DE-MYSTIFYING ASYLUM ADJUDICATION

Judicial Perspectives on Law and Experience in German Administrative Courts

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A Note to the Reader

Original quotes are in German, all translations are my own.

Wenn ich „Heimweh“ sage, sag ich „Traum“.
Denn die alte Heimat gibt es kaum.
Wenn ich Heimweh sage, mein ich viel:
Was uns lange drückte im Exil.
Fremde sind wir nun im Heimatort.
Nur das „Weh“, es blieb.
Das „Heim“ ist fort.

(Mascha Kaleko in „Mein Lied geht weiter“, posthum)

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Abstract

De-Mystifying Asylum Adjudication - Judicial Perspectives on Law and Experience in German Administrative Courts

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Refugee status determination is often described as one of the most complex adjudication functions in industrialised democracies. Such statements are driven by the legal and factual complexities of asylum adjudication. As a result, refugee law and status determination are seen as different to other legal areas and described as particularly ambiguous and discretion-heavy. At the same time those legal professionals who make asylum decisions every day - like judges - lack attention. This study therefore interrogates how judges in German administrative courts make asylum decisions and how they deal with uncertainty, investigating asylum adjudication from the perspective of the judge.

This research is based on extensive fieldwork at two different administrative courts in Germany, including courtroom observations, case and file material and semi-structured interviews with judges. It argues that judges use different strategies and techniques, referring both to law and experience to make sense and solve a case reaching a rationally justifiable decision. Thereby it promotes a holistic idea of decision-making or 'judgecraft' in which elements like professional experience and intuition become active parts of the reasoning and decision-making process, questioning the binaries of reason and emotion, rules and discretion that underpin much of the decision-making literature. This thesis further argues that a crucial part of judges' experience is formed by those cases a judge decided in the past, the dialogue, discourse and exchange between colleagues and his or her chamber, as well as the use and acceptance of intuition as a technique, such as letting time pass and writing. By revealing how these strategies interlock in the daily decision-making practices of judges, this thesis' findings challenge the assumption that asylum decisions are arbitrary, subjective or akin to a 'lottery'. Instead, this research nuances these debates by showing how legal norms and professional methods come together, and how judges employ intuition, experience and emotions pro-actively as part of a decision-making strategy underpinned by the rationalizable confines of procedure and principle.

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Table of Abbreviations

AA	Auswärtiges Amt (*German Foreign Office*)
Abs.	Absatz (*Section*)
AufenthG	Aufenthaltsgesetz (*German Immigration Law*)
AsylG	Asylgesetz (*German Asylum Law*)
BAMF	Bundesamt für Migration und Flüchtlinge (*Federal Office for Migration and Refugees, here forth called 'Home Office'*)
BayVGH	Bayrischer Verwaltungsgerichtshof *(Bavarian Higher Administrative Court)*
BMI	Bundesinnenministerium (*Federal Ministry of the Interior*)
BVerwG	Bundesverwaltungsgericht (*Highest Administrative Court*)
EASO	European Asylum Support Office
FRG	Federal Republic of Germany
GG	Grundgesetz (*German Basic Law*)
IOM	International Organisation for Migration
RN	Randnummer (*Section Number*)
UNAMA	United Nations Assistance Mission to Afghanistan
UNHCR	United Nations High Commissioner for Refugees
OVG	Oberverwaltungsgericht (*Higher Administrative Court*)
VG	Verwaltungsgericht (*Administrative Court*)
VwGO	Verwaltungsgerichtsordnung (*Administrative Court Order*)

CHAPTER I - INTRODUCTION

"Justice is a human construction, and it is doubtful that it can be made in only one way".[1]

When we talk about migration, the idea of the border together with the notion of the sovereign state and its control are omnipresent. Those in favour of tighter regimes want to "take back control"[2] over state and borders, whereas others dream of a world of none. In the midst of this divided discussion are both the individuals crossing state lines and those administering them. However, as the so-called 'refugee crisis' in the summer of 2015 has shown, borders are no longer the only structure that defines migration. Instead, many crucial elements of 'border-crossing' happen inside the territory of states. At least in Europe and especially in its geographical heartland, in Germany, refugees are administered and processed not by walls, fences or border guards, but by bureaucrats and judges. Some of those decision-makers in the *Bundesamt für Migration und Flüchtlinge*, the *BAMF* - the first administrative level - are especially hired and trained for this job. While others, like those in the courts, perform a much larger function, reviewing all kinds of administrative decisions that affect both citizens and non-citizens alike. No matter who is in charge of the first or the final decision, those seeking refuge inevitably start building lives while the administrative process unfolds, and decision-makers ponder the outcomes. As a result of the way the asylum system operates today, the lines between access and refoulement, approval and rejection become blurred – just as moving from an old life to a new one does not happen in a smooth and linear way.

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[1] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic books 2008) 5.

[2] Slogan of 'Vote Leave' Campaign during the 2016 EU Referendum, see for example Michael Deacon, 'EU Referendum: Boris Johnson Fires up the Brexit Juggernaut' (The Telegraph, March 2016) <https://www.telegraph.co.uk/news/politics/boris-johnson/12190736/EU-referendum-Boris-Johnson-fires-up-the-Brexit-juggernaut.html>.

It is in this blurry space that judges and other decision-makers operate. They rely on a legal foundation of refugee law and policy which attempts to cater to this deeply human situation. As states draft and compose legal texts, rational guidelines and abstract norms, lives are shaped by unpredictable conflicts told in borderless stories. In a philosophical sense, it is the individual and her life story against the confines of sovereignty and the inevitability of the abstract legal text. Viewed that way, the asylum system seems set up to fail or at least to crumble. But as civil war, persecution and authoritarianism around the world persist, the system is kept alive by the people that navigate it: the decision-makers, applying the abstract norms created to border access to the nation state and the people hoping to make their stories heard, seeking protection and legitimising their fate with the title 'refugee'.

When decision-makers and applicants come together, when judges are confronted with the faces and stories of those turning to them to decide their case, the border manifests in the courtroom. In their heads, in their hands and beneath their robes, a political conflict takes place every day. Judges are caught in this conflict and at times prisoners to it, despite often being ignorant of it. All the while, society, the political system and the judges themselves expect judges to be objective, wise, noble, Solomonic. As a result, the political conflict judges encounter merges with those expectations and the legal, the administrative asylum case. As Kaufman put it, "in the end, law is among the most human of all enterprises, and those who are appointed to decide questions of 'law' must contend with all the drama, confusion, failure and achievement that constitute the human experience."[3]

[3] Irving R Kaufman, 'The Anatomy of Decisionmaking' (1984) 53 Fordham L. Rev. 1.

1. Discovering Judges: A Personal Backdrop

I began this research project to hear the voices of those deciding the lives of others, administering the border from within. Without delimiting the voices of those who seek refuge and who pass - often powerless - through the system, shaping their lives and futures, my intention was to focus this research on judges and decision-makers. One reason being, the limited attention that has so far been placed on these powerful individuals in the refugee studies literature, who are contemplating lives, while themselves negotiating a rocky terrain. Hearing the voices of judges also means to hear all of what they are, including their emotions, frustrations, fears and uncertainties. All their humanity. Uncovering the emotion and humanity behind the law was the most springing feature of this research as it stood in stark contrast to the conventional wisdom, that "emotions have a certain, narrowly defined place in law", closely delineated not to "encroach on the true preserve of law: which is reason."[4] Embracing the uncertainty of the law to describe it as such initially filled me with unease. However, I slowly discovered, that unlike conventional thinking made me presume, in the everyday practice of judicial decision-making emotions and reasons in law are not opposed or exclusive of one another. Indeed, both unite precisely in the judge's humanity. This is what the thesis aims to explore: how judges navigate their own and the law's uncertainties and complexities uncovering strategies and methods that align the professional with the personal and law with experience.

More often than not, we refuse to open our eyes to this human side of judges. No one wants or needs to know what a judge had for breakfast, or whether they argued with their partner the night before, that their kids are sick or that they are tired or feel impatient. We refuse to see judges' humanity, because it risks exposing their fallibility. Instead, we want to trust them, and we want to trust in the truth of the decision they make. But,

[4] Susan Bandes, *The Passions of Law* (NYU Press 2000).

despite our personal and philosophical denial, judges are and do all that. They are human. In fact, their humanity and their emotions are not simply a by-product or a necessary evil the judicial system faces. On the contrary, it might be of particular importance in asylum cases given the complexity of the stories involved and the uncertainty of their facts. As Posner sets out, in difficult or uncertain questions, solving a case might require more than purely algorithmic procedure, but recourse to "intuition, moral feelings, the balancing of opposed interest and political preferences", including empathy.[5] Indeed, this thesis argues that because of the factual uncertainty around many asylum claims, judges refer to their experience and intuition to make sense and solve a case, all within the rationalizable confines of procedure and principle.

However, accepting the humanity of judges is also accepting their fallibility. This is what makes this abstract socio-legal argument particularly potent and relevant for the asylum and refugee literature. Naturally, the standard in asylum cases is a high one as the lives of people returned to their home country might be immediately at risk. As a result, studies of the asylum system tend to apply a standard of uniformity and cognition to then discover the individuality and emotions judges bring to the bench. The hope of this thesis' particular socio-legal approach to asylum decision-making is that by understanding one of the laws' most conflictual areas we can learn about the challenges the law and legal professionals face more generally. As we come to understand the set of resources legal professionals can deploy and the paths they seek to resolve the law's deficiencies, obstacles and uncertainties, we form a more accurate and frank image of asylum status determination in the courts today.

[5] Richard A Posner, 'Emotion versus Emotionalism in Law' [1999] The passions of law 321.

2. Discovering Judges: An Academic Backdrop

Refugee and asylum protection status[6] attribution is frequently described as distinct from other legal areas.[7] It is termed to be one of the "most complex adjudication functions in industrialised societies".[8] Key to this difference is the fragmented nature of refugee and asylum law along national, regional and international lines, as well as - consequentially - the uneasy fit between local administrative practices and the human rights origin of certain provisions as well as the culturally and geographically foreign context on which the award of protection is adjudicated.

This convolution of fragmenting factors, distinguishing the attribution of protection status from other legal domains, therefore fosters the assumption that protection status attribution is legally and practically complex, ambiguous and therefore discretion-heavy.[9] Supported by the empirical observation of diverging asylum acceptance rates both between, as well as within states, the notion of 'unfettered discretion' in asylum law is further evidenced.[10]

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[6] The terms 'asylum law' and 'refugee law' as well as 'asylum', 'refugee' or 'protection' status will be used interchangeably encompassing all four grounds for temporary leave to remain, based on the need for international protection, i.e. Asylum Status (Art. 16a Basic Law); Refugee Status (Art. 1A 1951 Convention Relating to the Status of Refugees and §60(5) AufenthG); Subsidiary Protection (Art. 15 EU Qualification Directive and §4(1) AsylG); Prohibition of deportation (§60(5) and (7) AufenthG).

[7] Gregor Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (M Nijhoff Pub 2005); Gregor Noll, 'Asylum Claims and the Translation of Culture into Politics' (2006) 41 Tex. Int'l LJ 491; Cécile Rousseau and others, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' (2002) 15 Journal of refugee studies 43; Didier Fassin, 'The Precarious Truth of Asylum' (2013) 25 Public Culture 39; Patricia Tuitt, *False Images: Law's Construction of the Refugee* (Pluto Pr 1996); Jane Herlihy, Kate Gleeson and Stuart Turner, 'What Assumptions about Human Behaviour Underlie Asylum Judgments?' (2010) 22 International Journal of Refugee Law 351.

[8] Rousseau and others (n 7) 43.

[9] Tobias G Eule, *Inside Immigration Law: Migration Management and Policy Application in Germany* (Ashgate Publishing, Ltd 2014); Stephen H Legomsky, 'Learning to Live with Unequal Justice: Asylum and the Limits to Consistency' [2007] Stanford Law Review 413.

[10] Lisa Riedel and Gerald Schneider, 'Dezentraler Asylvollzug Diskriminiert: Anerkennungsquoten von Flüchtlingen Im Bundesdeutschen Vergleich, 2010-2015' (2017) 58 Politische Vierteljahresschrift; Jaya Ramji-Nogales, Andrew I Schoenholtz and Philip G Schrag, *Refugee Roulette: Disparities in Asylum Adjudication* (New York University Press 2009); Eric Neumayer, 'Asylum Recognition Rates in Western Europe Their Determinants, Variation, and Lack of Convergence' (2005) 49 Journal of conflict resolution 43; Sean

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While policy implementation in administrative bodies and bureaucracies is well documented and the role of experience, routines and training in the exercise of discretion has been revealed in different areas[11] including in immigration and asylum decision-making[12], when it comes to the judiciary, an underlying expectation of legal rationality remains. This undergirds our understanding of the rule of law and has informed the image of judges as seemingly impartial, rational and dispassionate arbiters.[13] As a result, judicial decision-making is approached from the vantage point of a dichotomy between rules and discretion, rationality and emotion.[14] However, even for judges, the legally and factually complex environment of asylum and refugee status determination necessarily opens up room for manoeuvring and uncertainty. This gives rise to the question how judges navigate between the demands of the asylum case in front of them, abstract legal norms, methods of interpretation and their specific role as decision-makers within the context of administrative justice?

Using a bottom-up approach, the main question this research therefore wants to answer is: How do judges in the administrative courts in Germany make decisions in asylum cases? As part of this overarching question, this research further asks: How do administrative court judges grapple with the complexities inherent in asylum cases? It wants to understand in-depth how judges make decisions in asylum cases and how they

Rehaag, 'Judicial Review of Refugee Determinations: The Luck of the Draw' (2012) 38 Queen's LJ 1.

[11] Michael Lipsky, 'The Paradox of Managing Discretionary Workers in Social Welfare Policy' [1991] The sociology of social security 212; Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service* (Russell Sage Foundation 2010); Vicki Lens, 'Judge or Bureaucrat? How Administrative Law Judges Exercise Discretion in Welfare Bureaucracies' (2012) 86 Social Service Review 269; Evelyn Z Brodkin, 'Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration' (1997) 71 Social Service Review 1.

[12] Eule (n 9); Olga Jubany, 'Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within' (2011) 26 International Sociology 74.

[13] Daniel Z Epstein, 'Rationality, Legitimacy, & The Law' (2014) 7 Wash. U. Jurisprudence Rev. 1; Terry Maroney, 'The Emotionally Intelligent Judge: A New (and Realistic) Ideal' [2016] Revista Forumul Judecatorilor 61, 100.

[14] Keith Hawkins (ed), *The Uses of Discretion* (Clarendon 1992); Mary Pat Baumgartner, 'The Myth of Discretion' [1992] The uses of discretion 129; Cyrus Tata, 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process' (2007) 16 Social & Legal Studies 425.

deal with uncertainty. It thereby investigates the perspective of German administrative court judges on refugee decisions and their daily practices inside the courts.

3. Context: The German Asylum System

The German context lends itself particularly well to my research question, because regular administrative courts form the second instance for rejected asylum claims. Unlike in other countries where special asylum or immigration tribunals adjudicate on refugee claims, administrative judges in Germany are part of the career judiciary with a shared professional background and training, hence decision-makers tend to be more homogenous. As a result of this institutional arrangement, even during the so-called refugee crisis and the rapid procedural changes ensuing on the administrative level, the core principles of decision-making at the administrative courts remained consistent. At the same time, the administrative courts form an integral part of the asylum process as nearly every rejected asylum applicant appeals his or her decision, creating a broad and large caseload, which generates the need for efficient and holistic decision-making similar to that at the administrative level.

4. Previous Research and Relevance of the Research

The practical implementation of immigration law has long attracted scholarly attention on different analytical levels. While some scholars have placed their analysis within the macro-level of the so-termed 'asylum system', including legislature, executive, advocacy organisations, courts and the news media,[15] other ethno-methodological studies on protection status attribution centre more exclusively on the micro-level of asylum law

[15] Rebecca Hamlin, *Let Me Be a Refugee: Administrative Justice and the Politics of Asylum in the United States, Canada, and Australia* (Oxford University Press, USA 2014).

implementation, such as the workings of national immigration or visa offices, investigating the day-to-day work of different individuals, illustrating the social worlds of applicants, practitioners, politicians or civil servants.[16] However, there are only few bottom-up study of the role of the judiciary and the inner workings of judicial decision-makers in the field of asylum law.[17] The focus of most studies which look at the judiciary in refugee status determination either lies on administrative justice and restrictionism[18] or on offering a more holistic inquiry of the 'asylum system'[19].

The origins of the literature on judicial decision-making more generally can be found in explaining judge discrepancies in the specific context of the US Supreme Court, shaping the idea of extra-legal or ideological factors influencing decisions. This research - looking mainly for extra-legal influencing factors - determined the effect of different forms of bias[20] to the personal ideology of the decision-maker.[21] In its core, decision-making research has since been divided between the rationalist[22] and legal realist view[23], reflecting the binary

[16] Eule (n 9); Thomas Scheffer, 'Asylgewährung. Eine Ethnographische Verfahrensanalyse' [2001] Stuttgart: Lucius & Lucius; Max Travers, *The British Immigration Courts: A Study of Law and Politics* (Policy Press 1999); John R Campbell, *Bureaucracy, Law and Dystopia in the United Kingdom's Asylum System* (Routledge 2016).
[17] Didier Fassin and Carolina Kobelinsky, 'How Asylum Claims Are Adjudicated: The Institution as a Moral Agent' (2012) 53 Revue française de sociologie 657; Carolina Kobelinsky, 'The "Inner Belief" of French Asylum Judges', *Asylum Determination in Europe* (Palgrave Macmillan, Cham 2019); Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Bloomsbury Publishing 2011); Nick Gill and Anthony Good, *Asylum Determination in Europe: Ethnographic Perspectives* (Springer Nature 2019); Nick Gill and others, 'The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain's Asylum Appeals' (2018) 27 Social & Legal Studies 49.
[18] Livia Johannesson, 'In Courts We Trust: Administrative Justice in Swedish Migration Courts' (Department of Political Science, Stockholm University 2017); Sule Tomkinson, 'Who Are You Afraid of and Why? Inside the Black Box of Refugee Tribunals' (2018) 61 Canadian Public Administration 184.
[19] Hamlin (n 15); Campbell (n 16); Nick Gill, *Nothing Personal?: Geographies of Governing and Activism in the British Asylum System* (John Wiley & Sons 2016).
[20] Based on the heuristics and bias research, see for example Thomas Gilovich, Dale Griffin and Daniel Kahneman, *Heuristics and Biases: The Psychology of Intuitive Judgment* (Cambridge university press 2002); Jeffrey J Rachlinski, 'Heuristics and Biases in the Courts: Ignorance or Adaptation' (2000) 79 Or. L. Rev. 61.
[21] Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002); Lee Epstein and Jack Knight, *The Choices Justices Make* (SAGE 1997); Cass R Sunstein and others, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Brookings Institution Press 2007).
[22] Ronald Dworkin, 'No Right Answer' (1978) 53 NYUL Rev. 1; Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 36; Burt Neuborne, 'Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques' (1992) 67 NYUL Rev. 419.
[23] Brian Z Tamanaha and Keith Hawkins, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford university press 1997) 196–226; Dennis Michael Patterson, *A Companion to Philosophy of Law and Legal Theory* (Wiley Online Library 1996); Michael Heise, 'The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism' [2002] U. Ill. L. Rev. 819; Joseph William

thinking between rules and discretion, reason and emotion. At the same time, critical scholars have tried to populate this divide by offering new models: applying critical theory such as feminist scholarship[24] to decision-making, engaging with neuroscience[25] and the role of emotions[26] and intuition, offering empirical alternatives from cognitive psychology[27] as well as behavioural approaches[28], and story-telling models[29]. Similarly, Tata and Kritzer propose a decision-making model based on the judicial 'craftwork' focusing on the *how* of judicial decision-making and the synergies between reason and emotion, rules and discretion, as well as moving beyond the long-established binary between the law in the books and the law in action.[30] At the same time, the ethnographic scholarship of judicial decision-making is spread across various legal fields, as part of which different elements of the decision-making process and judicial reasoning, mostly in relation to criminal law, have been examined in detail, including the role of fact-finding[31]

Singer, 'Legal Realism Now' (1988) 76 Calif. L. Rev. 465.

