1-1-2014

The REAL ID Act: Proposed Amendments for Credibility Determinations

Linda Lam
The REAL ID Act: Proposed Amendments for Credibility Determinations

LINDA LAM*

Introduction

Over the past century in the United States and abroad, the word “refugee” has accumulated a variety of meanings. To some, a refugee may simply be someone who comes to the US seeking a better life. To others, a refugee is someone who specifically escapes a war-torn country, coming to the US in hopes of simply surviving. A significant portion of the population may consider the word “refugee” to be a form of self-identity, for it defines why they no longer reside in their home country. Whatever one’s personal definition of “refugee” may be, most would agree that US refugee and asylum law have played a pivotal role in forming American society over the past half century.

The United Nations Convention relating to the Status of Refugees, entered into force in 1951, endorsed a single definition of “refugee.”1 According to the Convention, a refugee is “someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.”2 The Convention incorporated temporal and geographic restrictions on refugee status, which were removed by the Protocol Relating to the Status of Refugees when it was entered into force in 1967.3 The Refugee Act of 1980 adopted this

---

* Linda Lam is a J.D. Candidate at the University of California, Hastings College of the Law, 2014. I am eternally grateful to my family and to all the incredible people I met at Hastings. A special thanks to Professor Karen Musalo, who offered me guidance and support on this note. Thank you to the Hastings Race and Poverty Law Journal staff, who all contribute to the journal’s cause because they believe in it. And to my grandparents, Vietnamese refugees who inspire me to never stop pushing forward.

2. Refugee Convention, supra note 1.
international legal definition into U.S. law. In passing this act, Congress created the first statutory refugee and asylum procedures in the US that sought to end the previous ad hoc treatment of refugee and asylum applications. Congress intended to bring US refugee law into conformity with the 1967 United Nations Protocol Relating to the Status of Refugees, to which the US assented in 1968.

Since the passage of the Refugee Act, American refugee and asylum law has continued to evolve, both through the courts and through legislation. Although “asylum status” and “refugee status” are phrases commonly used interchangeably, a critical distinction between them is the physical location of the individual when applying for protection from persecution. This distinction indicates two procedural routes through which one may apply for protection. In reaction to the events of September 11, 2001, Congress enacted the REAL ID Act of 2005 (“the Act”) as part of a series of statutes designed to aid in fighting terrorism. Among other things, the Act amended the Immigration and Nationality Act (“INA”) in several respects, including a change to the standard for rendering credibility determinations in administrative proceedings and the federal courts of appeals. These amendments expanded the bases immigration judges may rely on in discounting the veracity of an asylum applicant’s claim. Given the need to comply with the international obligation to ensure safety and protection to those legitimately fleeing persecution, as articulated in the 1967 United Nations Protocol Relating to the Status of Refugees, it is no surprise that the Act’s amendments to the INA have been viewed with much scholarly criticism.

This note will address various issues inherent to the REAL ID Act and will analyze how to best resolve those issues. Due to the many challenges that asylum seekers face in telling their stories, the Act should be amended

5. Id.
8. Those seeking asylum may apply under Section 208 of the INA, while those seeking refugee protection may apply under Section 207 of the INA. Each section specifies its different requirements and standards that applicants must meet.
11. Id.
13. Id.
so that a trier of fact may not consider immaterial inconsistencies as part of
the "totality of the circumstances" test in making a credibility
determination. Further, a trier of fact should be permitted to request
corroboration only when an applicant is deemed insufficiently credible, and
the corroboration pertains to facts central to the claim. Part I will provide a
general overview of US asylum law and will discuss the integral role of
corroboration and credibility in asylum adjudication. Part II will discuss
the difficulties facing asylum seekers in adequately presenting their cases in
administrative proceedings. Part III will describe the Act and its effects on
US asylum law. Finally, Part IV will offer amendments to the Act to
address the negative impact it has had on legitimate asylum seekers.

