his support of Falun Gong.[155]

Operating under the benefit of the doubt standard, an IJ would consider the US State Department Report, which detailed the Chinese government's harsh treatment of Falun Gong practitioners.[156] This evidence would almost certainly be seen as persuasive evidence supporting Yang's claim.[157] The report, produced by the United States, provides objective proof of the Chinese government's response to Falun Gong supporters that independently corroborates Yang's fear and supports his claim.[158] Recognition of the exact persecution Yang claimed to fear by the US government would bolster his claim, substantiate his testimony, and provide the IJ with reassurance that he was telling the truth.[159] At this point, if the IJ felt that more evidence was needed in order for Yang to meet the refugee definition, at the very minimum Yang would have been informed of this and given adequate time to respond to that request.[160] More likely than not, however, Yang would have been given the benefit of

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(contending that the applicant should be given the benefit of the doubt when they appear to be generally credible but are unable to provide extrinsic documentary evidence).

154. *See supra* notes 46–57 (describing the UNHCR's framework for determining credibility).

155. *See supra* note 11 and accompanying text (discussing Yang's fear of persecution by the Chinese government because of his pro-Falun Gong beliefs).

156. *See supra* notes 46–48 (explaining that asylum applicants should be given the benefit of the doubt when generally accepted facts support an applicant's claim).

157. *See supra* note 10 (detailing the harsh treatment of Falun Gong practitioners and followers).

158. *See supra* note 25 (explaining that independent evidence which supports an initial statement is considered corroboration); *see also supra* note 29 (noting that the search for the truth is the underlying rationale behind requiring corroboration).

159. *See supra* notes 34–36 and accompanying text (detailing the types of evidence asylum applicants often produce to corroborate their claims).

160. *See supra* notes 46–57 (discussing that the benefit of the doubt standard is properly used when the applicant has been deemed credible).

the doubt regarding the absence of evidence.[161] Thus, presuming that the IJ believed he testified truthfully, coupled with the independent verification from the US State Department report that his fear of persecution based on his support of Falun Gong was not unfounded, his claim for asylum would likely have be approved.[162]

The benefit of the doubt standard does not eliminate the requirement that applicants supplement their claims with reasonably available evidence.[163] Rather, it reduces the role that corroborative evidence ultimately plays in determining an asylum applicant's credibility in light of the inherent difficulties they face in gathering this type of evidence.[164] It thus correctly focuses the inquiry on the merits of an applicant's claim.[165] The standard ensures that applicants receive a full and fair hearing by removing what is often an unattainable and impractical burden on asylum applicants.[166]

The mandatory language used in the REAL ID Act—requiring that an applicant "must" provide evidence deemed reasonably available—puts improper emphasis on the role of corroborating evidence in asylum proceedings, frustrating the purpose behind the 1951 Refugee Convention and the 1967 Protocol.[167] Not only does it elevate the corroboration requirement far beyond what was originally intended, it also has severe practical effects for many refugees seeking asylum in the

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161. *See supra* notes 49–50 (describing the benefit of the doubt standard's presumption that uncorroborated testimony by refugee claimants can be enough to prove that they meet the refugee definition).

162. *See supra* notes 46–47 and accompanying text (noting that under the benefit of the doubt standard, an applicant is considered credible if their testimony is coherent and plausible and does not contradict generally known facts).

163. *See supra* notes 52–57 and accompanying text (explaining that the benefit of the doubt standard should only be utilized after a certain credibility threshold is met).

164. *See supra* note 46 and accompanying text (describing the necessity of giving asylum applicants the benefit of the doubt if the applicant appears credible and has made a genuine effort to substantiate his story).

165. *See supra* notes 44–47 and accompanying text (discussing the value of an asylum applicant's testimony and the vital role of credibility determinations).

166. *See supra* note 55 and accompanying text (explaining that an asylum applicant's testimony is often the core of the credibility determination given the struggles they face when trying to corroborate their claims).

167. *Compare supra* notes 94–96 and accompanying text (discussing the REAL ID Act and its corroboration requirements), *with supra* notes 65–66 and accompanying text (discussing the intent behind the enactment of the 1980 Refugee Act).