[24] Rosemary Hunter, Clare McGlynn and Erika Rackley, *Feminist Judgments: From Theory to Practice* (Bloomsbury Publishing 2010); Carrie Menkel-Meadow, 'Mainstreaming Feminist Legal Theory' (1991) 23 Pac. LJ 1493; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press 2002); Regina Graycar, 'Feminism Comes to Law: Better Late than Never' (1986) 1 Australian Feminist Studies 115.

[25] Epstein (n 13); Stephen Grossberg and William E Gutowski, 'Neural Dynamics of Decision Making under Risk: Affective Balance and Cognitive-Emotional Interactions.' (1987) 94 Psychological review 300; Gilovich, Griffin and Kahneman (n 20).

[26] Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions' (2009) 94 Minn. L. Rev. 1997; Susan A Bandes, 'Compassion and the Rule of Law' (2017) 13 International Journal of Law in Context 184; Martha L Minow and Elizabeth V Spelman, 'Passion for Justice' (1988) 10 Cardozo L. Rev. 37; Bandes (n 4); Terry A Maroney, 'A Field Evolves: Introduction to the Special Section on Law and Emotion' (2016) 8 Emotion Review 3.

[27] Intuitive Override Model of Decision-Making, developed by Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 Cornell L. Rev. 1. Cognitive Reasoning Models, see for instance Dan Simon, 'A Third View of the Black Box: Cognitive Coherence in Legal Decision Making' (2004) 71 U. Chi. L. Rev. 511; Brandon L Bartels, 'Top-down and Bottom-up Models of Judicial Reasoning' [2010] The psychology of judicial decision making 41; Jeffrey J Rachlinski, 'New Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters' (1999) 85 Cornell L. Rev. 739.

[28] Coherence-Based Reasoning Model in Doron Teichman and Eyal Zamir, 'Judicial Decision-Making' [2014] The Oxford Handbook of Behavioral Economics and the Law.

[29] Nancy Pennington and Ried Hastie, 'A Cognitive Theory of Juror Decision Making: The Story Model Decision and Interference Litigation' (1991) 13 Cardozo Law Review 519; W Lance Bennet and Martha S Feldman, *Reconstructing Reality in the Courtroom* (Tavistock 1981).

[30] Tata (n 14); Herbert M Kritzer, 'Toward a Theorization of Craft' (2007) 16 Social & Legal Studies 321.

[31] Emma Cunliffe, 'Judging, Fast and Slow: Using Decision-Making Theory to Explore Judicial Fact Determination' (2014) 18 The International Journal of Evidence & Proof 139; Peter Applegarth, 'Deciding Novel and Routine Cases without Evidence' (2018) 11 Journal of Tort Law 173; Jennifer Brown and others, 'Connections and Disconnections: Assessing Evidence, Knowledge and Practice in Responses to Rape.'

and the use of common sense and cultural reasoning therein[32]. My research builds on these findings and applies them in the context of asylum law which has so far been regarded as unlike other areas of law and has therefore barely incorporated these foundational findings on judicial decision-making in its scholarship, which is even more true for the particular context of German administrative court judges.

Empirical research into the legal profession in Germany has so far provided only limited insight into the figure of the judge in a civil law country like Germany. Originating in the 1970s and 1980s, the relevant studies mainly analysed the social make-up of the legal profession, in particular the social profile of judges linking it to decision-making in criminal and civil law courts.[33] Since the analytical focus on social class traditionally aligned with quantitative methods, the subsequent development of socio-legal research in Germany towards more qualitative and ethnographic methods moved on to focus on to other participants in the legal field. As a result, socio-legal studies on the figure of the judge in German administrative courts are rare and the practical work of administrative courts remains under-researched today.[34] Hence, this research produces an in-depth study of decision-making which fills an empirical void in understanding the policy

[32] Richard H Thompson, 'Common Sense and Fact-Finding: Cultural Reason in Judicial Decisions' (1995) 19 Legal Stud. F. 119; Kylie Burns, 'Judges, 'Common Sense'and Judicial Cognition' (2016) 25 Griffith Law Review 319.

[33] Hubert Rottleuthner, 'Klassenjustiz?' (1969) 2 Kritische Justiz 1; Wolfgang Kaupen, *Die Hüter von Recht Und Ordnung; Die Soziale Herkunft, Erziehung Und Ausbildung Der Deutschen Juristen, Eine Soziologische Analyse*, vol 65 (H Luchterhand 1969); Karl-Dieter Opp and Rüdiger Peuckert, 'Ideologie Und Fakten in Der Rechtsprechung' [1971] Eine soziologische Untersuchung über das Urteil im Strafprozeß. Goldmann, München; Raymund Werle, *Justizorganisation Und Selbstverständnis Der Richter* (1977); Rolf Bender and Rolf Schumacher, *Erfolgsbarrieren Vor Gericht: Eine Empirische Untersuchung Zur Chancengleichheit Im Zivilprozess* (Mohr Siebeck 1980); Hubert Rottleuthner, *Rechtssoziologische Studien Zur Arbeitsgerichtsbarkeit* (Nomos-Verlag-Ges 1984); Rüdiger Lautmann, *Justiz-Die Stille Gewalt: Teilnehmende Beobachtung Und Entscheidungssoziologische Analyse* (Springer-Verlag 1972).

[34] Peter Stegmaier, *Wissen, Was Recht Ist* (Springer 2009); Michael Wrase, 'Recht Als Soziale Praxis–Eine Herausforderung Für Die Juristische Profession?!', *Die juristische Profession und das Jurastudium* (Nomos Verlagsgesellschaft mbH & Co KG 2017); Thomas Scheffer, Kati Hannken-Illjes and Alexander Kozin, 'How Courts Know: Comparing English Crown Court, US—American State Court, and German District Court' (2009) 12 space and culture 183; Erhard Blankenburg, 'Mobilisierung von Recht' (1980) 1 Zeitschrift für Rechtssoziologie 33; Martin Morlok and Ralf Kölbel, 'Zur Herstellung von Recht: Forschungsstand Und Rechtstheoretische Implikationen Ethnomethodologischer (Straf-) Rechtssoziologie' (2000) 21 Zeitschrift für Rechtssoziologie 387.

implementation of asylum law in the judiciary today.

5. Methodology

As part of this research project extensive fieldwork was conducted at two different administrative courts in Germany. I call these fieldwork sites Metropolis and Oasis, reflecting their considerably different sizes. Metropolis is based in a large city in the north-east of Germany (with over 1 million inhabitants) and Oasis, in a smaller town in the south of Germany, with less than 100 000 inhabitants. The aim of selecting two different fieldwork sites was to gather richer data, including possible variations and nuances, like the way judges interact formally and informally in the space of the court.

My fieldwork amounted to a total of 30 interviews with judges and more than 50 hearing observations (33 at Metropolis and 21 at Oasis). In addition, I obtained the written judgements for nearly all of the observed cases: allowing me to unite three crucial parts of a case, the hearing, the reflection of the judge and the written judgement. This unique and rich data of a normally "hard-to-reach group"[35] of "high status and remoteness"[36] forms the basis for the analysis and the empirical findings this research developed. I apply a constructivist grounded theory approach based on Charmaz to develop a theoretical framework, or "unified theoretical explanation" of judicial decision-making in asylum cases.[37] At the heart of the bottom-up analysis I conducted is the interview data reflecting the perspectives of judges on the process of asylum decision-making. The grounded theory approach furthermore enabled me to move from a description of a phenomenon to an

[35] Dave Cowan and others, 'District Judges and Possession Proceedings' (2006) 33 Journal of Law and Society 547.
[36] Sharyn Roach Anleu, Stina Bergman Blix and Kathy Mack, 'Researching Emotion in Courts and the Judiciary: A Tale of Two Projects' (2015) 7 Emotion Review 145, 147.
[37] Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (Sage 2006); Robert Thornberg and Kathy Charmaz, 'Grounded Theory and Theoretical Coding' [2014] The SAGE handbook of qualitative data analysis 153; Anselm Strauss and Juliet M Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques.* (Sage Publications, Inc 1990).

understanding of the process by which it occurs.

6. Argument and Outline

The decision-making framework I developed after coding and analysing all empirical data illustrates, traces and investigates the decision-making process in asylum cases from the perspective of the judge. The framework shows how judges use methods and techniques based on their general legal training, combining both law and experience in order to reach rationally justifiable decisions, even in complex asylum cases that lack factual clarity and direct documentary evidence. The framework further develops how judges employ what they perceive as common sense and plausibility to test the facts of a case, trying to make sense of the appellant's story[38] by using the different sources of evidence available. The framework then shows how judges move to form a personal conviction[39] about a case using what they perceive as an individual benchmark to weigh and assess the applicants' story they constructed. This benchmark combines legal standards, jurisprudence as well as the judges' personal experience. Part of a judge's experience are those cases the judge decided in the past, the dialogue, discourse and exchange between colleagues and his or her chamber, as well as the use and acceptance of intuition as a technique, such as letting time pass and writing. Ultimately, legal norm and practice intertwine.

By revealing how reason and emotion, law and experience interlock in the daily decision-making practices of judges, these findings challenge the assumption that asylum decisions are arbitrary, subjective, constituting a 'lottery'. Instead, my research adds to this

[38] While the literal legal translation of the terminology used in German administrative asylum proceedings (*Antragsteller*) is 'appellant', I chose to use the words 'applicant', 'appellant' and 'claimant' interchangeably in this thesis.

[39] The notion of personal conviction is based on one of the core principles of judicial decision-making in German legal philosophy, namely '*richterliche Überzeugungsbildung*', see Anthony Good, Ms Daniela Berti and Gilles Tarabout, *Of Doubt and Proof: Ritual and Legal Practices of Judgment* (Ashgate Publishing, Ltd 2015) 37; Mark Schweizer, 'Die Logik Der Richterlichen Überzeugungsbildung' [2012] Forschungsbericht Max-Planck-Institut zur Erforschung der Gemeinschaftsgüter; Kobelinsky (n 17).

observation by showing how legal norms and professional methods come together and how judges can employ intuition, experience and emotions consciously as part of a decision-making strategy underpinned by pragmatism. Beyond the refugee and asylum literature, this research empirically supports decision-making theories that aim to overcome the 'rules vs discretion' binary, by viewing reason and emotion as part of the same decision-making 'craft'[40] or 'judgecraft'[41].

7. Structure and Chapter Outline

The second chapter (Chapter II – *Literature and Approach: Researching Refugee Status Determination in Courts*) establishes the conceptual foundation and approach for this research by exploring the existing literature in three different areas: refugee status determination, the role of appeal courts and administrative justice as well as (judicial) decision-making. It presents three core assumptions about refugee status determination present in the literature: Firstly, that asylum law is legally complex because of its hybrid nature nestled between international, human rights and national administrative law. Secondly, that determining refugee status is practically complex, because of the lack of direct evidence and its inherent power relations. And finally, as a result of these two claims, that refugee status determination is arbitrary, divergent, subjective, discretionary, akin to a lottery. This chapter furthermore explores the role of administrative courts and the role perception of judges therein in providing review and redress. Finally, this chapter presents the existing ethnographic research on decision-making, illustrating both the bottom-up approach, that street-level bureaucracy research offers as well as the factors identified in the judicial decision-making literature as affecting judicial behaviour. In that regard, it introduces the concept of 'judgecraft' or 'craftwork' which inspired this research – a

[40] Tata (n 14).
[41] Kritzer (n 30).

holistic approach towards judicial decision-making that focuses on an integrationist view of the process, rather than the dichotomies pervading other theories (emotions vs reason, discretion vs rule).[42]

In the third chapter (Chapter III – *The German Asylum System: Legal and Institutional Context)* I set out the legal and institutional background for this research. It establishes both the existing legal framework on protection status attribution within which judges in Germany operate today as well as the institutional context of the administrative courts. The latter includes the specific role of administrative courts in the asylum process in Germany as well as the internal organisation of these courts, including the role of chambers, career progressions, and training.

The fourth chapter (Chapter IV – *Method*) presents the method, in particular the constructivist grounded theory[43] approach, on which this thesis is built. It describes how the research data was collected, coded and analysed, including the practical challenges that I faced in gaining access to judges and conducting interviews. It also debates the analytical steps - from open to focused coding - that I took to develop the theoretical framework of decision making in asylum cases in German administrative courts.

The next three chapters form the empirical core of this thesis and focus entirely on the world of judges. The chapters roughly follow the journey of a claim in court from the perspective of the judge. For analytical and clarity purposes, the decision-making process is artificially dissected into its (in practice often overlapping) components. Beginning with the judge him- or herself, the fifth chapter (Chapter V – *Principles and Responsibilities: Finding Conviction*) explores the professional identity, duties and responsibilities as expressed by

[42] ibid; Tata (n 14).
[43] Charmaz (n 37); Kathy Charmaz and Linda Liska Belgrave, 'Grounded Theory' [2007] The Blackwell encyclopedia of sociology; Thornberg and Charmaz (n 37).

judges as well as the fundamental principles that shape this perception of role and responsibility. I further explore how judges define what it means for them to feel convinced about a case and how the concept of personal conviction places the burden of persuasion on the person and conscience of the judge. Thereby, personal conviction and its place in judicial work and self-perception represents the first coalescing point for what this thesis identifies as part of the judges' repertoire or 'judgecraft': the fluidity between law and experience. I further explore how the judges' overall objective of forming a personal conviction about a case transpires into the public performance of judicial independence and how procedural principles such as inquiry and transparency shape the judges' approach to a case.

The subsequent empirical chapters (Chapter VI – *Evidence and Plausibility: Making Sense of a Case* and Chapter VII – *Law and Experience: Solving a Case*) then turn towards the case in front of the judge and analyse how judges go about forming a personal conviction or persuasion about a case before them. It centres around how judges use, assess and bring together different sources of evidence to make sense of the applicant's story by testing its inherent logic and plausibility. I discuss the effects that this 'common-sensical' approach might have and the possible dangers inherent in this type of simplification strategy drawing on the wider literature on cultural essentialism in the courtroom[44], as well as reflections on rationality, truth and evidence[45], including the literature in other legal areas.[46]

[44] Edward W Said, *Orientalism* (Vintage 1979); Lisa C Bower, David Theo Goldberg and Michael C Musheno, *Between Law and Culture: Relocating Legal Studies* (University of Minnesota Press 2001); Larissa Vetters and Marie-Claire Foblets, 'Culture All around? Contextualising Anthropological Expertise in European Courtroom Settings' (2016) 12 International Journal of Law in Context 272.

[45] Mirjan Damaska, 'Truth in Adjudication' (1997) 49 Hastings LJ 289; Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press 1973).

[46] For example, the role that so-called 'myths' play in rape cases. See Olivia Smith and Tina Skinner, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) 26 Social & Legal Studies 441; Susan Estrich, *Real Rape* (Harvard University Press 1987); Brown and others (n 31); Russell B Korobkin

The last empirical chapter then shows what judges do with the collected evidence and the appellant's story, how they weigh the whole case as one narrative against a self-defined benchmark in order to 'solve the case'. This uncovers one of the main findings of my research, the way in which elements like professional experience and intuition become active parts of the reasoning and decision-making process converging in the judges' 'craft'. This finding speaks to the holistic idea of decision-making that questions the binaries of reasoning and emotion, rules and discretion that underpin much of the decision-making literature.

Finally, in the concluding chapter (Chapter VIII – *Conclusion*), I discuss my findings, answer the research question and set out the theoretical conclusions and implications drawn from my empirical findings in relation to the existing literature. Coming back to the question of discretion and arbitrariness in asylum law, I illustrate the transferability of my research, in particular its integrationist approach to other areas of judicial decision-making, as well as its relevance for the refugee status determination literature in de-mystifying judicial decision-making in the politically, socially and morally loaded area that is asylum law.

and Thomas S Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 Calif. L. Rev. 1051; Andrew E Taslitz, *Rape and the Culture of the Courtroom* (NYU Press 1999); Donald Nicolson, 'Taking Epistemology Seriously: "Truth, Reason and Justice" Revisited' (2013) 17 The International Journal of Evidence & Proof 1.

CHAPTER II – LITEARTURE AND APPROACH: RESEARCHING REFUGEE STATUS DETERMINATION IN COURTS

This chapter will introduce the existing literature and position my research within three distinct but interrelated fields of research that inform this thesis: refugee status determination, the role of courts and administrative justice as well as (judicial) decision-making. The first part introduces the complexity of asylum decisions in law and practice and how this leads to the widely shared assumption that decision-making in asylum cases is particularly discretion-heavy, subjective and arbitrary.[47] By tracing the relevant existing scholarship on refugee status determination, this chapter shows how through different findings on the complexities in law and practice, like the importance of credibility and the inherent power structures in asylum interviews, an assumption around discretion and arbitrariness is formed, supported by statistical findings on divergences in acceptance rates. Upon highlighting the existing gaps in the literature, the second part of this chapter will review socio-legal theory on decision-making more broadly. Thereby I aim to show how taking a socio-legal approach to refugee status determination and drawing on theories of judicial decision-making can help to close the gaps in our understanding of asylum decision-making. In particular, the final section of this chapter will illustrate that applying a holistic 'judgecraft' approach to judicial decision-making allows us to see discretion in asylum decisions in a different, more nuanced light.

I. Refugee Status Determination

In striving to understand how 'protection status'[48] is attributed to those seeking asylum, scholars have analysed different facets and elements of the process. Studies range from

[47] Rousseau and others (n 7); Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (n 7).
[48] The term protection status is used as an umbrella term, including all four different protection categories (asylum, refugee, subsidiary protection and protection from deportation)

legal analyses of the contractual, procedural and substantive obligations of states[49], to ethnographic scholarship from inside the relevant institutions[50] as well as sociological and linguistic endeavours aimed at various aspects of the procedure[51] to sociological and political science works on the interaction of the different institutions, law and politics[52].

The disciplinary and substantive variety of academic engagement shows that understanding protection status attribution is perceived as a complex process that goes beyond applying the correct national laws. It rather involves a myriad of related - contextual - considerations that revolve around the legal, institutional, political, linguistic as well as social environment in which protection status attribution takes place. Three underlying claims unite the existing literature on refugee status determination and shape the way in which asylum decisions are seen and researched today: Firstly, that asylum law is legally complex, because of its hybrid nature nestled between international, human rights and national administrative law. Secondly, that determining refugee status is practically complex, because of the lack of direct evidence and its inherent power relations. And finally, as a result of these two claims, that refugee status determination is arbitrary, divergent, subjective, discretionary, akin to a lottery and evidenced by discrepancies in outcomes.