I. Role of Credibility and Corroboration in Asylum
Proceedings

Asylum is discretionary relief available to any undocumented person
who is physically present in the US or who arrives at a US port of entry and
qualifies as a "refugee" under the INA. An undocumented person who is
in the United States and not in the midst of removal proceedings may file an
affirmative application for asylum once he is in the US or at the US border.
Alternatively, an application for asylum can be made "defensively" in the context of a removal proceeding. The INA defines a
refugee as any person who is unable or unwilling to return to any country of
such person’s nationality (or any country in which such person last
habitually resided, in the case of such person having no nationality) “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." To qualify as a refugee, an individual can demonstrate
that he has suffered past persecution, creating a presumption of a well-
founded fear of future persecution. This presumption can be rebutted,
however, if the government can prove changed circumstances in the
individual’s country of origin, in the individual himself, or any other
circumstances which would render the person no longer at risk of
persecution. Alternatively, the government may also show that internal
relocation would allow the individual to escape persecution. An individual

14. Cardoza-Fonseca, 480 U.S. at 428 (emphasizing the discretionary nature of asylum); 8
18. 8 C.F.R. § 1208.13(b)(1); Capric v. Ashcroft, 355 F.3d 1075, 1084–85 (7th Cir. 2004).
19. 8 C.F.R. § 1208.13(b)(1).
20. Id.
can establish a well-founded fear of future persecution in cases where there has been past persecution, or where there is objectively reasonable evidence that the person would be at risk upon return.21

Any individual seeking asylum must not only prove past persecution or a well-founded fear of future persecution; he must also show that such harm was "on account of" one of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.22 This is frequently referred to as the "nexus" requirement.23 In addition to meeting the nexus requirement, an asylum seeker must also show that the alleged harm is being inflicted by the government, or alternatively, that the government is unwilling or unable to protect from such harm.24 If an individual proves all of these elements, asylum protection may be granted at the Attorney General's discretion.25

An applicant for asylum has the burden of proof in establishing that he qualifies as a refugee under section 101(a)(42) of the Act.26 A credibility assessment, which may be made by an adjudicator in each case, is a determination of whether an asylum seeker's testimony should be accepted as evidence in determining whether he has met the burden of proof to show that he is a refugee.27 Thus, credibility plays an extremely important role in immigration proceedings. In fact, the credibility assessment is often the single most important step in determining whether an individual will be returned to his home country.28 The testimony of an applicant, by itself, may be sufficient to sustain the burden of proof if it is deemed credible.29 Immigration judges must evaluate each applicant's credibility because direct verification of an alien's testimony is typically very difficult and often impossible.30 Many victims of the most severe human rights violations are not likely to be able to obtain specific evidence to support their claim.31

In making a credibility determination, an immigration judge ("IJ") just assess the internal consistency, details, and plausibility of an applicant's claim.32 An adverse credibility determination can be based on a wide array

23. BOSWELL, supra note 7.
28. Id.
29. Id.
30. Capric, 355 F.3d at 1085.
32. Capric, 355 F.3d at 1085.
of factors, including hesitant and evasive demeanor, the absence of corroborating evidence that the IJ found was reasonably available, and discrepancies between testimony and other evidence. The Board of Immigration Appeals ("BIA") and federal courts of appeals generally afford significant deference to an IJ's credibility determinations, since the IJ in each case has a unique opportunity to "subjectively and intuitively" evaluate the applicant's demeanor in person. This deference places great importance on an IJ's evaluation of an applicant's credibility.

If the IJ finds the applicant's testimony to be incredible, then the applicant must provide corroborating evidence to support his claim. Under the Act, an IJ can also request corroborating evidence even when he finds the applicant to be sufficiently credible. Thus, without credible testimony or corroboration, an asylum seeker will not be able to meet his burden of proof and his claim will be denied. Negative credibility assessments are a leading reason for denial of asylum claims in most refugee status determination systems.

II. Difficulties Facing Asylum Seekers

While the United Nations High Commissioner for Refugees ("UNHCR") recognizes that each nation must develop its own law and procedures, the UNHCR has always encouraged "a generous asylum policy in the spirit of the Universal Declaration of Human Rights and the Declaration on Territorial Asylum." The 1951 Refugee Convention was designed in large part to promote "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination." Since genuine victims of human rights violations are unlikely to have access to extensive evidence of the harm they have suffered, the burden of proof placed on asylum seekers must take into consideration the innumerable barriers they face. This is necessary in order to satisfy the Convention's purpose in allowing human beings to enjoy fundamental rights and freedoms. This is a "protection-oriented" approach that allows legitimate

34. Id. (citing Tu Lin v. Gonzalez, 446 F.3d 395, 400 (2nd Cir. 2006).
35. Capric, 355 F3d at 1086.
37. Id.
40. Protocol, supra note 1, at Preamble.
asylum seekers to gain protection without having to meet a difficult, and
sometimes impossible, burden of proof. While some may condemn this
rule as setting a low standard of proof for applicants to meet, such approach
is simply taking the sensitive and difficult nature of asylum adjudication
into account.