United States.[168] Many US asylum cases are dismissed for lack of corroborating evidence before an immigration judge even makes a determination on the merits.[169] This procedural roadblock precludes many applicants from gaining asylum from the start, and fails to take into account that it is often impossible, both logistically and financially, for applicants to provide corroborating evidence for every factual issue that could arise during an asylum hearing.[170]

B. *Giving Asylum Seekers the Benefit of the Doubt in the United Kingdom*

The asylum adjudication model used in the United Kingdom is more in line with the benefit of the doubt standard, and should serve as an example for the United States.[171] Though it does not require applicants to submit corroborating evidence, the system does include procedural safeguards to filter out fraudulent claims.[172] The absence of strict evidentiary requirements in asylum proceedings reflects a true understanding by the United Kingdom of the difficulties faced by individuals fleeing from real persecution.[173] This practice also succeeds in promoting the humanitarian principles at the heart of the 1951 Refugee Convention and 1967 Protocol.[174]

The UK stance on corroboration allows for flexibility within asylum proceedings by encouraging judges to take account of

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168. *See supra* notes 86, 101–04 (discussing the practical effects of the heightened corroboration requirements in the United States).

169. *See supra* note 104 (highlighting the increased need for applicant's to corroborate their claims in the wake of the REAL ID Act).

170. *See supra* notes 22, 31–36 (discussing the various difficulties faced by asylum applicants in gathering corroborating evidence to support their claims).

171. *See supra* notes 45, 57, 125–29 (discussing why, given the nature of an asylum seeker's plight, requiring corroborating evidence is unduly burdensome and out of sync of with international obligations).

172. *See supra* notes 130–36 (discussing the distinction between true asylum seekers and fraudulent claimants, and noting that the asylum adjudication system in the United Kingdom distinguishes applicants who have intentionally misstated facts from those whose errors are innocent).

173. *See supra* note 129 (noting that the circumstances surrounding a true refugee's journey make it difficult to corroborate a claim with documentary evidence).

174. *See supra* notes 43–49 and accompanying text (discussing the unique challenges facing refugees, and noting that they should be evaluated under a liberal credibility standard which affords applicants the benefit of the doubt when they are unable to meet evidentiary burdens).

each alien's particular circumstances when evaluating claims.[175] Implicit in this is the recognition that a true refugee may not have the ability to substantiate his claim with more than his word.[176] Perhaps even more importantly, it specifically addresses the harrowing result that imposition of a mandatory corroboration requirement may have: deportation of many individuals whose lives are genuinely in danger.[177] Recognizing the disastrous and often permanent danger that exile will cause, a lack of corroboration by itself can never be the basis for denying an asylum claim in the United Kingdom.[178] This approach strikes the proper balance between weeding out meritless claims and providing legitimate victims of persecution with appropriate sanctuary.[179]

CONCLUSION

The United States should reevaluate its stance on the need for corroborating evidence and provide asylum applicants with the benefit of the doubt when evidentiary burdens cannot be met. The benefit of the doubt standard properly addresses the substantial evidentiary challenges inherent in asylum cases and offers some assurance that refugee protection will not be denied to those legitimately fleeing persecution based on an unduly burdensome procedural hurdle. In doing so, the United States will more closely align itself with the humanitarian principles at the core of asylum law.

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175. *See supra* notes 114–16, 120–29 and accompanying text (describing the process of evaluating an asylum claim in the United Kingdom).

176. *See supra* notes 29–36 and accompanying text (discussing the inherent challenges refugees face in corroborating their testimony).

177. *See supra* notes 31 and accompanying text (discussing the difficulty of evaluating asylum testimony and the related consequences).

178. *See supra* note 125 and accompanying text (discussing the absence of a strict corroboration requirement in the United Kingdom).

179. *See supra* notes 29–36 (discussing the evidentiary challenges asylum applicants face). *Compare supra* notes 101–02, 104 (noting the chilling effect heightened corroboration requirements in the United States have on asylum applicants), *with supra* note 125 (describing the role corroboration plays in asylum proceedings in the United Kingdom).