1. Complexities in Law

One of the most prominent arguments in the existing legal literature on refugee status

[49] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007); James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005); Deborah Anker, *Determining Asylum Claims in the United-States - Executive Summary of an Empirical-Study of the Adjudication of Asylum Claims Before the Immigration Court* (H Adelman ed, York Lanes Press Ltd 1991).
[50] Eule (n 9); Campbell (n 16); Scheffer, 'Asylgewährung. Eine Ethnographische Verfahrensanalyse' (n 16); Jubany (n 12).
[51] Jan Blommaert, 'Investigating Narrative Inequality: African Asylum Seekers' Stories in Belgium' (2001) 12 Discourse & Society 413; Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (n 7); T Spijkerboer, *Gender and Asylum* (Aldershot 2000).
[52] Hamlin (n 15); Christian Joppke, 'The Legal-Domestic Sources of Immigrant Rights: The United States, Germany, and the European Union' (2001) 34 Comparative Political Studies 339.

determination revolves around the complexity of refugee and asylum law.[53] As the following section explores, the literature uses two key assumptions to explain refugee law's status as exceptionally complex: Firstly, the national - international divide, as refugee law is spread along international, European and national lines. Secondly, the hybrid nature of refugee law as it sits uneasily between different types of law, that cover the relationship of the individual and the state.

1.1. The National – International Divide

Historically, the law on refugee, asylum or more broadly protection status determination crosses international, European and national lines.[54] As Lawrence and Ruffer put it, "the expansive international architecture of refugee status determination (guidelines, protocols, conventions, agencies) encourages the location of a supra-analytical apparatus transcending specific domestic legal or constitutional traditions".[55] Much of the legal literature on refugee status determination therefore focuses on the international refugee regime[56]. Despite its international origin, protection status is applied nationally, resulting in the importance of state administrations and national courts in giving effect to and applying its international doctrine. In other words, "refugee status determination offers perhaps the most clarion example of the entanglement of international human rights obligations with national politics, policy objectives and domestic anxieties"[57], leading back

[53] Rousseau and others (n 7) 43; François Crépeau and Delphine Nakache, 'Critical Spaces in the Canadian Refugee Determination System: 1989–2002' (2008) 20 International Journal of Refugee Law 50, 56; Thomas (n 17) 48.
[54] How this materialises in the legal environment in Germany in practice, will be discussed in the following chapter (Chapter III – *The German Asylum System: Legal and Institutional Context*).
[55] Benjamin N Lawrance and Galya Ruffer, *Adjudicating Refugee and Asylum Status* (Cambridge University Press 2015) 6.
[56] Goodwin-Gill and McAdam (n 49); ibid; Hathaway (n 49); Cathryn Costello, *The Human Rights of Migrants in European Law* (Oxford University Press 2013); Jane McAdam, 'Complementary Protection in International Refugee Law' (2007) 60 Order 48.00; Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, vol 77 (Cambridge University Press 2011); Daniel Thym, *Migrationsverwaltungsrecht*, vol 188 (Mohr Siebeck 2010); Non Hailbronner, 'Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking? 26 Va' (1986) 857 J. Infi. L.
[57] Lawrance and Ruffer (n 55) 8.

to the wider scholarly debate around how internationally procured rights - like the rights of refugees as derive from the 1951 Convention - are linked with the nation-state.

Scholarly opinion on this matter ranges from arguments around 'international convergence'[58], which propel the extension of rights to non-citizens on the basis of an international human rights regime[59] to the more pessimistic concept of 'exclusionary convergence', which describes an alignment of industrialised states' immigration policy around deterrence.[60] Bridging this divide authors like Hollifield and Joppke introduce the 'liberal constraints paradigm'[61] or 'liberal paradox'[62] in which they show how both inclusionary and exclusionary forces are at play in liberal states. More infrequently, others like Hamlin point to the significant role of the national administrative system in which refugee status determination takes place. She argues that refugee status outcomes have more to do with "domestic concepts of administrative justice than the international refugee regime".[63] Overall, this debate exposes a fragmentation of the legal basis of refugee decisions with respect to the intentions of asylum law, caught in a constant struggle between the restrictive nature of national sovereignty and international or regional human rights obligations.[64]

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[58] Hamlin (n 15) 14.
[59] Yasemin Nuhoglu Soysal and AJ Soyland, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994); Karen Jacobsen, 'Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes' [1996] International migration review 655; Saskia Sassen, *Losing Control?: Sovereignty in the Age of Globalization* (Columbia University Press 1996); Virginie Guiraudon, 'European Integration and Migration Policy: Vertical Policy Making as Venue Shopping' (2000) 38 JCMS: Journal of Common Market Studies 251.
[60] Hamlin (n 15) 14; Gammeltoft-Hansen (n 56); Matthew J Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge University Press 2004).
[61] Christian Joppke, 'Why Liberal States Accept Unwanted Immigration' (1998) 50 World politics 266; Joppke (n 52).
[62] James F Hollifield, 'Migration and International Relations: The Liberal Paradox' [2004] Migration between markets and states 3.
[63] Hamlin (n 15) 13.
[64] ibid; Alexander Betts, 'International Cooperation in the Refugee Regime' [2011] Refugees in international relations 53; Alexander Betts, Gil Loescher and James Milner, *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection* (Routledge 2013); Michael S Teitelbaum, 'Immigration, Refugees, and Foreign Policy' (1984) 38 International organization 429.

1.2. The Double Hybrid of Asylum Law

Asylum law not only treads the line between the international, regional or national legal spheres but also between different types of law. While there seems to be agreement on the fact that refugee claims constitute neither criminal nor civil law cases[65], the exact relationship between the claimant and the state when asking for protection is blurred. Indeed, asylum law seems to operate within uneasy territory. Noll describes this as a 'double hybrid' by which he means that asylum law sits between inquisitorial and adversarial modes of decision-making as well as between features derived from penal and administrative proceedings.[66] As a result of this 'double hybrid', asylum law is frequently considered different to other areas of law, not least because of the prognostic elements that frequently arise in asylum cases and are considered untypical for either public or administrative law claims.[67] As such, when determining whether the applicant faces a real risk of persecution if returned to their country of origin, "past events can serve as best as proxy indicators of what is likely to happen in the future"[68].

This comparison with other areas of law shows that because of the literature's focus on the unique role of the state and the individual in asylum law as well as its split across international and domestic lines, asylum law is frequently regarded as a somewhat peculiar or unique area of law. As a result, broader similarities and standard legal practices have so far been overlooked. As a consequence, decision-making theory and scholarship on discretion or judging has equally rarely been applied as a lens through which to understand asylum law. Instead of trying to fit asylum law into pre-conceived categories, my research tries to fill this gap by drawing on socio-legal scholarship and decision-making

[65] Lawrance and Ruffer (n 55) 8.
[66] Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (n 7) 3.
[67] ibid.
[68] Good, Berti and Tarabout (n 39) 13.

theory to cast light on how judges in German administrative courts routinely make decisions on refugee status.

2. Complexities in Practice: The Lack of Evidence and Inherent Power Structures

Beyond the complexity inherent in refugee and asylum law itself, the existing literature furthermore describes the practical application of asylum law as exceptionally complex, ambiguous and discretion heavy.[69] This research can be divided into macro- and micro-level studies. While the former focus on the extra-communal or political nature of asylum claims, the latter revolve around the everyday interactions between decision-makers and asylum applicants and the role that culture, language and bureaucratic identities play therein. Underlying these different types of research are the power asymmetries arising from the relationship between the state and the claimant in asylum law, which becomes visible in both substance and process.

2.1. Asymmetries all Around: Extra-Communal Claims, Culture, Language and Identity

Extra-Communal Claims

Arguably, asylum decisions are extra-communal claims on membership that are made "on the border" of the national community.[70] Bureaucracy research refers to this process as 'gate-keeping', pushing people in or out of the juridical system.[71] However, in asylum and refugee law the so-called gatekeeper is also a keeper of national community, in the sense that by applying for asylum, the asylum-seeker asks to be taken in by the host community. The extra-communal nature of the asylum claim puts the asylum seeker in an

[69] Rousseau and others (n 7).
[70] Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (n 7).
[71] Loraine Gelsthorpe and others, *Exercising Discretion. Decision-Making in the Criminal Justice System and Beyond* (Loraine Gelsthorpe and Nicola Padfield eds, Wilan Publishing 2003).

asymmetrical relationship to the decision-maker, be it a judge or immigration officer, as representative of the state. As such, asylum procedures have often been described in terms of power imbalances between applicants and state authorities.[72] In other words, "the asylum seeker's status depends on the procedures of national asylum systems and on how case officers interpret international law while using information that is often uncertified and highly limited".[73]

In addition to the asymmetries that manifest in other legal areas, like welfare claims, in which bureaucrats or judges take over control of the conversation by way of their professional knowledge and ability[74], the asylum seeker also represents an 'other' in the legal system. Unlike other forms of criminal or administrative law where it might seem like state and individual (at least in western democracies) are on equal footing, negotiating *inter pares*, the asylum seeker seeks entry to the national community, figuratively arguing his case from the outside. However, in what way such an equal footing is actually achieved in other areas of law taking into consideration the distribution of power in society has been put into doubt in the socio-legal literature.[75] This points to a gap in the existing literature which my thesis seeks to address. It raises the question whether and how the position of the asylum seeker prompts the exceptionality of asylum law and whether in fact, findings from other areas of law could become relevant for a better understanding

[72] Jane Herlihy and Stuart Turner, 'Should Discrepant Accounts given by Asylum Seekers Be Taken as Proof of Deceit?' (2006) 16 Torture: quarterly journal on rehabilitation of torture victims and prevention of torture 81; Nienke Doornbos, 'On Being Heard in Asylum Cases: Evidentiary Assessment through Asylum Interviews' in Gregor Noll (ed), *Proof: Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden/Boston: Martinus Nijhoff Publishers 2005); Marco Jacquemet, 'Transcribing Refugees: The Entextualization of Asylum Seekers' Hearings in a Transidiomatic Environment' (2009) 29 Text & Talk-An Interdisciplinary Journal of Language, Discourse & Communication Studies 525.

[73] Johannesson (n 18); Anthony Good, *Anthropology and Expertise in the Asylum Courts* (Routledge 2007).

[74] Vicki Lens and others, 'Choreographing Justice: Administrative Law Judges and the Management of Welfare Disputes' (2013) 40 Journal of Law and Society 199.

[75] Marc Galanter, 'Why the" Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & society review 95; Stanton Wheeler and others, 'Do the Haves Come out Ahead-Winning and Losing in State Supreme Courts, 1870-1970' (1987) 21 Law & Soc'y Rev. 403.

of asylum decision-making.

Nonetheless, the perspective of the 'other' is reflected in the metaphors authors use to describe the position of asylum seekers, ranging from "misfits"[76] to people no longer corresponding to a national state[77] or "anomalies in the international system"[78]. These descriptions all find their philosophical roots in Arendt, Agamben's and Bauman's conceptualisation of the refugee as "the inclusive exclusion", the "non-citizen" deprived of her or his rights, making it impossible to say whether the refugee is in fact inside or outside the legal framework of the state[79] reflecting on the arguably self-reinforcing relationship between 'the other' and 'the us' within and outside the modern nation state.[80]

As a result, asylum decisions have been described as "enforcing the border from within", placing the pressure on decision-makers to filter the "deserving" from the "undeserving".[81] UNHCR itself has drawn on this popular distinction, referring to "disentangling refugees from migrants to ensure their protection".[82] However, migration scholars have argued increasingly that the assumption of a dichotomy between real and false is oversimplified, stressing mixed motives, individual agency and the need for even "real" refugees to rely on smugglers, which leads to the "perpetuation and exaggeration of stories of migration",[83] making the task of internal border enforcement even more difficult.

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[76] Aristide R Zolberg, 'The Formation of New States as a Refugee-Generating Process' (1983) 467 The Annals of the American Academy of Political and Social Science 24, 31.
[77] ibid.
[78] Emma Haddad, 'The Refugee: The Individual between Sovereigns' (2003) 17 Global Society 297.
[79] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stan 1998) 29; Haddad (n 78).
[80] Hannah Arendt, *The Origins of Totalitarianism*, vol 244 (Houghton Mifflin Harcourt 1973).
[81] Hamlin (n 15) 21.
[82] UNHCR, 'Refugee Protection and Mixed Migration: The 10-Point Plan in Action' (2011) 5.
[83] Gil Loescher, 'UNHCR at Fifty: Refugee Protection and World Politics' [2003] Problems of Protection: The UNHCR, Refugees and Human Rights, Routledge: New York 3.

Furthermore, as granting protection is understood as akin to enforcing the borders of a community from within, the obvious assumption that follows is the politicisation of this decision-making process. Following this argument scholars decry decision-making in asylum cases as shaped by political objectives and ideals. Feldman for instance focuses on the importance of policy goals as establishing the boundaries within which a decision is made, and ultimately as a source of idiosyncrasies. At the same time many human rights scholars are "wary of accepting any kind of connection between political considerations and asylum law".[84] These arguments are based both on the humanitarian nature of refugee and asylum law, a moral and philosophical assumption that asylum is inherently apolitical as well as a concern for the ideological practices of governments that might ensue.[85] A lot of the discussion on the political nature of asylum and refugee law therefore hinges on the difference between immigration law - the instrumentalist, state-interest driven policy - and the humanitarian, apolitical and human rights infused refugee and asylum law. However, as Kanstroom argues, the reality of this perceived bifurcation is subtler and evolving[86], bearing in mind the distinctly legal nature of granting asylum, subjecting it to "demands on predictability, impartiality and due process".[87]

Culture

Building on this extra-communal nature of asylum claims and the power asymmetries that arise in the interaction between decision-maker and applicant, existing research frequently highlights how perceived or existing 'cultural' differences come to the fore in claims for protection. Meaning adjudicators not only need to evaluate available evidence on what might happen or happened abroad, but the applicant literally brings the foreign

[84] Daniel Kanstroom, 'Loving Humanity While Accepting Real People: A Critique and a Cautious Affirmation' in David Hollenbach (ed), *Driven from Home. Protecting the Rights of Forced Migrants* (1st edn, Georgetown University Press 2010).
[85] ibid.
[86] ibid 117.
[87] Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (n 7).

context into the hearing, including his or her understanding of everyday concepts.[88] This renders adjudication *on* a culturally and geographically foreign context akin to adjudicating *in* a foreign context. Ethnographers and anthropologists have placed particular salience on the cultural sensitivity of specific concepts, like time, family, geographical distance, truth or falsehood.[89] Kälin for instance describes differences between the western conception of varying degrees of family members, or between membership and support of a political party shaping the way in which stories are told and communicated.[90] Kälin goes so far as to use the term "culture shock" to describe what shapes and at times impairs the interaction between applicant and decision-maker.[91]

However, these arguments are not without critique, which links closely to the critical scholarship produced in the literature on the 'cultural defense' in criminal law and centres around the risk of essentialising culture. In fact, Vetters and Foblets show that judges have a more nuanced perception of culture than previously assumed. According to a survey conducted, the authors distinguish between three dimensions of culture which relate to the way the judicial decision-making process is organised: Culture as communication, relevant when there is direct exchange with the applicant; culture as context, mostly in relation to gathering empirical evidence of the situation the applicant is in and finally culture as norms, related to foreign laws, traditions and quasi-legal systems.[92] Nevertheless, the consensus in the literature today seems to be that "culturally grounded

[88] Walter Kalin, 'Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing' [1986] International Migration Review 230.
[89] ibid.
[90] ibid.
[91] ibid. Interestingly, Kälin suggests, that permitting officials to deal with asylum-seekers from only a select few countries, would increase cultural sensitivity and soften the 'culture shock'. German administrative courts would be prime examples of this type of specialisation. However, it remains to be seen in the subsequent chapters whether such a narrow lens can really work in favour of cultural sensitivity and does not just lead to increased stereotypes.
[92] Vetters and Foblets (n 44) 276.

or cross-cultural misunderstandings are common" in asylum hearings.[93] Framed as obstacles that characterise the interactions between asylum-seekers and officials, the manner of expression, the cultural relativity of concepts like lie and truth or the different perceptions of time have all been identified as sources for misunderstanding.[94] However, the question that largely remains unanswered by this literature is how decision-makers themselves reflect and weigh the role that culture might play within the asylum process.

Beyond cultural differences, psychologists have looked at the experience of seeking refuge and how it affects those seeking protection. Those describing its effects refer not only to classified psychological illnesses like post-traumatic stress disorders or PTSD[95], but also to those less visible effects of trauma, like a crisis of trust in the state and its institutions[96] and other psychological aftereffects of exile, such as isolation, identity crisis, uncertainty, stress, fear or depression.[97] Going one step further, scholars have also shown how the psychological effects of seeking refuge may affect the oral accounts of applicants in different ways: blocked memory, difficulty in concentrating, silence or laconic speech.[98]

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[93] Anthony Good, 'Cultural Evidence in Courts of Law' (2008) 14 Journal of the Royal Anthropological Institute S47, 56; Kalin (n 88).
[94] Kalin (n 88).
[95] Stuart L Lustig, 'Symptoms of Trauma among Political Asylum Applicants: Don't Be Fooled' (2008) 31 Hastings Int'l & Comp. L. Rev. 725.
[96] Stuart Turner, 'Torture, Refuge, and Trust' [1995] Mistrusting refugees 56; E Valentine Daniel and John Chr Knudsen, *Mistrusting Refugees* (Univ of California Press 1995); Jane Herlihy and Stuart W Turner, 'The Psychology of Seeking Protection' (2009) 21 International Journal of Refugee Law 171.
[97] Caroline Moorhead, 'Human Cargo' [2006] A Journey Among Refugees. London: Vintage; Marita Eastmond, 'Stories as Lived Experience: Narratives in Forced Migration Research' (2007) 20 Journal of refugee studies 248; Laurence J Kirmayer, 'Failures of Imagination: The Refugee's Narrative in Psychiatry' (2003) 10 Anthropology & medicine 167; Pia Zambelli, 'Hearing Differently: Knowledge-Based Approaches to Assessment of Refugee Narrative' (2017) 29 International Journal of Refugee Law 10; Jill Hunter, Linda Pearson and Mehera San Roque, 'Mental Health Expertise in Refugee Status Decision-Making: Judging or Caring?' (2014) 18 The International Journal of Evidence & Proof 310; Jill Hunter and others, 'Asylum Adjudication, Mental Health and Credibility Evaluation' (2013) 41 Federal Law Review 471.
[98] Cécilia Rousseau and Patricia Foxen, 'Constructing and Deconstructing the Myth of the Lying Refugee: Paradoxes of Power and Justice in an Administrative Immigration Tribunal' [2005] Lying & Illness: Power and Performance, Amsterdam: Aksant, pp56-91; Rousseau and others (n 7).

Language

Discourse theorists have looked even closer at the interaction between decision-maker and applicant and identified the importance of language in conveying the refugees' claim illustrating how refugee narratives are formed and transformed by the decision-making process.[99] In producing a testimony in a different language and mostly through interpreters, scholars have highlighted the 'narrative inequality' inherent in the asymmetric linguistic-communicative resources during the asylum interview, shaping the way in which evidence is produced.[100] According to Blommaerts the asylum procedure involves, "a complex set of discursive practices and language ideologies", which are used as criteria for what constitutes 'truth', 'trustworthiness', 'coherence' and 'consistency'.[101] The African asylum seekers in Belgium Blommaerts investigated, frequently lacked the linguistic, narrative and stylistic resources in order to partake in these discursive and narrative practices. According to Blommaerts this is due to a lack of language proficiency which materialises in mistakes in 'speech act interpretation', like misinterpreting the tonality of instructions. From this perspective language is at the heart of misunderstandings and the perception of inconsistencies in the account of the asylum-seeker by decision-makers, making it another factor that renders the application of asylum law complex in practice.