This protective concept is further embodied by the “benefit of the
doubt” rule. The benefit of the doubt rule serves an important function in
asylum proceedings, given the tremendous difficulties that many applicants
face in presenting their cases to an adjudicator. Furthermore, credibility
determinations in asylum hearings can be arduous to make, due to factors
such as “differences in cultural norms, the effect of an asylum seeker’s past
traumatic experiences and flight on her ability to recall events, language
barriers, the adversarial nature of the hearing, the asylum seeker’s limited
access to legal counsel, and the adjudicator’s sometimes inaccurate
perceptions of foreign culture and politics.”

A protection-oriented approach would take into account the trials and
tribulations that victims of persecution face. Circumstances among asylum
seekers greatly vary, so the meaning of “persecution” has been one of many
topics of debate among scholars. To present day, there is no universally
accepted definition of persecution. In INS v. Stevic, the Supreme Court
stated that “persecution” for purposes of refugee law is considered to be “a
seemingly broader concept than threats to life or freedom.” Although the
Handbook on Procedures and Criteria for Determining Refugee Status
(“UN Handbook”) is not binding on US courts, it is considered “significant
notes that a threat to life or freedom on account of one of the five grounds
recognized by the INA always amounts to persecution. While physical
torture and harm usually constitute persecution, actions that do not result in
actual physical harm may also constitute persecution. In Begzatowski v.
INS, the Seventh Circuit noted that to sustain an asylum application, the
harm suffered must amount to more than mere harassment.

43. Id.
44. Under case law, the definition of “persecution” has come to include “acts as severe as
imprisonment and torture as well as less harmful acts such as confiscation of property.” Christian
A. Fundo, Book Note, Toward A More Individualized Assessment of Changed Country Conditions
45. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 153 (1999).
46. UN Handbook, supra note 39, at ¶ 61.
48. Id. at 439.
49. UN Handbook, supra note 39, at ¶ 51.
50. Id. at ¶ 31.3.
51. Begzatowski v. I.N.S., 278 F.3d 665, 669 (7th Cir. 2002).
listed types of actions that might constitute persecution, including illegal searches, confiscation of property, surveillance, beatings and torture. The Ninth Circuit has found past persecution where the asylum applicant has received persistent threats to his life, property and business. Whether a harm amounts to persecution is typically decided on a case-by-case basis, taking into account all the facts with an understanding that “due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.”

Many asylum applicants escape from their home countries under circumstances of great urgency. As the Seventh Circuit put it in Dawoud v. Gonzalez, “[s]ome are literally running for their lives . . . . They often have nothing but the shirts on their backs when they arrive in this country.” There, Ehab Dawoud, a member of an orthodox sect of Christianity in Egypt, was targeted by the terrorist group al-Gama'a al-Islamiyya after a video of Dawoud’s wedding was shown in public. Three members of the terrorist group came to Dawoud’s home and took him to a building outside of his city, where he was kept chained and underfed for ten days. On a separate occasion, the National Police of Egypt took Dawoud to a police building and placed him in solitary confinement. For three days there, the officers would run water underneath Dawoud before dropping an electrical device into the water to shock him. When he was finally released, Dawoud and his wife immediately fled for the United States.

After hearing Dawoud’s testimony, the IJ denied his application for asylum, noting that Dawoud was not credible and had failed to corroborate his story with affidavits from relatives. On appeal, the BIA agreed with the IJ that Dawoud’s failure to provide corroborating evidence disfavored him, noting that Dawoud did not submit a translated copy of a handwritten medical note, among other things. Dawoud’s story is a prime example of the types of circumstances that asylum applicants have undergone before arriving in the U.S. In reiterating the rule that credible testimony alone may

52. Begzatowski, 278 F.3d at 669.
53. Singh v. INS, 94 F.3d 1353, 1360 (9th Cir. 1996).
54. UN Handbook, supra note 39, at ¶ 52.
56. Id. at 613.
57. Id. at 609.
58. Id.
59. Id.
60. Id.
61. Id. at 610.
62. Id.
63. Id.
be enough to satisfy an applicant’s burden of proof, the Seventh Circuit in Dawoud stated that, “[t]o expect these individuals to stop and collect dossiers of paperwork before fleeing is both unrealistic and strikingly insensitive to the harrowing conditions they face.” Because the asylum provisions of the Act only apply to new applications filed on or after May 11, 2005 and Dawoud’s case was filed before this date, the Act did not apply to him. Thus, the Seventh Circuit was able to decide Dawoud’s case based on his credible testimony alone—without corroborating evidence.

Notwithstanding the impracticability of having access to corroborating evidence, asylum seekers face a wide range of other difficulties in presenting their claims before an adjudicator. One of these difficulties involves the differences in cross-cultural communication. Studies have shown that observers are typically unsuccessful in sensing deception from relative strangers. Immigration judges and asylum officers are no exception. This notion, coupled with the fact that certain behaviors are indicative of falsity and disrespect in some cultures and not others, indicates a strong possibility of asylum seekers being discredited for illegitimate reasons. For instance, failure to maintain eye contact is considered a sign of deception in Western cultures; in reality, the social significance of eye contact varies from culture to culture. Additionally, an applicant may have been taught in her home country to “volunteer nothing to people in uniforms.” This belief may inhibit an asylum seeker from giving truthful information to a border or customs agent, raising an issue of inconsistent statements if the applicant later tells a different story to an asylum officer. An even larger issue may exist where an applicant may not want to reveal information due to a fear of reprisal from his persecutor at home, or a fear that the applicant’s family members who are still residing in his home country would be put at risk. This reluctance may be the cause of various missing parts in an applicant’s testimony, casting doubt on the credibility of a claim.

In many refugees’ home countries, speaking against the government is not only frowned upon, but would subject one to jail and torture. During

64. Dawoud, 424 F.3d at 613.
65. Id.
67. Id. at 14.
68. Id.
69. Id.
70. Id.
an asylum proceeding, this is precisely what a refugee must do if he has been persecuted by his own government. This cultural barrier can be particularly difficult to overcome, particularly where the individual has experienced first-hand torture for actions taken in opposition to his home country’s government. What is more, any hearing, whether “nonadversarial as before the asylum officer (“AO”) or adversarial before an IJ, creates stress which fosters behavior that is likely to be interpreted as deceptive.72

These instances are only a small sample of the numerous differences in communication norms that exist among cultures. In addition to facing cross-cultural dissimilarities that may be extremely harmful to their claims, asylum seekers have the heavy burden of telling a consistent story to the adjudicator.73 Internal consistency is one of the primary factors contributing to an IJ’s credibility assessment.74 This often poses an uphill battle because “memories of trauma survivors have proven to resist verbal linear storytelling.”75 Memories of trauma in human beings are usually fragmentary and lack context.76 Some scholars have even questioned whether such physical and emotional pain caused by persecution is expressible at all, suggesting that words could not possibly convey such tragic experiences.77 Physical violence and intense feelings of danger or threat may force a victim to concentrate solely on the immediate situation and ignore hunger, pain, or exhaustion.78 In the midst of horrific detention or torture, victims who are simply trying to survive are unlikely to be wholly cognizant of their surroundings—assuming that they even know where they are. Traumatic events tend to produce profound psychological effects on human beings. A traumatized person may remember every detail of the event without emotion, or may have intense emotions relating to the event without clear memory of it.79 Torture can also manifest itself in subtle physiological ways, including a loss of hearing or inattentiveness.80 Moreover, an asylum applicant may seem generally uncomfortable in his seat while telling his story, for the mere human reason of having to relive a devastating event. An adjudicator may misunderstand such behavior to be an indicator of dishonesty or fabrication of lies. It may be unrealistic and callous to expect a victim of relatively recent torture to relay his story in a completely articulate and sensible manner.