Bureaucratic Identities

From the perspective of sociologists 'cultural differences' in asylum adjudication are perceived and described in the literature by reference to their role in shaping bureaucratic

[99] Robert F Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing*, vol 29 (John Benjamins Publishing 1994); Katrijn Maryns and Jan Blommaert, 'Conducting Dissonance: Codeswitching and Differential Access to Context in the Belgian Asylum Process', *Language Ideologies, Policies and Practices* (Springer 2006); Jan Blommaert and others, 'Language, Asylum, and the National Order' (2009) 50 Current anthropology 415.
[100] Blommaert (n 51); Campbell (n 16) 6.
[101] Blommaert (n 51) 414.

identities. These scholars view the interaction between applicant and decision-maker as driven by expectations and assumptions about the respective other. This process has been described as a constant flux where labels and categories are shifted and re-defined using expectations of identity and victimhood.[102] Scholars have applied this idea to different scenarios. For instance, Zetter describes the creation of legal identities by the 'administrative state', in this case referring to the refugee status determination procedures by UNHCR. He effectively illustrates how refugees "are made" by labelling them as such.[103] Other parts of the post-constructivist movement go further arguing that the social practices of decision-makers go beyond simple acts of labelling or categorising, and include the construction of facts, artefacts and (in)credibility.[104]

2.2. All about Credibility: Identifying the Factors behind Decisions

As the previous sections set out asylum law is perceived as legally and practically complex and different conceptual angles like culture, language and inherent power structures feed this argument. At the heart of the argument for complexity of asylum decision-making, however, sits the concept of credibility and how and whether it can be assessed correctly. Assessing credibility by evaluating evidence without clear rules and from different often foreign contexts makes asylum decision difficult in practice. In other words, decision-makers need to, "make inferences about the motivations of remote actors and the assessment of whether the government in the asylum-seekers home county can provide her with adequate protection from persecution".[105] Various scholars have spoken about whether and how such an assessment is possible attempting to shed light on the factors that influence the decision-making process. Credibility also brings to the fore assumptions

[102] Judith Butler, 'Bodies That Matter: On the Limits of "Sex."' [1993] London: Rout; Michel Foucault, 'The Foucault Reader, Ed' [1984] P. Rabinow. New York: Pantheon.
[103] Susan Sterett, 'Legal Identities and the In-between Rules' (2013) 1 Politics, Groups, and Identities 244.
[104] Julia Dahlvik, 'Asylum as Construction Work: Theorizing Administrative Practices' (2017) 5 Migration Studies 369.
[105] Hamlin (n 15) 20.

of discretion and subjectivity. In the words of Good, assessing the credibility of a claim and weighing the evidence constitutes, "a decisive moment at which the tribunal has discretionary power".[106] In the literature, credibility has been heralded as the, "single most important step in the refugee status determination process"[107], more important than statutory interpretation or developing legal doctrine.[108] Indeed, the argument is that most cases fail on the grounds of credibility[109]. As a result, most sociological or anthropological papers revolve around the concepts of credibility, doubt and disbelief. Which in turn is often related to the feeling of mistrust it creates in both the decision-maker as well as, most importantly, the asylum seeker.[110] Apart from a few accounts expressly dedicated to appellate bodies, these studies are predominantly based on the narrow experiences of first-instance decision-makers in a national environment.[111]

Zambelli - herself an immigration lawyer - called "assessing the narrated plea for asylum one of the most difficult challenges of a legal system".[112] As Staffans describes in her comparative study on evidentiary assessment in asylum claims, evidentiary assessment, "is the part of decision-making that strives to understand the reality against which legal rules and principles are to be projected".[113] Byrne argues that the only area of law in which judges are required to assess similarly foreign accounts based on their credibility are human rights abuse cases in international criminal law.[114] As she demonstrates in her

[106] Good (n 73) 237.
[107] Michael Kagan, 'Is Truth in the Eye of the Beholder-Objective Credibility Assessment in Refugee Status Determination' (2002) 17 Geo. Immigr. LJ 367, 367.
[108] Thomas (n 17) 134.
[109] Anker (n 49); Thomas (n 17) 134.
[110] Zachary Whyte, 'In Doubt: Documents as Fetishes in the Danish Asylum System', *Of Doubt and Proof* (Routledge 2016) 148.
[111] Thomas (n 17); Ida Staffans, 'The Appellate Organ in the Asylum Procedure' (2006) 75 Nordic Journal of International Law 89; Fassin and Kobelinsky (n 17).
[112] Zambelli (n 97) 11.
[113] Ida Staffans, *Evidence in European Asylum Procedures* (Martinus Nijhoff Publishers 2012) 36.
[114] Rosemary Byrne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals' (2007) 19 International Journal of Refugee Law 609.

paper however, asylum and refugee adjudication lacks a unified standard of evaluating evidence, contrary to international criminal law in which rules of evidentiary assessment have been developed. As poignantly summarised by Noll, apart from the EU Qualification Directive, "which replicates the UNHCR Handbook, there is no body of international legal norms directly and exhaustively regulating refugee status determination".[115] Despite this lack of normative guidance, procedural elements and evidentiary assessments, like testing the applicants' credibility, have crucial importance for the outcome of the decision. Due to the fairly unregulated nature of evidentiary assessments in refugee and asylum law, decision-makers indeed have few rules they can revert back to when it comes to testing and evaluating evidence. Whereas evidentiary assessment in other areas of law focuses on responsibility or liability, refugee cases hinge on predictability.[116] At the same time assessing credibility is not alien to other areas of law. Some scholars have drawn parallels to other areas of law and argued for instance that there are striking similarities in relation to family law decisions which might equally hinge on an evaluation of the credibility of a personal account.[117] It holds true that in these types of cases corroboration and assessment of the accounts in light of their credibility also constitutes a core tenet of the decision-making process. However, the foreign context out of which the personal account is taken, namely the country of origin of the asylum-seeker, as well as the fragmented nature of the assessment of evidence and the burden of proof, seem to place the credibility assessment in asylum law outside the framework existent in other areas of law, making the application of asylum law in practice considerably more complex.

[115] Jennifer Beard and Gregor Noll, 'Parrhēsia and Credibility: The Sovereign of Refugee Status Determination' (2009) 18 Social & Legal Studies 455, 456.
[116] Hilary Evans Cameron, 'When in Doubt. Law of Fact Finding in Canadian Refugee Status Determination' (University of Toronto 2016).
[117] Miguel Clemente and others, 'Judicial Decision-Making in Family Law Proceedings' (2015) 43 The American Journal of Family Therapy 314, 43.

How is credibility assessed?

While some scholars argue that fear, pain and death are radically singular, therefore unintelligible and uncommunicable to the other,[118] making a correct determination of credibility impossible, others cover a middle ground, drawing attention to the subjective elements and implicit ways in which the credibility assessment may be shaped by specific factors, like gender or emotionality.[119] Spijkerboer and others for instance show how gender and the expectations of motives and behaviours akin to women and men shape how credibility is ascertained and persecution established.[120] Spijkerboer argues that the display of a certain degree or quality of emotionality may shape how trustworthy someone is perceived. Similar stereotypes are described for sexuality, in particular the behaviour expected from homosexual asylum seekers.[121] Looking at the behaviour of first instance decision-makers, Jubany-Bucelles confirms in her extensive ethnographic study of asylum decision-making in the UK and Spain, that decision-makers in fact stereotype by categorising individuals. She distinguishes between the use of explicit and implicit criteria.[122] The former consists of features, which are readily observable by the public, like gender, family situation, demeanour and level of education. The implicit criteria, however, require a subjective understanding, as they are complex cues, identifiable through work experience and job training. These are for example: the display of emotions, the recollection of details or the coherence of the story. As Jubany argues, the subjectivity

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[118] Costas Douzinas and Ronnie Warrington, '"A Well-Founded Fear of Justice": Law and Ethics in Postmodernity' (1991) 2 Law and Critique 115.

[119] Thomas Spijkerboer, 'Stereotyping and Acceleration: Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System' in Gregor Noll (ed), *Proof, evidentiary assessment and credibility in asylum procedures* (M Nijhoff Pub 2005).

[120] Spijkerboer (n 51); Hanna Wikström and Thomas Johansson, 'Credibility Assessments as' Normative Leakage': Asylum Applications, Gender and Class' (2013) 1 Social Inclusion; Åsa Wettergren and Hanna Wikström, 'Who Is a Refugee? Political Subjectivity and the Categorisation of Somali Asylum Seekers in Sweden' (2014) 40 Journal of Ethnic and Migration Studies 566.

[121] Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 The International Journal of Human Rights 391; Thomas Spijkerboer, *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013).

[122] Jubany (n 12) 82.

of these criteria increases the odds that their veracity will not be questioned. This further relates to the role that instinct or intuition on the part of the decision-maker play as, "a main source of information" or "an indicator for the credibility of applicants".[123] Jubany goes so far as to term this practice, "codification of personal stereotyping as 'experience' and 'expertise', applied and legitimised by the subculture of disbelief".[124]

Similar to Jubany, a recent German study shows decision-makers using and reproducing both authorised and informal knowledge when assessing credibility highlighting the interaction of specialised knowledge about the rules of asylum and tacit knowledge based on either professional or daily life experiences.[125] Moreover, the authors identify time pressure as influencing the decision-making process by using coping strategies for 'difficult cases', which might include combining pre-categorised cases or simply overlooking or delaying complicated ones.[126] Drawing on the context of decision-making more generally, Moskowitz et al go even further and identify the sequencing of decisions as impacting the likelihood of a reversal or approval of the decision.[127]

In addition to credibility, in different national contexts authors have found "doubt to flit through the asylum system".[128] With some making the argument that doubt and credibility represent opposite sides of the same coin as doubt is eliminated by testing the credibility of asylum-seekers and their stories.[129] In the words of Good, "judgements in

[123] Jubany (n 12).
[124] ibid 87.
[125] Karin Schittenhelm and Stephanie Schneider, 'Official Standards and Local Knowledge in Asylum Procedures: Decision-Making in Germany's Asylum System' (2017) 43 Journal of Ethnic and Migration Studies 1696.
[126] ibid 1710.
[127] Daniel L Chen, Tobias J Moskowitz and Kelly Shue, 'Decision Making under the Gambler's Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires' (2016) 131 The Quarterly Journal of Economics 1181.
[128] Whyte (n 110).
[129] Good, Berti and Tarabout (n 39) 13.

legal proceedings, in order to be accepted as valid and legitimate, must be backed up by an authority that arises partly from the judges' displayed mastery of techniques of doubting, and of dispelling doubt."[130] This is done by testing the credibility of the applicants' submission. It further illustrates the social role of doubt and focuses on the techniques for creating and removing doubt employed by practitioners, which again serves to highlight the uncertainties researchers have found abundant in refugee status determination procedures.

Identifying the Factors behind Credibility

In order to understand the factors that impact decision-makers' credibility assessments, scholars have taken different perspectives: from investigating the everyday bureaucratic processes to the social worlds of decision-makers and the wider political field in which decisions take place. Eule, for instance, has provided an in-depth analysis of the bureaucratic processes in different German Immigration Offices. From an ethnographic perspective, he delivers an account of the organisation as well as the interactions and paths an asylum decision is based on, illustrating how "bureaucrats can exercise varying levels of discretion in applying policy to practice".[131] Travers provides a similar account for the British asylum system. Following an ethno-methodological approach, he zooms into the social worlds of applicants, practitioners, politicians and civil servants.[132] Similarly to Eule, Travers draws predominantly from observations of the day-to-day work of these different people, describing their institutional and practical perspectives on immigration control. These two approaches are more closely aligned with the aim of understanding bureaucratic routines, workloads and practices.

[130] ibid 1.
[131] Eule (n 9) 47.
[132] Travers (n 16).

Campbell goes even further and attempts to provide a fully fletched ethnographic analysis of the British asylum system. Contending that previous research has focused too narrowly on an analysis of language and legal interpretation as well as having disregarded the influence of the wider political field on asylum decision-making, Campbell turns to the anthropology of law to address these shortcomings.[133] He follows the trajectory of asylum applications from the initial claim to the lawyer's office and into the courts. Campbell uses Sally Falk-Moore's concept of the semi-autonomous field in order to "underline the wider social context in which law operates"[134]. Similar to Hamlin, who also draws on the term of the "migration system" in which she includes the legislature, the executive, advocacy organisations, courts and news media, Campbell coins the term of the "asylum field" to describe the wider context in which decision-makers operate.

Other factors that have been pinpointed as influencing decision-making are: the use of different investigatory techniques, training and adjudicators' relationship to lawyers[135]; humanitarian considerations, but also military, economic and diplomatic relations with the countries of origin.[136] In the German context, authors have demonstrated how different recruitment practices and organisational structures affect case officers' attitudes[137], including how docket control changes (i.e. how decision-makers deal with the bulk of cases) have had an anti-immigrant effect[138], while others focus on the organisational structuring of asylum casework in Germany and how it impacts decision-making.[139] Evans argues more generally that decision-makers have unrealistic

[133] Campbell (n 16).
[134] ibid.
[135] Tomkinson (n 18).
[136] Marc R Rosenblum and Idean Salehyan, 'Norms and Interests in US Asylum Enforcement' (2004) 41 Journal of Peace Research 677.
[137] Johanna Probst, 'Entre Faits et Fiction: L'instruction de La Demande d'asile En Allemagne et En France' [2011] Cultures & Conflits 63.
[138] Dagmar Soennecken, 'The Paradox of Docket Control: Empowering Judges, Frustrating Refugees' (2016) 38 Law & Policy 304.
[139] Stephanie Schneider and Kristina Wottrich, '„Ohne'ne Ordentliche Anhörung Kann Ich Keine

expectations of what and how people remember, leading to unsound credibility findings.[140]

Underlying much of this literature which focuses on identifying possible impacting factors on decision-makers' credibility assessment is a distinction between legal and extra-legal factors or between the blackletter law and the applied law, presupposing the existence of a clear distinction between the two. Juss, for instance, suggests studying asylum decision-making in light of recent findings on the role of extra-legal influences on decision-making more generally.[141] Juss however limits his inquiry to the administrative level, arguing that the level of discretion and deviation and the "interplay of legal with extra-legal influences" is much greater on the administrative level. He finds that policy factors dominate over legal rules, leading "to increased exercise of subjective discretion by officials".[142]

In the context of the French court of appeal Kobelinsky and Fassin introduce the idea of 'intimate conviction' as a judicial practice of dispelling doubt.[143] This 'inner belief' of judges'[144] shapes judicial analysis and deliberation and acts as a sort of veil for the entry of moralism into questions of law and refugee protection.[145] Kobelinsky equates the concept with an idea of 'moral certainty' and states that "a central element to inner conviction is the existence of emotions at the basis of the inner belief of the

Ordentliche Entscheidung Machen" – Zur Organisation von Anhörungen in Deutschen Und Schwedischen Asylbehörden' [2017] Asyl verwalten. Zur bürokratischen Bearbeitung eines gesellschaftlichen Problems 81.

[140] Hilary Evans Cameron, 'Refugee Status Determinations and the Limits of Memory' (2010) 22 International Journal of Refugee Law 469.

[141] Satvinder Singh Juss, *Discretion and Deviation in the Administration of Immigration Control* (Sweet & Maxwell 1997).

[142] ibid 2.

[143] Fassin and Kobelinsky (n 17).

[144] Kobelinsky (n 17).

[145] Didier Fassin, 'Les Économies Morales Revisitées', *Annales. Histoire, sciences sociales* (Éditions de l'EHESS 2009); Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* (Russell Sage Foundation 1992).

adjudicator".[146] She argues that judicial decision-makers use 'inner convictions' as a veil to point to the 'subjective' elements, such as moral and political values and ideologies or emotions. Kobelinsky and Fassin thereby question whether decision-makers 'intimate conviction' is based on objective elements in the case or a subjective assessment of the case, presupposing a clear distinction between the two. Taking similar debates on the administrative level further, they argue that the institution of the court behaves like a moral agent through policies and practices. By inviting a moral lens to asylum decision-making, they focus on how the selection between 'real' and 'false' refugees is carried out, pre-supposing that it is indeed possible to distinguish between the two.