72. Lost in Translation, supra note 71, at 155.
74. Id.
75. Durst, supra note 71, at 150.
76. Id. at 149.
77. Id. at 150.
78. Id.
79. Id.
80. Id.
Psychological barriers can even further inhibit an applicant from prevailing on her claim when they are combined with cultural misunderstandings. For instance, an asylum seeker may seem suspiciously indifferent when telling her story, casting a shadow of doubt on her own credibility. For example, it is common for a woman suffering from Post-Traumatic Stress Disorder and Major Depressive Disorder to appear withdrawn and detached. This is frequently referred to as the "flat effect." From a Western perspective, this lack of emotion may signify that the applicant is not telling the truth, because the story being told is one that is normally expected to cause a serious emotional reaction. Therefore, it is often the case that the torture that the applicant is attempting to prove created the very obstacle that prevents him from proving it.

Unfortunately, adjudicators rely on these very characteristics (resulting from experiencing traumatic events) in finding a lack of credibility in asylum applicants. In *Mwembie v. Gonzalez*, the Fifth Circuit condemned an IJ’s "incorrect and irrational assumptions about human behavior and especially the behavior of people from foreign cultures, such as her assumptions about a victim’s ability to remember phone numbers, about all aliens’ behavior in saying good-bye to their families before fleeing, or about the ‘incomprehensible’ brutality of the persecutors." Any conclusions about an applicant’s credibility based on these factors would be both insensitive and nonsensical. Not only may an IJ misinterpret various behaviors from an applicant to signify dishonesty, applicants also frequently misunderstand IJs. An asylum proceeding often requires the help of an interpreter due to a language barrier between the applicant and the adjudicator. Cultural relativity of notions and concepts may distort communication, even with an accurate interpreter. Asylum seekers are likely to misunderstand, due to a disconnect in cultural norms or lack of effective interpretation, questions or requests that an IJ asks of them. In turn, this would cause an IJ to misconstrue the applicant as one who is trying to dodge a question or is unable to provide basic information about his case.

In seeking asylum, applicants are already in a vulnerable state. Such vulnerability is sometimes exacerbated by the intimidating experience of being before an immigration judge in a process that could result in their

---

82. Id.
83. Id. at 654.
84. Durst, *supra* note 71, at 149.
85. 443 F.3d 405, 413 (5th Cir. 2006).
removal from the U.S. and return to their home country. These circumstances make it particularly difficult for applicants to appear credible. IJs can contribute to the applicant's intimidation by asking aggressive questions. For instance, in *Fiadjo v. Attorney General*, Ms. Fiadjo was seeking asylum in the U.S. after escaping religious slavery in West Africa.\(^8^7\) The IJ questioned Ms. Fiadjo in an abusive tone about details regarding sexual abuse by her father when she was seven years old.\(^8^8\) The IJ spoke in an aggressive manner, drilling Ms. Fiadjo about extremely minor details of her claim that her father forced her into religious and sexual slavery.\(^8^9\) The IJ ultimately found her to be incredible, with the BIA affirming the IJ's decision.\(^9^0\) On review, the Third Circuit found that an adverse credibility assessment based on a hearing conducted under these circumstances "could not survive review."\(^9^1\) Noting that Ms. Fiadjo was experiencing Post Traumatic Stress Disorder and postpartum depression, the court of appeals went on to state that, "[i]f not by design, in effect, [the IJ] produced the very atmosphere that... would cause memory loss, blocking, dissociating and breakdown."\(^9^2\) The Third Circuit remanded the case so that it could be heard by a different IJ.\(^9^3\)

Although most asylum hearings do not present an atmosphere that is nearly as egregious as the one in Ms. Fiadjo's case, individuals in immigration proceedings tend to feel understandably intimidated. Being forced to tell one's personal traumatic story in front of foreign authorities can be a particularly difficult task. The stakes are extremely high in every asylum proceeding, adding increased pressure to a situation that is already stressful. This predicament, when considered along with the numerous other factors that make asylum hearings challenging for applicants, provides one explanation as to why applicants face considerable adversity in seeming credible in front of an IJ.

89. *Fiadjo*, 411 F.3d at 142.
90. Id. at 145, 149.
92. Id. at 154.
III. The REAL ID Act

a. Credibility

Congress passed the REAL ID Act in 2005, amending the INA in several ways.94 One of the primary purposes of the Act was to eliminate fraudulent asylum claims and thereby prevent terrorists from using asylum as a means of access to the U.S.95 For the first time in US history, the Act set into law uniform credibility guidelines to be applied in asylum cases.96 While there were clear criteria in case law for credibility prior to the Act, adjudicators operated without statutory credibility guidelines.97 The Act contains a credibility provision that changed the manner by which credibility determinations are rendered in administrative proceedings and how they are reviewed by federal appellate courts.98 The provision states, in part:

[A] trier of fact may base a credibility determination on the demeanor, candor or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions, and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.99

Before passage of the Act, most IJs and federal circuit court judges only upheld adverse credibility determinations based on "issues that [went] to the heart of the applicant's claim and not on irrelevant inconsistencies or inconsistencies that could not be viewed as attempts by the applicant to enhance his claims of persecution."100 There were no standards set by statute for how adjudicators were to determine an applicant's credibility—factors to be considered simply came from the BIA and federal case law.101 The provision in the Act includes all of the factors previously relied upon

---

96. Id. at 213.
97. Id.
98. Forman, supra note 88.
99. Id.
100. Barton, supra note 95, at 218.
101. Id.
by IJs, but organizes these factors under a totality of the circumstances test. Under the Act, adjudicators are to consider the totality of the circumstances in making and reviewing credibility determinations. This language gives more discretion to adjudicators in determining the credibility of asylum applicants. In her article, In Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise, Marisa Silenzi Cianciarulo expresses caution that the "careless" drafting of certain asylum provisions in the Act could lead to unnecessarily stringent interpretations that would deny protection to those who are eligible for it. Cianciarulo explains that because the Act codified much existing case law regarding asylum proceedings, it should not cause a major change in asylum adjudications or how they are reviewed.

Although the credibility provision of the Act may seem to vary little from the pre-2005 common law guidelines followed by IJs and federal courts, there is a striking difference between the two standards. Specifically, the Act allows for any inaccuracies in an applicant’s account to be taken into consideration in the credibility determination, “without regard to whether the inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim.” Prior to the Act, inconsistencies that did not enhance an applicant’s claim had “little to no bearing on an applicant’s credibility.” That is, only inconsistencies central to a claim could be considered in an adverse credibility finding. In most federal circuits prior to 2005, if an inconsistency did not go to the heart of a claim, it was insufficient to support an adverse credibility finding.

b. Corroboration

In addition to its credibility provision, the Act also contains a corroborating evidence provision that deviates from pre-2005 common law. This section, titled “Sustaining burden,” states, in relevant part:

The testimony of an 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

102. Id. at 220.
103. Id.
107. Barton, supra note 95, at 220.
evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.\textsuperscript{108}

Before the Act, there was no definitive standard for determining whether and when corroborating evidence was required to support an applicant’s testimony.\textsuperscript{109} Still, the BIA and all circuit courts agreed that while the failure to provide corroboration might affect an applicant’s credibility, a lack of corroboration alone could not justify an adverse ruling.\textsuperscript{110} Although BIA and circuit courts all agreed that credible testimony alone could, in some cases, suffice to sustain an applicant’s burden of proof, there was disagreement as to when personal testimony alone satisfied the burden of proof, and when an adjudicator could appropriately ask for corroboration.

In establishing new corroboration requirements under the Act, Congress solidified the common law notion that under some circumstances, credible testimony without corroboration will be sufficient to successfully present a claim.\textsuperscript{111} Although the law still provides that credibility can be established by testimony alone, recent case law has suggested that few applicants are able to do this.\textsuperscript{112} The provision goes on to mandate that an applicant “must” provide evidence deemed reasonably available by the adjudicator.\textsuperscript{113} If an applicant fails to produce this evidence, he can only prevail if he can show that corroboration is not available to him, and that he cannot reasonably obtain it.\textsuperscript{114} The Act thus gives heightened emphasis on corroboration, as opposed to former case law urging adjudicators to consider as just one factor whether all available evidence has been presented.\textsuperscript{115} This shift adds to an already heavy burden that asylum applicants must bear.