3. Statistical Divergences, Discretion and Subjectivity

As a consequence of both the complex legal environment in which decision-makers operate as well as the practical challenges around credibility, a different strand of research in various countries attempts to quantify the role of credibility and discretion in the asylum system by looking for inconsistencies and disparities in outcomes between countries[147] and between decision-makers.[148] Most notably, Schoenholtz and Ramji-Nogales found that in the US the success of an asylum claim might depend as much on the luck of the draw as on the merits of the case.[149] The authors examined 60,000 asylum decisions rendered by the four major sets of adjudicators (asylum officers, immigration judges, members of the BIA and judges of the US courts of appeals) in the US, discovering

[146] Kobelinsky (n 17) 55.
[147] Neumayer (n 10); Dimiter Toshkov and Laura de Haan, 'The Europeanization of Asylum Policy: An Assessment of the EU Impact on Asylum Applications and Recognitions Rates' (2013) 20 Journal of European Public Policy 661; Rebecca Hamlin, 'International Law and Administrative Insulation: A Comparison of Refugee Status Determination Regimes in the United States, Canada, and Australia' (2012) 37 Law & Social Inquiry <http://www.readcube.com/articles/10.1111/j.1747-4469.2012.01292.x> accessed 10 November 2016.
[148] Thomas Holzer, Gerald Schneider and Thomas Widmer, 'The Impact of Legislative Deterrence Measures on the Number of Asylum Applications in Switzerland (1986-1995)' [2000] International Migration Review 1182; Maarten Vink and Frits Meijerink, 'Asylum Applications and Recognition Rates in EU Member States 1982–2001: A Quantitative Analysis' (2003) 16 Journal of Refugee Studies 297; Anker (n 49); Rehaag (n 10); Ramji-Nogales, Schoenholtz and Schrag (n 10).
[149] Ramji-Nogales, Schoenholtz and Schrag (n 10).

wide discrepancies among the regional offices and different circuit courts. The authors refer this back to the degree of scepticism a decision-maker brings to the case, which defines the verdict on the applicant's credibility.[150] In the Canadian context, Rehaag points to the length of service and the professional background of decision-makers to explain discrepancies in outcomes he found.[151] More recently Schneider et al in Germany studied the outcome of first-instance decisions in Germany to find variations in acceptance rates between countries of origin in different regional administrative offices of the BAMF, which they correlate to different political parties in power in the different federal states.[152]

However, the quantitative endeavours to determine inconsistencies in the asylum system have focused on specialised first instance bodies, like asylum tribunals in Canada and the USA or the administrative body (individual decision-makers) in Germany. So far, there has not been a study measuring inconsistencies in the courts nor has there been one that can successfully explain how the material difference of cases may add to the difference in outcome. Authors have failed to successfully link the ethnographic literature examining the factors that impact decision-making and the role of culture, language or power imbalances within the system with the quantitative observations around outcomes. What these quantitative studies however seem to substantiate is that refugee and asylum law decisions are a "domain characterised by the discretion of the person who assesses the accounts".[153] By placing the exercise of discretion at the heart of asylum decision-making, the literature on refugee status determination created a catchall explanation for divergences in acceptance rates. By arguing that because of the importance of credibility

[150] ibid 99.
[151] Rehaag (n 10); Sean Rehaag, 'Troubling Patterns in Canadian Refugee Adjudication' (2007) 39 Ottawa L. Rev. 335.
[152] Riedel and Schneider (n 10).
[153] Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (n 7) 1.

findings discretion in asylum law is difficult to evaluate, given the lack of a "single, straightforward general yardstick according to which it can be measured"[154], the empirical observations of diverging asylum acceptance rates (both between as well as within states) are viewed as proof for a notion of "unfettered discretion" within asylum law.[155] This gives rise to the assumption that the process of refugee status determination is "highly interpretative and speculative, especially because there is often very little factual information on which to base the decision."[156]

II. Researching the Courts: Judicial Decision-Making

Many of the studies about refugee status determination described above have been conducted in and about first instance administrative bodies or special asylum tribunals. However, there are important differences between the administrative and judicial levels of decision-making disregarding the differences that arise as a result of the specific national context. The most fundamental distinction between the two levels of decision-making seems to be the changed set-up, from a dualistic to a triadic dispute resolution mechanism. While the state exercises authority over the asylum process during the initial administrative phase, the appeal stage introduces a third party - the judge - adding an independent arbiter to the equation and thus creating a form of triadic dispute resolution.[157] This change transforms the two parties - state and asylum seeker - into supposedly equal opponents before the judge, whose representation of impartiality is thereby reinforced. As a result, the appellate court is required to formally re-evaluate the case, gathering its own evidence, including interviewing the applicant. The material gathered in the first administrative decision can serve as a basis for an evaluation but will

[154] Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (n 7).
[155] Rousseau and others (n 7); Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (n 7) 1; 141.
[156] Hamlin (n 15) 20.
[157] Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 2013).

not be sufficient for a final decision in the light of the courts' impartiality.[158]

Because of these crucial differences between the administrative and the appellate stage, this research draws on the existing literature on courts and judicial decision-making. Two research perspectives on the courts can be distinguished: Firstly, the courts as institutions, which in their role as bodies of administrative justice can offer review and redress[159] or shape policy.[160] Secondly, the courts as the places in which judges or other legal professionals practice the law and make decisions.[161]

1. Administrative Justice and Policymaking

In modern conceptions of administrative justice the courts are described as the external institutions of accountability in addition to the internal rules and regulations in the relevant administrative agencies.[162] Albeit less frequently occurring, external forms of accountability, like court appeals, "are necessary for the achievement of justice in administrative decision-making".[163] In achieving this, courts review both the formal and procedural as well as the material outcomes of administrative decisions. Whether and how substantial justice and procedural fairness are achieved depends on the normative constituents of the model defining the ideal type of administrative justice.[164] Depending on the policy areas, different models of what administrative justice means have been developed in socio-legal research.[165] For asylum decisions administrative justice has been

[158] Paul Tiedemann, *Flüchtlingsrecht: Die Materiellen Und Verfahrensrechtlichen Grundlagen* (Springer-Verlag 2014) 117.
[159] Lens and others (n 74).
[160] Shapiro (n 157); Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press 2002).
[161] For example, Epstein and Knight (n 21); Segal and Spaeth (n 21); Lens and others (n 74); Roach Anleu, Bergman Blix and Mack (n 36).
[162] Michael Adler, 'A Socio Legal Approach to Administrative Justice' (2003) 25 Law & Policy 323, 323; Jerry L Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press 1985).
[163] Adler (n 162) 324.
[164] Johannesson (n 18) 42; Mashaw (n 162); Adler (n 162) 336.
[165] Johannesson (n 18) 42; Marc Hertogh, 'Through the Eyes of Bureaucrats: How Front-Line Officials Understand Administrative Justice' [2010] Administrative justice in context 203; Michael Adler,

said to mean that administrative courts can fulfil their purpose of review and redress, because appellate bodies have an overview of legal systems in their entirety, can ensure uniform decision making, correct errors either on facts, on law or on the application of law to specific facts and finally have the possibility to "lead the way for development of legal decision-making".[166]

Viewing the courts in their function as providing administrative justice is viewing them as part of the administration, revolving around what they do better, differently or despite the administrative body, rather than viewing them as decisions-makers in their own right. For instance, Johannesson takes an ethnographically inspired approach and shows how symbols of justice used in Swedish courts succeed in creating an impression of administrative justice, despite failing to meet standards of substantial and procedural conceptions of justice.[167]

In the British context Thomas evaluates the quality and effectiveness of appeal adjudication in asylum cases in the UK against core justice values, like openness, accuracy, predictability, cost efficiency, timeliness and impartiality.[168] By focusing on how Tribunal members navigate the tensions between competing priorities such as the accuracy of their decision-making and time efficiency, Thomas' research exposes the underlying policy tensions between immigration control and asylum protection. As a result, he reveals the similarities between the administrative and the appellate stage arguing that tribunals should be seen as an extension of the administrative process and thereby as part of the

Administrative Justice in Context (Bloomsbury Publishing 2010); Simon Halliday and Colin Scott, 'Administrative Justice'.
[166] Staffans (n 111) 90.
[167] Johannesson (n 18).
[168] Thomas (n 17) 282.

process of wider policy implementation in the modern administrative state.[169] In contrast to Thomas' perspective on asylum adjudication which is based on pre-defined analytical categories derived from administrative justice norms, this research aims to offer a 'prequel' to the question of administrative justice by understanding *how* judges operate as everyday decision-makers of asylum cases.

Similar to many other inquiries in the refugee status determination literature (described above) Thomas also identifies the credibility assessment as the single most important factor in Tribunal decision-making. Set on testing the quality and accuracy of the Immigration Tribunals' credibility decisions, he uses the country of origin information available to Tribunal members as a proxy to understand whether administrative justice values such as accuracy are met. Besides displaying the similarities between administrative and appellate stage decision-making again, Thomas also exposes the particular role which the national context plays for studies of asylum adjudication and the importance of offering new perspectives into different judicial systems. While British tribunal members are bound to rely on the country of origin information that is made available to them, German administrative judges have an express duty to inquire and collect evidence and use and seek information about the country of origin as a matter of their judicial duty, exposing a substantive difference between the truly adversarial British adjudicative system and the inquisitorial-leaning process in German administrative courts. My research hopes to broaden this contextually fragmented literature on appellate procedures by offering new insights from the perspective of an inquisitorial-leaning process such as that of German administrative courts.

[169] ibid 281.

In addition to their role as institutions of administrative justice, the courts have also been considered as political actors that form part of the governance process more generally and act as "crucial veto points in the policy process".[170] Scholars of political jurisprudence and judicialization originating in the US, acknowledge the courts' increasing role for society and politics as part of the judicial turn, arguing that courts as much as administrators act as policy makers.[171] As described above, in relation to questions of immigration the courts have been found to defend liberal policies in times where arguments for increasingly restrictive policies are more politically opportune.[172] These scholars view courts through the political lens, looking at higher-level jurisprudential trends, pointing to an inner logic of courts that might have led to an expansion of migrants' rights in opposition to the restriction of rights in current policies.[173] While both the theories of administrative justice and judicialization view courts in their institutional capacity, often mainly drawing on evidence collected in high-level and influential courts, such as the US Supreme Court, my research builds more extensively on the perspective linked to the action and behaviour of judges exploring the *minutiae* of judging and decision-making within the institution and the metaphorical and literal edifice of the court.[174]

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[170] Shapiro and Sweet (n 160) 2; Shapiro (n 157); Lawrence Baum, 'Implementation of Judicial Decisions: An Organizational Analysis' (1976) 4 American Politics Quarterly 86.
[171] Silvia von Steinsdorff, '(Verfassungs-) Richterliches Entscheiden', *Interdisziplinäre Rechtsforschung* (Springer 2019); Ran Hirschl, 'The Judicialization of Politics', *The Oxford handbook of political science* (2008); Shapiro and Sweet (n 160); Shapiro (n 157).
[172] Joppke (n 61); Guiraudon (n 59); Hollifield (n 62).
[173] Saskia Bonjour, 'Speaking of Rights: The Influence of Law and Courts on the Making of Family Migration Policies in Germany' (2016) 38 Law & Policy 328; Hamlin (n 15); Christina Boswell and Andrew Geddes, *Migration and Mobility in the European Union* (Palgrave Macmillan 2010); Antje Ellermann, 'When Can Liberal States Avoid Unwanted Immigration? Self-Limited Sovereignty and Guest Worker Recruitment in Switzerland and Germany' (2013) 65 World Politics 491; Diego Acosta Arcarazo and Luisa Feline Freier, 'Turning the Immigration Policy Paradox Upside down? Populist Liberalism and Discursive Gaps in South America' (2015) 49 International Migration Review 659.
[174] Richard Moorhead and Dave Cowan, *Judgecraft: An Introduction* (Sage Publications Sage UK: London, England 2007).

2. Socio-Legal Perspectives

Fundamental to both the literature on refugee status determination as well as on the role of courts in their institutional qualities is an essential process: judicial decision-making. Much of the socio-legal scholarship on decision-making implicitly undergirds the refugee studies literature, often without being explicitly factored in. Arguably, because this literature is so heavily focused on established concepts, like credibility, discretion or the 'asylum lottery'. In fact, socio-legal research on decision-making explicitly explores the concepts which the refugee studies literature argues make refugee decisions so complex: namely ambiguous, incomplete and contradictory facts as well as different rules, values and principles that can be invoked.[175] The following section will therefore set out the existing socio-legal scholarship on judicial decision-making, drawing out the key approaches on which this thesis builds. It begins with the different models of judicial decision-making that have been developed over time, including the role that discretion plays therein and finally introduces the concept of 'judgecraft' which inspired this thesis.

2.1. Different Decision-Making Models

In its broadest interpretation decision-making scholarship reaches across different sciences encompassing various levels of inquiry from the neurological to the organisational level. Hundreds of theories exist in this field, with much of the literature focusing on developing decision-making models which try to explain decision outcomes, instead of unwrapping the processes of decision-making.[176] Originating in the US, many of these models are driven by the goal of identifying the extra-legal factors that influence judges' decisions and thus seem to determine case outcomes.[177] Scholars began with testing predictions about the outcome of cases by first factoring in judges' party affiliations, background or

[175] Simon (n 27) 516.
[176] Andreas Glöckner and Cilia Witteman, 'Beyond Dual-Process Models: A Categorisation of Processes Underlying Intuitive Judgement and Decision Making' (2010) 16 Thinking & Reasoning 1.
[177] Epstein and Knight (n 21); Segal and Spaeth (n 21).

socialisation[178] and over time moved to drawing attention to more fluid variables like values, worldviews, ideologies, attitudes or personal policy preferences.[179] For instance, legal behaviouralists Segal and Spaeth developed the attitudinal model and coined the term "motivated reasoning" in which the law serves as a post-hoc justification for reflecting judge's political preferences.[180] This model stands in stark contrast to the legal model centred on fidelity to the law, as "judges decide cases on the basis of their personal ideologies as conventional liberals or conservatives and not on the basis of any sense of fidelity to law or legal interpretation".[181] Other research found extra-legal variables, like race[182], gender[183] or socio-economic status of defendants[184] or earlier decision outcomes[185] to factor into decision-making. Most of this research, however, is based on a

[178] John R Schmidhauser, 'The Justices of the Supreme Court: A Collective Portrait' (1959) 3 Midwest Journal of Political Science 1; Jack Ladinsky and Joel B Grossman, 'Organizational Consequences of Professional Consensus: Lawyers and Selection of Judges' [1966] Administrative Science Quarterly 79; Stuart S Nagel, 'Political Party Affiliation and Judges' Decisions' (1961) 55 American political Science review 843.

[179] Howard Gillman, 'What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making' (2001) 26 Law & Social Inquiry 465, 470; S Sidney Ulmer, 'The Analysis of Behavior Patterns on the United States Supreme Court' (1960) 22 The Journal of Politics 629; Harold J Spaeth, 'An Approach to the Study of Attitudinal Differences as an Aspect of Judicial Behavior' (1961) 5 Midwest Journal of Political Science 165; Joseph Tanenhaus, Joel B Grossman and Edward N Muller, *Frontiers of Judicial Research* (Wiley 1969); Charles Herman Pritchett, *Courts, Judges, and Politics: An Introduction to the Judicial Process* (Random House 1979).

[180] Segal and Spaeth (n 21).

[181] Gillman (n 179) 467.

[182] Celesta A Albonetti, 'An Integration of Theories to Explain Judicial Discretion' (1991) 38 Social Problems 247; James D Unnever, Charles E Frazier and John C Henretta, 'Race Differences in Criminal Sentencing' (1980) 21 The Sociological Quarterly 197; Marjorie S Zatz, 'Los Cholos: Legal Processing of Chicano Gang Members' (1985) 33 Social Problems 13; Thomas M Uhlman and N Darlene Walker, '" He Takes Some of My Time; I Take Some of His": An Analysis of Judicial Sentencing Patterns in Jury Cases' [1980] Law and Society Review 323; Celesta A Albonetti and others, 'Criminal Justice Decision Making as a Stratification Process: The Role of Race and Stratification Resources in Pretrial Release' (1989) 5 Journal of Quantitative Criminology 57.

[183] John Hagan, John D Hewitt and Duane F Alwin, 'Ceremonial Justice: Crime and Punishment in a Loosely Coupled System' (1979) 58 Social Forces 506; John Hagan, Ilene H Nagel and Celesta Albonetti, 'The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts' [1980] American Sociological Review 802.

[184] Ronald A Farrell and Victoria Lynn Swigert, 'Prior Offense Record as a Self-Fulfilling Prophecy' [1978] Law and Society Review 437; Victoria Lynn Swigert and Ronald A Farrell, 'Murder, Inequality, and the Law' [1976] Lexington, MA: DC Heath; Cassia Spohn, John Gruhl and Susan Welch, 'The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges' (1987) 25 Criminology 175.

[185] Alan J Lizotte, 'Extra-Legal Factors in Chicago's Criminal Courts: Testing the Conflict Model of Criminal Justice' (1978) 25 Social Problems 564; Charles A Moore and Terance D Miethe, 'Regulated and Unregulated Sentencing Decisions: An Analysis of First-Year Practices under Minnesota's Felony Sentencing Guidelines' [1986] Law and Society Review 253.

simplified distinction between legal and extra-legal factors that is exacerbated by the fact, that it relies on the successful codification of these factors into measurable variables and a reliance on observing outcomes.[186] Despite attempts to nuance the understanding of the influence that political affiliations might have on the application of the law by drawing attention to collegiality and group dynamics on the bench[187], the underlying assumption is that there are distinctive factors contrary to what the law intends or purports to be that influence decisions and which can be elicited through statistical analysis of case data.[188] Edwards and Livermore voice this criticism by arguing that a majority of the empirical studies on extra-legal factors in judicial decision-making fail to distinguish between "forms of moral or political reasoning intrinsic to law and those that are extrinsic to law", as well as omitting variables that represent 'the law' like the applicable law, controlling precedent and judicial deliberations.[189]

Several other decision-making models try to put names to the factors, behaviours or strategies that decision-makers use to deal with uncertainty in decision-making. The strategic model of decision-making for instance has elaborated this view, arguing that judges pursue policy preferences not only in light of their ideological predisposition, but also in light of the preferences of other important actors, such as other judges, judicial hierarchies or relevant institutions.[190] Rational choice theorists argue that in situations with incomplete knowledge and uncertainty, "actors attempt to reduce uncertainty by relying

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[186] Harry T Edwards and Michael A Livermore, 'Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking' (2008) 58 Duke LJ 1895.
[187] Sunstein and others (n 21); Frank B Cross, *Decision Making in the US Courts of Appeals* (Stanford University Press 2007); Harry T Edwards, 'The Effects of Collegiality on Judicial Decision Making' (2003) 151 University of Pennsylvania Law Review 1639.
[188] William M Landes and Richard A Posner, 'Rational Judicial Behavior: A Statistical Study' (2009) 1 Journal of Legal Analysis 775.
[189] Edwards and Livermore (n 186); Brian Z Tamanaha, 'The Realism of Judges Past and Present' (2009) 57 Clev. St. L. Rev. 77; Harry T Edwards and Michael A Livermore, 'Thirty-Ninth Annual Administrative Law Symposium: Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking' (2009) 58 Duke Law Journal 1895.
[190] Epstein and Knight (n 21).

on rationality produced by habit and social structure."[191] According to these theories, organisational structures, like established operating procedures, formal channels of communication or professional training all serve to absorb uncertainty inherent in decisions and lead judges to develop patterned responses.[192]

Moving beyond the legal behavioural models of decision-making that focus on the *if* and *what* of extra-legal factors, cognitive or social psychological research tries to fill the gap and explain *when* extra-legal factors, like ideology will exhibit greater or lesser influence over the choices judges make, honing in on the mental processes behind decision-making.[193] As such, cognitive behavioural theory, or 'coherence based reasoning', is based on psychological propositions about the unconscious, like that "the mind shuns complex decision-making tasks and simplifies them to yield clear outcomes".[194] Researchers in this field draw on seminal works about heuristic biases, such as the role of confirmation or hindsight biases[195], as well as the way in which rationalization can provide justifications for past conduct in order to shed light on judicial behaviour.[196] However, similarly to the attitudinal research in cognitive sciences and psychology, quantitative methods and experimental settings dominate, making results difficult to align with the arguably messier judicial setting of a court, which is often more unpredictable and at the same time offers unavoidable written and unwritten procedural rules for decision-making and judicial behaviour.

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[191] Albonetti (n 182).
[192] ibid; James G March and Herbert Alexander Simon, 'Organizations.'
[193] Bartels (n 27); Simon (n 27).
[194] Simon (n 27) 513.
[195] Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 science 1124; Gilovich, Griffin and Kahneman (n 20).
[196] Simon (n 27) 515.