The Act’s corroboration requirements add two necessary factual determinations for the adjudicator: whether corroborating evidence exists and whether corroborating evidence is reasonably available.\textsuperscript{116} This inquiry requires additional expertise on the part of the adjudicator regarding conditions of applicants’ countries of origin, yet illogically does not provide

\begin{flushleft}
\textsuperscript{110} Barton, \textit{supra} note 95, at 222.
\textsuperscript{111} \textit{Id.} at 220.
\textsuperscript{113} Barton, \textit{supra} note 95, at 224.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\end{flushleft}
for expanded training, additional financial or educational resources, or time for decision-making.\textsuperscript{117}

\section*{III. Proposed Amendments to the REAL ID Act}

The heightened burden that asylum applicants must now meet to prevail on their claims have made things more difficult for legitimate asylum seekers. While nearly all laws must advance some purpose at the expense of others, a law must be reconsidered when it poses significant potential harm to thousands of people seeking refuge from persecution. The amendments to the INA implemented by the Act may prevent legitimate victims of persecution from seeking refuge more than it has decreased the number of prevailing fraudulent asylum claims. Although this claim is speculative and its truth would be impossible to ascertain, it is not unrealistic.

In allowing adverse credibility findings based on inconsistencies that do not go to the heart of an applicant’s claim, the Act gives adjudicators overly broad discretion. While Congress has articulated that credibility findings must be reasonable and rational, the Act’s amendments allow for unreasonable decisions. An adverse credibility finding relying on minor inconsistencies that do not go to the heart of the applicant’s claim is, by its very nature, unreasonable. \textit{Jibril v. Gonzalez} is a prime example of an unreasonable credibility determination based on minor inconsistencies.\textsuperscript{118} Jibril was a member of a minority clan in Somalia.\textsuperscript{119} An IJ found that his testimony was not credible due to an inconsistency between his statement that he was pretending to be dead when members of a militia raided his house, and his statement that he was able to see the types of weapons the soldiers were carrying.\textsuperscript{120} The IJ also noted that Jibril testified at one point that his father only said he would take the family to Kenya but not to any place in particular, yet at a later point Jibril said that his father did indicate that he was taking the family to Nairobi.\textsuperscript{121} The Ninth Circuit, in analyzing the record, noted that Jibril’s testimony was not inconsistent and merely misunderstood, or at most, it was inconsistent with regard to trivial facts that did not go to the heart of his asylum claim.\textsuperscript{122} The appellate court ultimately concluded that these inconsistencies could not support an IJ’s adverse credibility determination.\textsuperscript{123}

\begin{thebibliography}{99}
\footnotesize
\bibitem{117} Conroy, \textit{supra} note 112, at 26.
\bibitem{118} 423 F.3d 1129, 1136 (9th Cir. 2005).
\bibitem{119} Id.
\bibitem{120} Id.
\bibitem{121} Id. at 1134.
\bibitem{122} Id.
\bibitem{123} Id. at 1134–35.
\end{thebibliography}
Similarly, in *Ai Yu Li v. Gonzalez*, an IJ found that Li's testimony lacked credibility based on minor inconsistencies. Specifically, the IJ cited several discrepancies in Li's testimony: whether her abortion procedure lasted thirty minutes or forty to fifty minutes, whether she had provided a urine sample to a doctor, whether she had been fined after the birth of her second child, and whether her husband's parents had been arrested. In stating that there was no substantial evidence in the record to support an IJ's finding that Li's testimony lacked credibility, the Second Circuit stated that because these inconsistencies were relatively minor and isolated, they should not have been fatal to Li's claim.

Asylum applicants are unlikely to remember every excruciating detail of their stories. In fact, it may be the case that those who have suffered from the most egregious harm are the ones who will have the most trouble remembering what exactly happened to them. Many of those who have experienced torture or other forms of persecution suffer from Post Traumatic Stress Disorder as well as other mental ailments that further inhibit detailed recollection of past events. Some applicants are only able to properly tell their story after obtaining legal and psychiatric assistance. The difficulties facing asylum seekers described in Part II are only the tip of the iceberg when it comes to the challenges that applicants must face.

Due to the often insurmountable challenges behind seeking asylum in the US and the strong likelihood that survivors of persecution will not be able to recall every detail of their stories, the Act should be amended so that a trier of fact may not base a credibility determination on any inaccuracies or falsehoods without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim. *Jibril* and *Ai Yu Li* illustrate how the Act as it stands may allow an IJ to make an unreasonable and inaccurate credibility determination. Furthermore, a trier of fact should only be able to require corroboration when the applicant is not deemed sufficiently credible, and when the corroboration pertains to facts central to the applicant's claim. Such amendments would take into consideration the harsh psychological barriers and cultural misunderstandings that asylum seekers inherently face.

Under the Act as it stands, IJs are given far more discretion than necessary in adjudicating claims. Although most are thoughtful and skilled in making credibility determinations, IJs have gained a reputation over the past few years for careless and "insensitive adjudication." This fact,

---

125. *Id.* at 101.
126. *Id.*
128. *Id.* at 640.
coupled with federal appellate courts’ increasing deference to IJs’ credibility findings, render the Act to be a fatal barrier to some asylum seekers. Amending the Act would create a systemic change that gives IJs more guidance in adjudicating claims. The amendments would promote greater consistency in claim adjudication across immigration courts and asylum offices across the U.S., giving each applicant an equal opportunity to prevail regardless of the state or region in which he is located.

The Act, even with the proposed Amendments, would still advance the interests of Congress in increasing national security and reducing the number of fraudulent asylum applications. An adjudicator would still be permitted to take into consideration inconsistencies of an applicant’s story under the “totality of the circumstances” test, so long as he did not base his overall credibility determination on any inconsistencies that did not go to the heart of the claim. By the same token, an adjudicator would still be permitted to ask for corroboration, so long as personal testimony alone is not sufficient and the corroboration pertains to facts central to the applicant’s claim.

In addition to these changes within the Act, training for asylum officers and IJs on psychological and cultural barriers that commonly apply to asylum applicants would allow them to more accurately determine an applicant’s credibility. Although every new asylum officer must complete a five-week basic training course and every regional office conducts four hours of training per week for all its officers on new legal issues, country conditions, and procedures, changes in training would be beneficial to both the system and those who must navigate it. Asylum officers should receive specific training on psychological issues that arise from experiencing trauma. Asylum officers and IJs should also be given more time to make decisions, if need be. Cases of such far-reaching repercussions should never be rushed. Adjudicators would be able to more efficiently assess claims if they had the tools to understand the applicant’s background and state of mind. Training on proper interview techniques and on how to ensure a safe environment for an applicant would also improve truth-seeking. The UN Handbook advises that in order for an adjudicator to exercise his duties properly, he must earn the applicant’s trust and confidence.

129. Melloy, supra note 81, at 641.
131. UN Handbook, supra note 39, at ¶ 52.
Conclusion

The US is not alone in facing the inherent difficulties of making credibility determinations of asylum seekers.\textsuperscript{132} The international legal community faces the same issues when adjudicating refugee claims.\textsuperscript{133} However, the UN Handbook encourages giving refugees the "benefit of the doubt" due to the great difficulty of producing corroborative evidence.\textsuperscript{134} The notion of a "benefit of the doubt" is protection-oriented and sensitive to the struggle resulting from persecution.

In passing the Act, Congress advanced the legitimate goal of carefully screening any noncitizen who is seeking to establish residency in the US. However, such a goal must take into account the ever-standing obligation of making domestic law consistent with the 1967 United Nations Protocol Relating to the Status of Refugees, which obligated countries to protect refugees on their territory.\textsuperscript{135} Amending the Act so that adjudicators may not rely on immaterial consistencies in making adverse credibility determinations would still advance truth seeking and protection from fraudulent asylum claims, while giving adjudicators less room to make unsupported decisions. Allowing IJs to require corroboration only where the applicant is not deemed sufficiently credible, as well as when the corroboration pertains to facts central to the applicant's claim and is reasonably available would also promote fewer unsupported decisions by adjudicators. These amendments, in addition to overall increased recognition of the cultural, psychological, and practical barriers that applicants must face, would take into consideration the harsh effects of persecution, while still safeguarding national security.

\textsuperscript{132} Nicole S. Thompson, \textit{Due Process Problems Caused by Large Disparities in Grants of Asylum: Will New Department of Justice Recommendations Solve the Problem?}, 22 EMORY INT'L L. REV. 385, 403 (2008).
\textsuperscript{133} \textit{Due Process Problems}, supra note 132.
\textsuperscript{134} UN Handbook, \textit{supra} note 39.
\textsuperscript{135} Protocol, \textit{supra} note 1.