Exposing an underlying binary – Rationalist vs Critical Approaches

Many of the judicial decision-making models explored above can be traced back to an age-long conflict between different jurisprudential traditions and conceptions of the law and its application. Formalist or rationalist jurisprudence typically hinges on an idea of rationality and logic, which includes legal inference, deductions and analogies. Rationality and logic are said to enable an 'objective' legal interpretation of the law, which makes judges' decisions guided by principles internal to law. As a result, formalists and rationalists portray decision-making as a quasi-scientific process bound by the law and its intent.[197] This view, however, has become increasingly marginalised in theory, as social sciences inquiries like the attitudinal or behavioural decision-making models point to factors outside of legal reasoning, like judges' own personal views or ideologies, that can determine decisions while judges seem to keep true to the purpose of the law.[198] As such, realists and critical legal scholars argue that judges "determine the outcome of a lawsuit before deciding whether the conclusion is, in fact, based on an established legal principle".[199] Both the legal behaviouralist studies and the cognitive research on reasoning and decision-making therefore build on the legal realist conception that the law is vague, incoherent and rarely lends itself to pure logical deduction.[200]

Consequentially, the arguments of 'legal realists'[201], 'formalists'[202] and critical legal

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[197] Max Travers, *Understanding Law and Society* (Routledge-Cavendish 2009) 30.
[198] Oliver Wendell Holmes, *The Common Law* (First published 1881, Little Brown 1923); Karl N Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44 Harvard Law Review 1222; Karl N Llewellyn, 'A Realistic Jurisprudence--the next Step' (1930) 30 Colum. L. Rev. 431; Roscoe Pound, 'Call for a Realist Jurisprudence, The' (1930) 44 Harv. L. Rev. 697.
[199] Simon (n 27); Timothy J Capurso, 'How Judges Judge: Theories on Judicial Decision Making' (1999) 29 U. Balt. LF 5; Llewellyn, 'A Realistic Jurisprudence--the next Step' (n 198); Frank (n 45); Eugen Ehrlich, *Grundlegung Der Soziologie Des Rechts*, vol 69 (Duncker & Humblot 1989).
[200] William W Fisher, Morton J Horwitz and Thomas Reed, 'American Legal Realism'; Benjamin N Cardozo and Andrew L Kaufman, *The Nature of the Judicial Process* (Quid Pro Books 2010).
[201] Holmes (n 198); Llewellyn, 'A Realistic Jurisprudence--the next Step' (n 198); Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (n 198).
[202] Dworkin, *Law's Empire* (n 22); Dworkin, 'No Right Answer' (n 22).

scholars[203] provide the undergird for the study of law and legal professionals in their wider socio-political context. Even though most scholars today no longer align directly with any one of these views, the underlying dichotomy between the formalist and the realist position pervades most thinking about judicial decision-making. It bifurcates the way in which we think about decision-making into binaries, such as legal and extra-legal, rule-bound and discretionary decision, pure logical deduction and vague emotional inference. Even critical legal scholarship or cognitive work on biases, that moved beyond this underlying dichotomy to understand the use of the law by 'ordinary people'[204] thereby revealing the distribution of power within that system[205] and paving the way for a more holistic understanding of legal decision-making to include feminist, emotional or holistic theories, reflects this same way of thinking about what the law is supposed to be rather than focusing on how decision-makers employ it.

Law and Emotions

The role of emotions plays an important part in any attempt at a holistic approach to decision-making. As such, Posner refers to the cognitive theory of emotion developed by psychologists and philosophers, who challenge the "conventional antithesis between rationality and emotion"[206] and argues that emotion is a form of cognition that works as a substitute for more conventional forms of reason. This is in fact an extension of the holistic 'judgecraft' approach that goes beyond the 'rules vs discretion' binary to include emotions as one element in decision-making.[207] Emotion is part of any action, any choice,

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[203] Duncan Kennedy, 'A Left Phenomenological Critique of the Hart/Kelsen Theory of Legal Interpretation' (2007) 40 Kritische Justiz 296.
[204] Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998); Travers (n 197); Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (University of Chicago Press 1990).
[205] John M Conley and William M O'Barr, 'Just Words: Law, Language and Power' (1998) 2 Chicago: Univ. of Chicago Press; John M Conley and William M O'Barr, *Rules versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press 1990).
[206] Posner (n 5) 310.
[207] ibid.

since "emotion short-circuits reason conceived of as a conscious, articulate process of deliberation, calculation, analysis, or reflection".[208] Sometimes this short-cut works to the benefit of the decision-maker, where he or she is unfocused or indecisive. But where a decision requires careful, sequential analysis or reflection "emotion may, by supplanting that process, generate an inferior decision."[209] In the case of judges, Posner - himself a judge - argues that emotion is not just a by-product of decision-making, but in fact necessary to "precipitate any decision, that is not merely the conclusion of syllogistic or other purely formal reasoning - the kind of reasoning a computer can do better than a human being".[210] Like in everyday life, judges use strategies and methods, like syllogism, reasoning, transparency and justifications to 'control' emotions, or as he calls it, the "more primitive way of reaching a conclusion".[211] Of course, this is contrary to the 'formalist' view of law, that legal professionals should solve cases like solving logical puzzles or mathematical problems. Instead, even complex mathematical problems might require emotions like wonder, delight or pride that help to provide an efficient shortcut.[212]

2.2. The Role of Discretion in Decision-Making Theories

The different strands of decision-making theory are also reflected in how discretion and its role in the decision-making process is understood. As such, the dichotomy between rules and discretion that features prominently in classical scholarship on discretion can be seen as an extension to formalist thinking. In contrast, the scholarship that conceptualises discretion as choice rather than as defined by the absence of rules, is based on a realist conception of law. This first view of discretion ('discretion vs rules') is influenced by doctrinal legal thinking that posits discretion as contrary to rules. The underlying idea is

[208] ibid 310.
[209] ibid 311.
[210] ibid 311.
[211] Posner (n 5).
[212] ibid.

captured in the doughnut analogy which illustrates discretion as a hole surrounded or else restricted by rules or standards.[213] The hole that represents discretion is constraint by precedent, statutes and their express intent.[214] Various scholars have used and interpreted this analogy to populate a version of this 'rules vs discretion' binary, attempting to delineate the breadth of discretion in different contexts or legal fields.[215] From a normative perspective, the possibility of clearly distinguishing between rules and discretion satisfactorily runs with the idea of fair and consistent decision-making based on rules versus arbitrary and inconsistent, even unfair decisions on the basis of discretion. As shown above, much of the literature on refugee status determination presupposes or reflects this conception of discretion, inferring arbitrariness from divergent outcomes and equating credibility assessment with subjectivity and the space for discretion therein with inconsistency.

If the law, however, is understood according to realist or critical views, a dichotomous conception of rules and discretion becomes impossible. Scholars, like Hawkins or Schneider dispute the possibility of a clear distinction between rules and discretion, arguing that discretion is not constrained by rules, but organisational, procedural or social elements satisfy this same function.[216] As such, these authors begin to shed light on the role that a shared understanding of practices, goals and procedures might play for regulating the exercise of discretion. Feldman, for instance, analyses constraints of decisions from a behavioural and organisational viewpoint, arguing that decision-making constitutes a social, rather than an individual exercise in which the social context serves to constrain the exercise of discretion. If the social context and other functions form an

[213] RM Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).
[214] Gillman (n 179).
[215] Matilde Høybye-Mortensen, 'Decision-Making Tools and Their Influence on Caseworkers' Room for Discretion' (2015) 45 British Journal of Social Work 600; Robert E Goodin, 'Welfare, Rights and Discretion' (1986) 6 Oxford Journal of Legal Studies 232.
[216] Hawkins (n 14).

active part in decision-making together with the exercise of discretion, the rule and discretion dichotomy underpinning our understanding of decision-making - be it in refugee law or other contexts - needs to be rethought. This leads to a broader conception of discretion as choice, with rules and discretion representing one element in a more holistic ideal of decision-making. [217] Within this holistic approach the final decision in a case can be viewed as the result of many choices and decisions in the career of that case.[218] From the provision of information that is put before the adjudicator, the use of language, the contingency on previous decisions, everything cumulates towards a (then) collective decision. These authors attribute discretion to every legal decision, reflecting the flexibility and ambiguity inherent in law and policy, no matter how precise. At the same time, the law inhabits its own restraints in the form of the *rule of law* against which possible derogations are evaluated. Baumgartner, for instance, debunks the myth of discretion as giving rise to unpredictability and its conceptualisation as opposed to the predictable legal rules. He shows that, "exercise of discretion by legal officials is in fact far from unpredictable. To the contrary, it follows clear and specifiable principles and is remarkably patterned and consistent."[219]

This scholarship hence puts the assumption of the refugee studies literature, that arbitrariness and unpredictability arise from discretion, into question. Instead, a holistic view of decision-making that moves beyond the 'rules vs discretion' binary can turn its focus on the question of *how* judges create patterns and consistency. The conception of craftwork, which I will elaborate on below, builds on this argument of holism and goes

[217] Denis James Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Repr with corrections, Clarendon Press 1986); Roy Sainsbury, 'Administrative Justice: Discretion and Procedure in Social Security Decision-Making' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press); Hawkins (n 14); Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press 1969).
[218] Hawkins (n 14).
[219] Baumgartner (n 14) 129.

deeper into the micro-manoeuvres of judges blurring the boundaries between rules and discretion. It is also an extension to the theories and models of decision-making, because it is not aimed at predicting outcomes[220] but moving into understanding the *how* of decision-making.

2.3. 'Judgecraft': A Holistic Approach of Judicial Decision-Making

Outside the courts decision-making has routinely been studied from the bottom up. Most notably, Lipsky began looking in-depth at the (in-)actions of front-line staff, the so-called 'street-level bureaucrats'.[221] While this approach has been influential in the context of lower-level bureaucrats, some authors have argued that what judges in routine claims do might be similar to what Lipsky describes bureaucrats doing.[222] In particular, Cowan and Hitchins argue that a bottom-up approach like Lipsky's allows us to focus on what it means to be a decision-maker and the emotional work that goes into it.[223] Indeed, judicial decision-making in socio-legal studies has rarely looked through the judge's lens.[224] As Moorhead and Cowan argue, the dominant political sciences perspective is one of macro issues, proofing biases or political influences as well as philosophical or jurisprudential discourse of rights and normativity. Which leads to "a distinct lack of the *minutiae* of judging".[225]

My research draws on this alignment of bottom-up bureaucracy research and the specific judicial context. This has been coined in the theory of 'judgecraft'. 'Judgecraft' is based on "the conscious development over time of careful techniques and strategies to underpin

[220] ibid 138. Baumgartner for example focuses on the social background of defendants in homicide or rape cases to predict the outcome or leniency of the judge.
[221] Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service* (n 11).
[222] Dave Cowan and Emma Hitchings, ``Pretty Boring Stuff': District Judges and Housing Possession Proceedings' (2007) 16 Social & Legal Studies 363.
[223] ibid.
[224] Moorhead and Cowan (n 174).
[225] ibid.

the social practice of judging".[226] Scholars in the 'judgecraft' tradition argue that by looking at the street-level and the everyday decision-making, it becomes clear that decision-making is in fact a dynamic or holistic process. By viewing decision-making as a craft, different elements come to the fore, allowing us to think about both, "choice and order, implicit routine and normative order".[227]

Tata refers to the number of "taken for granted epistemic binaries" that underpin the traditional decision-making literature.[228] These include the binary between rules and discretion described above and extends to different variants of the same dichotomies based on the formalist and realist divide: reason and emotion, rational deduction and intuition, consistency and individual justice. Examining the 'discretion vs rule' binary more closely, Tata argues that this dichotomy goes back to the judicial paradigm, according to which decision-making is either "informal and thus lacking structure, arbitrary and capricious" or it is governed by "legal rules, principles and policies".[229] As a result of this distinction between legal factors and non-legal factors and by extension between certain, unequivocal, logical and rational decision-making versus fluid, vague and irrational forms of decision-making, much of the existing literature on refugee status determination is driven by the assumption that discretion in the evaluation of evidence and the assessment of credibility is the source for divergent decisions. Instead, 'judgecraft' offers an approach that allows a more holistic perspective of what judges do when they decide asylum cases. In other words, "the practical considerations, that guide appellate judges, are equally important and all too often ignored, in that the process of adjudication

[226] Howard S Becker, 'Arts and Crafts' (1978) 83 American Journal of Sociology 862; Kritzer (n 30); Cowan and Hitchings (n 220) 154.
[227] Tata (n 14).
[228] ibid 426.
[229] ibid 428.

is a delicately calibrated mixture of theory and practice, of art and science".[230] While some, like Tata and Kritzer call this delicate mixture 'craft' or 'judgecraft', others like Cardozo have coined it the 'brew' of decision-making.[231]

The role of 'craft' in 'judgecraft'

At the center of the idea of 'judgecraft' lies the concept of craftsmanship. Craftsmanship in Sennett's conception stands for the human impulse to "do something well for its own sake".[232] Sennett explores the combination of skill, commitment and judgement viewing them as part of the intimate connection between head and heart.[233] More accurately, he views it as a "dialogue between concrete practices and thinking".[234] In the judicial craft this synthesis aligns with the routines, procedural tasks and practices that happen in conjunction with what we would traditionally view as 'thinking'. Even though, I would argue, that the idea of 'thinking' as such is a romanticised notion of a process that can be as much procedural or technical as it is creative or ingenious.

Craftsmanship is therefore founded on skill developed to a high degree.[235] In legal practice this skill might encapsulate the interpretation of legal norms, the knowledge and application of procedural rules and regulations, and can go as far as the skill of methodical writing or pondering. Skill is equally nurtured by experience, the simple practice and habit of doing something routinely that develops into technique and skill. According to

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[230] Guy S Goodwin-Gill, *International Law and the Movement of Persons between States* (Oxford University Press 1978); Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007); James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005); Cathryn Costello, *The Human Rights of Migrants in European Law* (Oxford University Press 2013); Jane McAdam, 'Complementary Protection in International Refugee Law' (2007) 60 Order 48.00; Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, vol 77 (Cambridge University Press 2011).
[231] Cardozo and Kaufman (n 200) 10.
[232] Richard Sennett, *The Craftsman* (Yale University Press 2008) 9.
[233] ibid.
[234] ibid.
[235] ibid 21.

Sennet craftsmanship also includes a communal element, which can easily be imagined in the context of a court as well, where communication and shared experiences between judges play a constitutive role in shaping strategies and methods of decision-making.

Kritzer looks at craft from a distinctively judicial viewpoint. He defines craft as an analytical concept. Based on the distinction between art and craft - where craft focuses on functionality and utility and art on the expression of the creator - judicial craftwork encapsulates similar elements to those addressed by Sennett: utility, consistency, clientele, skills, technique, problem-solving and aesthetic. Kritzer aims to go beyond a conceptualisation of craft as "how someone does his job".[236] Instead, applied to the legal context, Kritzer describes how the production of a service of utility - with consistency and for a defined clientele - is at the centre of craftwork. Again, drawing attention to the (judicial) community in which the relevant norms develop and emerge.

No matter the context, the focus of what defines 'craft' lies on skills and techniques. Skill, which is acquired through training and repetition, crucially contains an intuitive quality, which is exemplified by the fact that "a significant amount of what the craftsperson does cannot readily be described by that craftsperson".[237] In the judicial setting, the skill of 'judging' or deciding, i.e. weighing a complex set of facts and coming to a decision, lends itself best to describe this intimate connection between practice, intuition and experience.

By using a holistic conception of judicial decision-making like 'judgecraft', I hope to bring these elements back into scope, painting a picture of the activity of judging without prejudice. At the same time, my methodology and research design (*Chapter IV*) will attempt to mitigate, the warning issued by Young, that the 'judgecraft' approach might shed an

[236] Kritzer (n 30) 322; Roy B Flemming, Peter F Nardulli and James Eisenstein, *The Craft of Justice: Politics and Work in Criminal Court Communities* (University of Pennsylvania Press Philadelphia 1992).
[237] Kritzer (n 30) 327.

unduly positive view on judges' work, without acknowledging the fact that some elements of their approach to judging might constitute 'craftiness' rather than craftwork.[238] Especially, because asylum cases bring issues to the table, both in terms of their set-up, meaning adjudicating on circumstances in a foreign country, and their practical complexities, like credibility and evidentiary assessment, holistic theories of decision-making can offer a lens through which to understand what judges do and how they do it.

Conclusion

In this chapter I presented three different theoretical perspectives relevant to the make-up and contribution of my thesis. Firstly, I discussed how the refugee and asylum literature is dominated by three sets of claims, that focus on the complexity of refugee and asylum law itself, on the complexity of applying it in practice and as a result, the importance of credibility and other extra-legal factors rendering the application of refugee law arbitrary and discretion-heavy. Secondly, I showed how courts have been viewed and researched as institutions, fulfilling a discrete function, such as offering administrative justice or making policy. This institutional view on courts has shaped how the role of courts has been researched in the context of asylum decision-making in the refugee literature. The literature's focus on the deterministic elements of refugee decisions highlighted by quantitative studies on divergent outcomes also reveals its shortcomings, namely a deeper and more nuanced understanding of the processes of decision-making. The notion of exceptionality that surrounds asylum decision-making has arguably let to valuable insights from other areas of law being overlooked. Given that many of the elements that contribute to the complexity of asylum decisions, such as ambiguous, incomplete and contradictory

[238] Richard Young, 'Managing the List in the Lower Criminal Courts: Judgecraft or Crafty Judges?' (2012) 41 Common Law World Review 29.

facts, are equally prominent in other areas of law, I suggest that socio-legal scholarship can help to explore the processes of decision-making in asylum cases.

I therefore introduced how judicial decision-making has been theorised in the socio-legal literature and showed how a holistic approach to decision-making might offer a third way of approaching asylum decision-making by focusing on the *minutiae* of judging. By exposing the underlying binary that bifurcates how we think about decision-making into legal and extra-legal, rule-bound and discretionary, reason and emotion, I suggest an approach that goes beyond, proposing a bottom-up approach that explores the micro-manoeuvres of judges based on the holistic concept of 'judgecraft'.

Given much of the literature on judicial decision-making presented in this chapter originates in the common law tradition, the question arises, how this approach can be used to understand civil law decision-making. Certainly, the manifold distinctions between civil and common law principles and practices are of fundamental importance when it comes to legal theory or jurisprudence. At the same time, an increasing number of scholars find that differences between the two legal systems are not as prevalent as assumed. For instance, Schneider shows that despite the assumption that civil-law judges only engage in the resolution of individual disputes and do not produce legal rules that influence judicial decisions in the future, the German Labour Courts of Appeal he studied in fact promulgate new decisions in a similar way as courts in common-law countries.[239] As such, in an ethnographic inquiry based on deep immersion in the context the conceptual distinctions surrounding civil and common law, arguably lose some significance.[240] This is particularly true, since some argue that a German sociology of law

[239] Martin R Schneider, 'Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal' (2005) 20 European Journal of Law and Economics 127.
[240] Philip Selznick, ''Law in Context'Revisited' (2003) 30 Journal of Law and Society 177.

is not yet as established as in the Anglo-Saxon world[241], where as some put it, "even in law schools, everyone is a Realists now"[242]. In addition, key elements of judicial decision-making like fact-finding or credibility assessment are theoretically and empirically not well analysed and reflected in German legal studies.[243] Given this lack of relevant socio-legal scholarship from a specific civil law perspective, this research draws on the existing common law theories of judicial decision-making, including the 'judgecraft' approach.

[241] Wrase (n 34); Stefan Machura, 'German Sociology of Law' (2001) 32 The American Sociologist 41.
[242] Singer (n 23) 467.
[243] Wolfgang Frisch, 'Beweiswürdigung Und Richterliche Überzeugung', *Zehn Jahre ZIS-Zeitschrift für Internationale Strafrechtsdogmatik* (Nomos Verlagsgesellschaft mbH & Co KG 2018).

CHAPTER III – THE GERMAN ASYLUM SYSTEM: LEGAL AND INSTITUTIONAL CONTEXT

Researching how judges award protection status cannot go without an understanding of the national context in which decision-making takes place. As Selznick puts it, "law in context points to the many ways legal norms and institutions are conditioned by the insistent realities of culture, practice, and social organisation".[244] In particular, if we consider this a socio-legal undertaking and the decision-making practices of judges in German administrative courts a social activity, the legal, institutional and political context in which judges operate becomes relevant. This chapter will therefore explore three important sets of environments in which judges operate: the legal, political and institutional environment. I will begin by analysing the legal boundaries within which decision-makers operate, staking out the choices decision-makers (administrators and judges alike) face in attributing protection status. The second and third part will take into account the institutional context, including the federal system and the process a claim goes through before reaching the courts, as well as the unique political situation I encountered when I began this research in 2016.

I. Legal Environment: A Pluralist Landscape on National Territory

As explored above the four distinct protection categories German law offers (Asylum-, Refugee, Subsidiary Protection-, and Protection from Removal Status) derive from different sources of law, originating at the international, regional and national level. Each body of law was subsequently developed by the courts and institutions to reflect the

[244] Selznick (n 238); Leouard Brown and Philip Selznick, 'Sociology–A Text with Adapted Readings' [1968] New York, Evanston and London: Harper & Law Publication.

challenges decision-makers face when attributing law to fact. Some of these developments attempt to adapt the existing legal categories to ever changing complex realities of flight. In Germany, the attribution of protection status itself is an administrative process, regulated by two specialised bodies of administrative law, the *Aufenthaltsgesetz* (*AufenthG*/'Residency Law') and the *Asylgesetz* (*AsylG*/'Asylum Law'). It comprises the four different protection categories: Asylum Status (Art. 16a *Grundgesetz*); an internationally derived category incorporated into German law: Convention Refugee Status (*Flüchtlingsschutz*, §3(1) AsylG and § 60(1) AufenthG). An originally European law category: Subsidiary Protection Status (*Subsidiärer Schutz*, §4 Abs.1 AsylG); as well as a national category driven by European human rights law: Protection from Removal (*Abschiebungshindernisse*, §60 Abs. 5, 7 AufenthG).

Best described by the concept of 'civic stratification', originally developed in the citizenship and inequality studies, each of the four protection status categories has different rights and obligations attached to it.[245] The four different protection categories serve as "formal devices of inclusion or exclusion" with respect to rights including the length of residency title, the right to family reunification, the right to work and reside, access to language classes or social benefits.[246] As a result, the choice of status or protection category is not merely an intellectual exercise, but has very real consequences through the conditions of eligibility associated to them, both for the individual as well as for the construction of the categories themselves.

The system of protection categories has been criticised in the academic literature, arguing that this 'cookie cutter approach' fails to reflect the realities of so-called 'mixed migration

[245] Lydia Morris, 'Civic Stratification and the Cosmopolitan Ideal: The Case of Welfare and Asylum' (2009) 11 European Societies 603; Lydia Morris, 'Managing Contradiction: Civic Stratification and Migrants' Rights' (2003) 37 International Migration Review 74; David Lockwood, 'Civic Integration and Class Formation' [1996] British Journal of Sociology 531.
[246] Morris, 'Managing Contradiction: Civic Stratification and Migrants' Rights' (n 243) 79.

flows'[247], new types of wars[248] and the complexities of flight.[249] This serves to illustrate the challenges inherent in assessing access to protection categories in a system where those categories do not necessarily reflect the realities refugees face. This in turn raises the question to what extent existing categories are able to capture the complex and messy social realities'[250] at all. The first part of this chapter therefore aims to dis-entangling the four different protection categories to explore their boundaries.

1. Asylum Status: The Constitutional Law Status

Asylum Status, also called 'political' or 'constitutional' asylum, is a category unique to German constitutional law. It was incorporated in Article 16 of the German Constitution (GG/*Grundgesetz*) after World War II and provides that those who are politically persecuted enjoy (asylum) protection.[251] However, in 1992, with mounting pressure on the asylum system by refugees fleeing the Yugoslav Wars, the major political parties in parliament reached a compromise (the so-called *Asyl Kompromiss*) to change the constitution.[252] Today, Art. 16a (1) GG is still available to those persecuted for their political convictions. However, the 1992 amendments further "establish a geographical limitation by prescribing that the right to asylum may not be invoked by one who enters from a European Union State or from a third country where application of the 1951 Refugee Convention and of the 1950 European Convention on Human Rights is guaranteed"[253] or other "safe third countries"[254] (Art. 16a (2) GG). As a result, in 2019

[247] IOM, 'Mixed Migration: Flows in the Mediterranean and Beyond: Compilation of Available Data and Information 2015' (IOM (GMDAC) 2016); Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (Cornell University Press 2013).
[248] Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era* (John Wiley & Sons 2013).
[249] Heaven Crawley and Dimitris Skleparis, 'Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's "Migration Crisis"' [2017] Journal of Ethnic and Migration Studies 1; Rousseau and others (n 7).
[250] Crawley and Skleparis (n 247) 3.
[251] „Politisch Verfolgte genießen Asyl" (Art. 16 Abs. 1 GG).
[252] Sam Blay and Andreas Zimmermann, 'Recent Changes in German Refugee Law: A Critical Assessment' (1994) 88 The American Journal of International Law 361.
[253] Goodwin-Gill and McAdam (n 49) 43.
[254] Safe third countries are states, which will be presumed 'not to engage in political persecution or inhuman

only 1.2 % of all applicants were eligible for asylum status under Art. 16a (1) GG.[255]

The rights attached to asylum status are generous and by law equal those afforded to Convention refugees.[256] These include a three-year residency title, privileged rights to family reunification and full access to the labour market.[257] On the one hand the conceptual and substantive similarities between constitutional asylum and Convention refugee status led to the de facto insignificance of constitutional asylum, making it more difficult to obtain, while providing the same rights as refugee status.[258] On the other hand, the intertwined nature of both categories bestowed refugee status with the same superiority over other statuses due to asylum status' constitutionally enshrined rights.

2. Refugee Status: The International Law Status

As in most countries, the most prominent and powerful legal protection category in the German asylum system is refugee status, based on the 1951 Convention relating to the Status of Refugees and the 1967 Protocol ('Refugee Convention').[259] Developed, negotiated and agreed upon in the aftermath of World War II, the Refugee Convention is the first international instrument systematically regulating the protection of persons forced to flee their countries of origin.[260] Art.1 A of the Refugee Convention grants protection to a person, "*who owing to well-founded fear of being persecuted for reasons of race, religion,*

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or degrading treatment or punishment'. These may be determined by law and approved by the *Bundesrat* (Federal Assembly), Goodwin-Gill and McAdam (n 23) 42.

255 'Schlüsselzahlen Asyl 2019' (Bundesamt für Migration und Flüchtlinge 2020) Statistik <https://www.bamf.de/SharedDocs/Anlagen/DE/Statistik/SchluesselzahlenAsyl/flyer-schluesselzahlen-asyl-2019.pdf?__blob=publicationFile&v=3>.

256 § 2(1) AsylG, Constitutional asylum status holder enjoy equal rights as those who are protected under the Refugee Convention of 1951.

257 Bundesamt für Migration und Flüchtlinge (BAMF), 'The Stages of the German Asylum Procedure. An Overview of the Individual Procedural Steps and the Legal Basis' (2016) 17 <http://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/Broschueren/das-deutsche-asylverfahren.pdf?__blob=publicationFile> accessed 28 April 2017.

258 Wissenschaftliche Dienste, 'Kategorien Des Asylrechtlichen Schutzes in Deutschland' (Deutscher Bundestag 2015) 30/15.

259 UN Treaty Series vol 189, 137 (entered into force 22 April 1954).

260 Nora Markard, *Kriegsflüchtlinge: Gewalt Gegen Zivilpersonen in Bewaffneten Konflikten Als Herausforderung Für Das Flüchtlingsrecht Und Den Subsidiären Schutz*, vol 60 (Mohr Siebeck 2012); Hathaway (n 49).

nationality, membership of 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".[261]

Beyond its substantive value, refugee status further illustrates the complexity that arises out of the interaction between different sources and layers of law in a pluralist legal landscape as described above. Entangled in a net of supranational interpretation and enforcement, especially through the European courts (CJEU and ECHR), the meaning and confines of the refugee protection category have been shaped at a global level.[262] A wide array of scholarship has attempted to describe this interaction between national and international law.[263] Thym for example coined this specific transformation of refugee law the process of "de-internationalisation by way of Europeanisation".[264] Even though the European Courts do not have the authority to directly interpret the Refugee Convention, European law provides that the Common European Asylum System (CEAS) has to be in conformity with the Refugee Convention.[265] As a result, the power of interpretation of the Refugee Convention is shifted from the German Constitutional Court in Karlsruhe (*Bundesverfassungsgericht/BVerfG*), to the European court in Luxembourg (CJEU).[266] So indeed, European law gains some power of interpretation over international law.

[261] This provision is incorporated into German law under §3(1) AsylG and § 60(1) AufenthG.
[262] UNHCR, 'States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol' (2015); Elihu Lauterpacht and Daniel Bethlehem, 'Non-Refoulement (Article 33 of the 1951 Convention)' [2003] Fellner, Türk and Nicholson (ed); Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 International Journal of Refugee Law 630; Guy S Goodwin-Gill, 'The Search for the One, True Meaning ...' in Guy S Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law. Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press 2010); Klaus F Röhl and Stefan Magen, 'Die Rolle Des Rechts Im Prozess Der Globalisierung' (1996) 17 Zeitschrift für Rechtssoziologie 1.
[263] Röhl and Magen (n 260).
[264] Thym (n 56); Jan Wouters, PA Nollkaemper and Erika De Wet, *The Europeanisation of International Law: The Status of International Law in the EU and Its Member States* (TMC Asser Press 2008); Salvatore Fabio Nicolosi, 'Disconnecting Humanitarian Law from EU Subsidiary Protection: A Hypothesis of Defragmentation of International Law' (2016) 29 Leiden Journal of International Law 463; Ramses A Wessel and Steven Blockmans, *Between Autonomy and Dependence* (Springer 2013).
[265] Art 78 (1) AEUV.
[266] Thym (n 56) 119.

Similarly, the infusion of European and international human rights standards through the European Court of Human Rights (ECHR) fosters international developments of protection principles independent from the national level. This is best illustrated by a statement by Tony North, the president of the International Association of Refugee Law Judges in 2006, who argues that "refugee law is more globalised than any other international law because judges around the globe are engaged in an ongoing daily conversation about the interpretation of its text"[267], creating a global(ised) meaning of 'the refugee'.

At the same time, the day to day implementation and interpretation of refugee law still takes place on a local level, arguably leading to a de-internationalisation based on nationalisation, more or less de-synchronised from international developments.[268] As Tiedemann argues, domestic courts are fixated with national law, which blocks their perception of the international dimensions of refugee law.[269] According to Tiedemann's study, because of the transposition of the Refugee Convention into national law, the average German administrative court judge does not directly engage with the Convention, hence remaining at least partly unmindful to wider international judicial developments on the issue. Refugee Status therefore transgresses a complicated system of European, international and national legal developments, constantly shifting in the way they shape and impact each other, creating a complex legal environment for decision-makers to navigate.

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[267] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2008) 171.
[268] Goodwin-Gill (n 260).
[269] Paul Tiedemann, 'The Use of Foreign Asylum Jurisprudence in the German Administrative Courts' in Guy S Goodwin-Gill and Hélène Lambert (eds), *The limits of transnational law: refugee law, policy harmonization and judicial dialogue in the European Union* (Cambridge University Press 2010).

3. Subsidiary Protection Status: A Civil War Category

Subsidiary Protection Status is a provision in EU law[270], implemented into German law (§ 4 (1) AsylG). [271] A person is eligible for subsidiary protection if he or she would face a real risk of suffering serious harm upon return, which consists of (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

The reference in the subsidiary status provision to a range of different factual scenarios and reasons for flight illustrates how global changes and developments create a complex and dynamic legal environment for decision-makers. With new protection needs arising, as a result of 'new types of wars' or 'mixed migration flows', the construction of categories equally needed to change. [272] In the words of Dauvergne the "EU's qualification directive amounts to a restatement of refugee law for the twenty-first century"[273], which is characterised by a "growing complexity of push-factors" to which the EU Treaties reacted by setting uniform protection standards for "nationals of third countries, who without obtaining European asylum, are in need of international protection".[274]

While subsidiary protection status differs substantively from refugee status in that it lacks a prescribed nexus between persecution and specific grounds for persecution as

[270] Art 2e and 15 of the 2011 recast Qualification Directive.
[271] 2011 Qualification Directive, art 2(e) 'Person eligible for subsidiary protection' means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.'.
[272] Kaldor (n 246); Markard (n 258); IOM (n 245); Betts (n 245).
[273] Dauvergne (n 265) 150.
[274] Kay Hailbronner and Daniel Thym, 'Legal Framework for EU Asylum Policy', *EU Immigration and Asylum Law* (Nomos Verlagsgesellschaft GmbH & Co KG 2016) 1033.

enumerated in the Refugee Convention (i.e. race, religion, nationality, social group, political opinion), it adheres to a traditional individualistic approach, requiring the claimant to show that he or she is personally at risk.[275] As Goodwin-Gill draws out, the Qualification Directive can be seen as the most important instrument combining refugee and human rights law to date.[276] Overall, it serves to codify a protection status on the basis of new global protection risks, constructing a protection category that aims to cover such situations, thereby granting rights and creating an obligation on states.

The novelty of the subsidiary protection category and the subsidiary protection holder, however, further increases the challenge inherent in its application by decision-makers on the national level, because the CJEU - ultimately in charge of its interpretation - has yet to rule on a number of key elements.[277] As a result, this provision, "which by its nature can potentially affect the outcome of many cases dealing with international protection, has not proved easy for judges to apply"[278]. Statistics seem to confirm divergent interpretations amongst EU member states.[279] Some critics argue that political will might influence the degree to which subsidiary protection status is applied in contrast to other protection categories. In Germany, for instance, the number of subsidiary protection holders significantly increased between 2015 and 2016 (from 0.7% in 2015 to 22.1% in 2016), despite an overall similarity in the distribution of countries of origin amongst those applying for asylum.[280] This change took place after the right to family reunification was

[275] Goodwin-Gill and McAdam (n 49).
[276] ibid.
[277] European Asylum Support Office (EASO), 'Article 15(c) Qualification Directive (2011/95/EU): A Judicial Analysis' (2014).
[278] ibid.
[279] Taking into account the possibility of unequal distribution of countries of origin amongst those applying for asylum in the different member states, 2017 saw 14% of all first instance decisions in France awarded subsidiary protection status, 27% in Sweden, 13% in Belgium, 22% in Germany and 10% in Italy; Eurostat, 'First Instance Decisions by Outcome, Selected Member States, 1st Quarter 2017 Update' <http://ec.europa.eu/eurostat/statistics-explained/index.php/File:First_instance_decisions_by_outcome,_selected_Member_States,_1st_quarter_2017_update.PNG>.
[280] Bundesamt für Migration und Flüchtlinge, 'Das Bundesamt in Zahlen 2015. Asyl, Migration Und

put on hold for subsidiary protection status holders in order to curb the numbers of asylum seekers in Germany after the summer of 2014. In relation to Syrian applicants this meant that 0,1% were awarded subsidiary protection in 2015, and 16% in 2016.

This changing practice not only illustrates how wider political developments can impact status attribution, but this particular example also reveals the role that the rights attached to a particular protection status play. While subsidiary status holders had the same rights as Convention refugees in Germany, including access to work, language courses and other social benefits, in 2018 the right to family reunification was permanently scrapped for subsidiary protection holders, making family reunification a discretionary administrative decision limited by a nation-wide quota of 1000 family members per month. [281] As a result, the number of appeals before the administrative courts increased significantly, because those who had been awarded subsidiary protection status appealed that decision to 'top-up' their status to refugee protection in order to be able to reunite with their families.[282] This in turn led to both reports of strained resources at the administrative courts, as well as judicial ping pong between the courts and the BAMF, as well as between

Integration' (2016); Bundesamt für Migration und Flüchtlinge, 'Das Bundesamt in Zahlen 2016' (2017). In 2016 the 10 nationalities with the highest numbers of asylum applications were: Syria, Afghanistan, Iraq, Iran, Eritrea, Albania, Unknown, Pakistan, Nigeria, Russia. In 2015 these were: Syria, Albania, Kosovo, Afghanistan, Iraq, Iran, Serbia, Unknown, Eritrea, Macedonia, Pakistan.

[281] ProAsyl, 'BAMF-Entscheidungspraxis Geändert: Für Immer Mehr SyrerInnen Wird Der Familiennachzug Ausgesetzt' (2016) <https://www.proasyl.de/wp-content/uploads/2015/12/Rechtspolitisches-Papier_Familiennachzug_aktuell_final.pdf>; 'Informationsverbund Asyl & Migration - Sonderfall: Subsidiär Schutzberechtigte' <https://familie.asyl.net/ausserhalb-europas/sonderfall-subsidiaer-schutzberechtigte/> accessed 17 April 2020.

[282] Oberverwaltungsgericht Niedersachsen, 'Belastung Der Verwaltungsgerichtsbarkeit Durch Die Zunahme von Asylverfahren | Nds. Oberverwaltungsgericht' <http://www.oberverwaltungsgericht.niedersachsen.de/startseite/aktuelles/belastung_verwaltungsgerichtsbarkeit_durch_zunahme_von_asylverfahren/belastung-der-verwaltungsgerichtsbarkeit-durch-die-zunahme-von-asylverfahren-137758.html>; Die Zeit, 'Richterbund Warnt Vor Überforderung Der Gerichte' <http://www.zeit.de/politik/deutschland/2017-07/asylverfahren-verwaltungsgericht-richter-ueberlastung-flluechtling>; Frankfurter Allgemeine Zeitung (FAZ), 'Überlastung Durch Asylverfahren' (28 January 2015) <http://www.faz.net/aktuell/politik/inland/verwaltungsgericht-regensburg-ueberlastung-durch-asylverfahren-13395496.html>.

courts of different levels[283] and the states (*Bundesländer).*[284] These developments illustrate how the rights attached to the subsidiary protection category have been in constant flux and how wider political developments bring fluidity and complexity into the law, effectively consolidating a protection hierarchy.

4. Protection from Removal: A Fall-back Category with Discretionary Rights

Beyond the definition of refugee status codified in Art. 1A of the Refugee Convention, the principle of *non-refoulement* established under Art. 33(2) of the same Convention, was used by different human rights bodies to develop alternative forms of protection. In particular, applied and enforced by the European Court of Human Rights, the *non-refoulement* principle provides a normative basis for adjusting the protection framework to protection needs. Specifically, it has allowed for the integration of international human rights law into refugee law, as well as limited the possibility for states to extend measures curbing immigration.[285]

Whilst European human rights law clearly proves the most effective, because of the binding nature of the Strasbourg Court's jurisprudence[286], the Human Rights Committee under Art. 7 ICCPR66, and the Committee against Torture under Art. 3 CAT84 both equally developed human rights and protection jurisprudence on the basis of the principle of *non-refoulement*. This cumulated in the 2005 UNHCR ExCom Conclusion, which called for states to uphold their obligations under international human rights law and

[283] A feed-back loop can be observed between decisions by the OVG in 2014 awarding refugee protection status, and the practice awarding the same status in 2015, See for example ProAsyl (n 279); (2014) Az. 5 K 707/12.KS.A (Hessischer Verwaltungsgerichtshof); (2014) 2 L 16/13 (Oberverwaltungsgericht Mecklenburg-Vorpommern).
[284] Between January 2016 and June 2017, out of six publicised higher administrative court decisions, three confirmed the award of subsidiary protection status, whereas three others overturned the decision and awarded Convention Refugee status.
[285] Costello (n 56) 172.
[286] Art. 46(1) ECHR50. See also Terje Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to de Facto Asylum' (1990) 2 International Journal of Refugee Law 361.

encourages them to use "complementary forms of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol"[287], acknowledging it as a useful tool in "responding pragmatically to certain protection needs".[288]

German lawmakers have codified these legal developments in a formal protection category. As such, §60 (5) and (7) AufenthG create a prohibition of returning someone to a country (*zielstaatsbezogene Abschiebungshindernisse*), if doing so would result in concrete danger for his or her life, freedom and body or would violate the rights enshrined in the European Convention of Human Rights (§60 Abs. 5 AufenthG). This refers to the rights resulting from Art. 3 ECHR, the protection against torture and inhumane and degrading treatment.[289] Protection from return may also arise in cases where inhuman and degrading treatment relate to the lack of adequate medical treatment, where the applicant suffers from a life-threatening and grave illness.[290]

In a strict legal sense protection from removal merely prevents deportation. As a result, it only implicitly constitutes a right to protection and therefore to remain, making it the least powerful protection category. As a result of its fall-back nature, the protection from removal category is the only ground of protection status which grants immigration officers explicit discretion for the length of the residency title awarded to the applicant in question (§ 25 (3) iVm § 26 (1) 4 AufenthG). The immigration office (*Ausländerbehörde*) "should" - but is not obliged to - grant a residency title. In the same vein, the fall-back nature of the protection from removal category is reflected in the limited and discretionary rights

[287] UNHCR, 'ExCom Conclusion No 103 (LVI) "Conclusion on the Provision on International Protection Including through Complementary Forms of Protection"' para i.
[288] ibid para h.
[289] *HLR v France* (1997) 30240/96 (ECHR); *Ahmed v Austria* (1997) 24573/94 (ECHR); *D v UK* (1997) 146/1996/767/964 (European Court of Human Rights (ECHR)).
[290] *D v UK* (n 287); Dauvergne (n 265) 180.

attached: Protection from removal status holders do not have privileged rights to family reunification and are granted labour market access only with permission of the immigration office, making it the protection ground with the most limited rights position. All power seems to sit with the immigration officer, who determines the length of stay and the rights and obligations attached. In comparison with other protection categories, protection from removal is also a fall-back category in terms of the number of awards of protection. In 2019 merely 3.2% of all first instance decisions led to the award of protection from removal, compared with 24.5% who were awarded refugee status, 10.6% subsidiary protection and 29.4% who were rejected.[291]

As shown above, the existence of four different protection grounds originated, shaped and transformed by and in a pluralist sphere of rights and developments, not only raises the question for judges whether someone is granted protection, but also what kind of protection category she or he falls into. This is not always an easy task as there might be substantial overlaps between the categories. According to Markard for instance, the siege of Sarajevo against its Muslim population in 1992-1996 serves to illustrate how an individual fleeing a similar situation could be categorised both as someone fleeing (civil) war under the EU subsidiary protection norm[292], or as a Convention refugee, because of a well-founded fear of being persecuted for reasons of religion (their Muslim faith) or belonging to a particular social group (those living in Sarajevo).[293] The same might be true for most asylum applicants from Syria today, who might be individually persecuted for political reasons, while similarly fleeing indiscriminate violence or having a well-founded fear of inhumane and degrading treatment, while potentially also suffering from Post-Traumatic Stress Disorder (PTSD) protecting them from return, because of health

[291] 'Schlüsselzahlen Asyl 2019' (n 253).
[292] This is merely a hypothetical consideration, since the Qualification Directive and thus subsidiary protection status was not in place at the time.
[293] Markard (n 258).

reasons.

II. Institutional Environment: Management and Governance of Rights

1. The Asylum Process in Germany: From *BAMF* to Court

The second part of this chapter illustrates the process by which asylum cases pass through the system, as it strives to understand the institutional setting decision-makers navigate to attribute protection status. It starts with the *BAMF*, the first instance administrative body before moving up to the administrative courts, the second instance or appeal courts. It shows how organisational arrangements, like the division of labour, hierarchies of authority, formal channels of communication all make up the institutional environment which administrative court judges and decision-makers manoeuvre.

1.1. The Administration: *Bundesamt für Migration und Flüchtlinge* (BAMF)

The *Bundesamt für Migration und Flüchtlinge* (*BAMF*/Federal Office for Migrants and Refugees) is the administrative body responsible for deciding asylum applications in the first instance.[294] When an asylum application is lodged, the *BAMF*, which is based in Nürnberg, and its satellite offices across the country assess an applicant's claim on all four different grounds for protection simultaneously. As part of the *BAMF's* assessment, an individual asylum hearing is conducted with the applicant (*Anhörung*) (§25 AsylG) in most cases. As part of this interview, the applicant has the right to an interpreter. The asylum claim is documented, transcribed and this first bureaucratic manifestation of the applicant's story will form the cornerstone for all subsequent re-iterations of the case.

[294] Kleine Anfrage der Abgeordneten Luise Amtsberg u.a. und der Fraktion Bündnis 90/die Grünen, 'BT - Drucksache 18/10704 Befristete Beschäftigungsverhältnisse Beim Bundesamt Für Migration Und Flüchtlinge'.

As described above, the administrative asylum hearing has been at the centre of different sociological, socio-linguistic and ethnographic studies, highlighting divers aspects of the interaction between asylum-seekers and the State, emphasising at times the underlying power dynamics[295], asymmetrical communication[296] or the role of 'culture', trauma and language in shaping communication[297], the sensitivity of cultural references[298], the role of gender[299] and intertwined expectations of vulnerability[300].

A bureaucratic institution, like the *BAMF* is a hierarchical space. As such, case-officers and other decision-makers at the *BAMF* are bound by instructions (*weisungsgebunden*) issued by higher ranking officials or general administrative regulations (*Verwaltungsvorschriften*) issued by the Federal Ministry of the Interior (*BMI*), which guide the application of legal rules to the individual case. Upon reaching a decision, the *BAMF* issues a written, justified notice (*Bescheid*) to the applicant, which includes references to legal remedies (§31 Abs. 1 S. 1 &2 AsylG). The operative provision (*Tenor*) of the decision as well as the information on legal remedies is translated, while the reasons for the decision are not.[301] Where an application is rejected, the applicant is ordered to leave the country within 30 days (§38 AsylG). At the same time, recourse to appeal the decision in the administrative courts is granted (§40 VwGO).[302]

The cases of applicants who were rejected - by the *BAMF* or should they have appealed by the courts - are transferred to the local immigration office (*Ausländerbehörde*) in charge

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295 Kalin (n 88); Sonja Pöllabauer, 'Forschung Zum Dolmetschen Im Asylverfahren: Interdisziplinarität Und Netzwerke' (2008) 53 Lebende Sprachen 121.
296 Henrik Zahle, 'Competing Patterns for Evidentiary Assessments', *Evidentiary Assessment, Proof and Credibiity in Asylum Law* (Martinus Niijhofer Publishers 2005).
297 Blommaert (n 51).
298 Kalin (n 88); Vetters and Foblets (n 44).
299 Spijkerboer (n 51).
300 Pamela J Kea and Guy Roberts-Holmes, 'Producing Victim Identities: Female Genital Mutilation and the Politics of Asylum Claims in the United Kingdom' (2013) 20 Identities 96; Butler (n 102).
301 UNHCR, 'Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. Detailed Research on Key Asylum Procedures Directive Provisions' (2010) 46.
302 See Art. 32(2) Refugee Convention and Art.13 ECHR.

of enforcing the decision. In cases where the decision is not enforceable, for instance due to a lack of personal documents or passports, a temporary short-termed status is issued to ensure that a failed asylum seeker is not left without any legal title but short of any substantial protection status. This is called '*Duldung*', which literally translates to 'toleration' and is not a secure immigration title, because the negative asylum decision remains enforceable. The length of the *Duldung* is decided by the immigration office on an individual basis, leading to so-called *Kettenduldungen* (chain tolerations) making this an often precarious and volatile status.[303] In June 2020 there were roughly 220 000 people living in Germany with this status, 148.8410 of which were failed asylum seekers.[304]

1.2. The Second Instance: The Appellate Courts

Administrative courts in each federal state serve to guarantee judicial review of all acts of the executive (Art. 4, Art. 19 Abs. 4 GG). Early on, in a seminal judgement, the Federal Constitutional Court (*BVerfG*) guaranteed the application of this principle in Art. 19 Abs. 4 GG to foreign nationals without limitations.[305] As a result, rejected asylum seekers can launch - in technical terms - a *Verpflichtungsklage* ('declaratory claim'), aimed at the declaration of an administrative decision, in this case the granting of refugee protection (*den Erlass eines Verwaltungsaktes*). Rejected asylum seekers can argue that failure to grant protection is an adverse legal decision (*rechtswidrig*) by the *BAMF*, violating the rights of the individual (§74 AsylG). The applicant then demands the attribution of protection status by the *BAMF* in her claim. The appeal can be aimed at either one or all different

[303] While those with a *Duldung* are entitled to benefit payments according to the *Asylbewerberleistungsgesetz* (Asylum Seekers Benefits Act), whether they are given permission to work is determined by the immigration office and the job center on a discretionary basis. Since 2015 people with a *Duldung* who have lived in Germany for more than eight years (or six for families with children) and have earned most their living expenses themselves are entitled to apply for leave to remain. Similarly, young adults up to the age of 21 who have lived and attended school in Germany for four years are able to apply for leave to remain. See also Mediendienst Integration, 'Asylrecht' <https://mediendienst-integration.de/migration/flucht-asyl/asylrecht.html#c1377>.

[304] 'Bundestagsdrucksache 19/21406 Abschiebungen Und Ausreisen Im Ersten Halbjahr 2020' 35.

[305] *[1973] 1 BvR 23 15573 (BVerfG (Ester Senat)).*

protection status categories depending on whether the applicant's claim was rejected or whether she was previously granted an 'inferior' status like subsidiary protection, which she wants to 'upgrade' to a status that would afford her more rights and stability. This seemingly complicated legal process is a result of the strict division between the administrative level and the judicial branch. As a result of which the court can merely order the administration, in this case the *BAMF* to attribute protection status, as the court does not have the power to attribute protection status itself.

In Germany asylum appeals are directed at the general administrative courts, in contrast to other European or western democracies where the appeal authority in asylum cases often consists of a specialised body, tailored to the requirements of asylum procedures, like a board (Belgium, France, Sweden) or tribunal (i.e. Immigration Tribunals in the UK).[306] The procedural rules governing the attribution of protection status are of administrative character,[307] determined first and foremost by national administrative law principles, as the specific international documents, such as the Refugee Convention are silent on the issue of procedure. Unlike with appeal bodies integrated into the administrative agency, where the assumption is that "the same interests that impose the guidelines on bodies of first instance, are to determine whether the body of first instance has applied the guidelines correctly"[308], courts are presumed neutral and independent, by way of autonomy from the executive and legislative.

In the administrative courts, cases are expected to be reviewed on fact and law. As such, the judge has a duty to engage in fact-finding in order to establish the evidence before

[306] UNHCR ExCom Conclusion No 8 (XXVIII) 'Determination of Refugee Status' (1977) para 6 refers to the right of appeal in stating, "if the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority whether administrative or judicial, according to the prevailing system."
[307] Staffans (n 113) 26. See also EU Asylum Procedures Directive (recast).
[308] Staffans (n 111) 103.

her, meaning that the judge is neither bound by "the result of the investigation of the first instance nor by the evidence put forth by the applicant"[309] (*Amtsermittlungsgrundsatz*, §86 VwGO). To this end, some of the federal states' administrative courts established their own archives to ensure access to independent information about the relevant countries of origins. One notable example is the *Dokumentations - und Informationsstelle* (documentation and - information base), an electronic database called 'Asylfact' in the administrative courts in Hessen, which was established in 1981 and is now contractually used by other states' courts as well.[310] The information centre collects and catalogues media sources on countries of origin as well as relevant information provided by the Federal Foreign Office (*Asuwärtiges Amt*), reports by academic institutes, non-governmental organisations, protocols of expert witness statements and other relevant documents. In relation to the significance of the information database for the work of the courts, the administrative court in Wiesbaden held that, "a documentation centre is a necessary pre-requisite in order to guarantee the independence of the court in asylum procedures, but also in order to warrant up to date information derived from the daily press, which is not delivered or used by the *BAMF*. Otherwise, independence from the *BAMF*, which would then deliver the working materials in a pre-filtered from, would not be guaranteed"[311].

Despite this strive for a fully independent assessment of fact and law, the court may also have regard to the files kept by the administration (§99 Abs. 1 Satz 1 VwGO) or the oral evidence submitted by the participants. At the same time, the participants have a processual duty to participate (§ 86 Abs. 1 Satz 1 Halbs 2 VwGO). Herein lies, according

[309] Tiedemann (n 267) 60.
[310] Verwaltungsgericht Wiesbaden, 'Die IuD-Stelle Und Ihre Datenbank "Asylfact"' <https://vg-wiesbaden-justiz.hessen.de/irj/VG_Wiesbaden_Internet?cid=2d769c48c982a688c8ee3d2a90441553>.
[311] *6 K 152/14WIA* (Verwaltungsgericht Wiesbaden) 7. "Insoweit ist eine Dokumentations- und Informationsstelle, wie sie derzeit in Hessen gegeben ist, zwingende Voraussetzung zur Gewährleistung der Unabhängigkeit des Gerichts in Aylverfahren, aber auch zur Gewährleistung aktueller Information auch aus der Tagespresse, wie sie vom Bundesamt nicht geliefert wird. Andernfalls wäre eine Unabhängigkeit gegenüber dem BAMF, die dann die Arbeitsmaterialien in der Form von vorgefilterten Erkenntnissen dem Gericht liefern würde, nicht gewährleistet."

to Fuller, the essence of administrative justice by adjudication, in that it "confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in her or his favour"[312]

Administrative courts conduct an oral hearing as part of the standard administrative proceedings (*Mündlichkeitsgrundsatz*, § 101 Abs. 1 VwGO), during which the court is to retrieve evidence (*Unmittelbarkeitsprinzip,* §96 Abs.1 VwGO).[313] However, it is possible to decide a case without an oral hearing, if all parties are in agreement (§ 101 Abs. 2 VwGO).[314] The oral hearing serves to guarantee that all members of the court are able to make a decision based on their immediate personal impression of the case before them in law, fact and evidence.[315]

Beyond these procedural benchmarks of an asylum hearing at the administrative courts, there are two important particularities of the German administrative courts, that shape the way in which asylum appeals take place: The career judiciary and the institutional organisation of courts in chambers.

Career Judiciary and the Division of Labour

The German judiciary is a classic career judiciary, where the best graduates are able to launch their judicial careers right after graduation. As a result, judges are appointed by merit and serve life tenure, giving rise to assumptions of a strong independent judiciary connected to its meritocracy. However, a career judiciary also implies, that those recruited "start from the bottom of an employment ladder", meaning judges are on probation

[312] Lon L Fuller and Kenneth I Winston, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 364.
[313] Jürgen Brandt, *Handbuch Verwaltungsverfahren Und Verwaltungsprozess* (CF Müller GmbH 2009).
[314] See for example, VG Sigmaringen Urteil vom 31.1.2017, A 3 K 4482/16 decided without an oral hearing. BVerwG, Beschlüsse vom 08.11.2005 – 10 B 45.05 4; und vom 17.10.1997 – 4 B 161.97, Buchholz 310 § 87a VwGO Nr. 3 S. 4 jeweils m.w.N
[315] See also, in relation, §112 VwGO according to which the decision can only be made by the judge who personally took part in the (oral) proceedings.

(*Richter auf Probe*) for the first three to five years of their careers.[316] Schneider compares the hierarchy that this internal employment ladder creates to an internal labour market, where tenured judges with fixed pay compete for promotions to the next rank.[317] In this type of fixed term career judiciary promotions and career opportunities within its closed system are the only economic incentive.[318] Despite the "training, recruitment and guarantees that exist to safeguard the independent status"[319] of judges, the role that reputation loss or gain can play in impacting decision-making in a career judiciary therefore has to be acknowledged.[320] However, in the asylum context the reputational gains are arguably limited, because of the limited number of onward appeals to the higher level administrative courts (*Oberverwaltungsgericht*).[321] As a result, administrative court judges are rarely overruled by a higher court, limiting the possibility of reputation loss through adverse findings.

In general, the appeal system of administrative courts in Germany is organised in a division of labour type fashion. Every German federal state (*Bundesland*) has one or (in most cases) more administrative courts of first instance, known as *Verwaltungsgericht* (VG)

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316 John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press 1985); Carlo Guarnieri, Patrizia Pederzoli and Cheryl A Thomas, *The Power of Judges* (Oxford University Press, USA 2002).
317 Schneider (n 237).
318 ibid.
319 Guarnieri, Pederzoli and Thomas (n 314) 18.
320 Thomas J Miceli and Metin M Coşgel, 'Reputation and Judicial Decision-Making' (1994) 23 Journal of Economic Behavior and Organization 31.
321 Unlike in other areas of law, asylum procedure law does not allow a secondary appeal to the higher (OVG and BVerwG) courts with reference to grave doubts ("*ernstlicher Zweifel*") about the decision (normally codified under §124 Abs. 2 Nr. 1 VwGO but lacking in §78 Abs. 3 AsylG). Instead, an appeal is only possible based on divergence from higher rulings and because of its fundamental importance. As a result, appeals rarely reach the highest courts, in an area of law where decisions are highly case-sensitive and prone to errors and doubts. This has been widely criticised both by practitioner's associations, academics as well as parliament itself, with the argument that it obstructs justice in the individual case (*Einzelfallgerechtigkeit*). Which is of particular importance compared to other administrative procedures, since in asylum cases, the applicant's life, bodily integrity and liberty might be at stake. Secondly, the set time limit of two months between a claim in the administrative courts of first instance and the higher administrative courts (§124a Abs. 4 S. 3 VwGO) that is prescribed for standard administrative law cases, differs from the one-month limit given in asylum procedure law. This has been widely criticised as an unjustified divergence from general proceedings, particularly taking into account the added difficulties, that language barriers, financial strains both on claimants and asylum and immigration solicitors and complex case-law provide for lodging an appeal.

and one administrative court of second instance, *Obverwaltungsgericht* (OVG).[322] Asylum claims are federalised and therefore lodged at the regular administrative courts of the state (*Bundesland*) where the asylum-seeker is resident. The highest administrative court is the Federal Administrative Court (*Bundesverwaltungsgericht/BVerwG*) based in Leipzig. The administrative courts are set-up into different chambers (*Kammern*). Specific areas of expertise are attributed by designated committees in every court to each of these chambers on a yearly basis.[323] Despite measures passed by Parliament in 1992 allowing the government to establish specialised chambers for asylum law, judicial resistance led to the distribution of asylum cases amongst the entire bench.[324] As a result, asylum claims are organised by country of origin and attributed to the different chambers inside the court.[325] However, the chamber as a decision-making body does not seem to play an important role in asylum cases. In 2018 for instance nearly all asylum cases were adjudicated upon by an individual judge and less than 7% of all cases were decided by the full chamber.[326] In contrast, in regular administrative law cases 76% of all cases were decided by an individual judge and 24% by the chamber as a whole.[327] What stands out in the data on administrative courts as well is the fact that in 93% of all cases only the claimant, i.e. the asylum seeker had legal representation, whereas only 4% of the opposition, i.e. the *BAMF* had legal representation.[328] This reflects, what I witnessed during my court observations. Similarly, the number of claimants in receipt of legal aid is relatively small, merely 14% of all asylum claimants received legal aid.

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[322] Tiedemann (n 267) 59.
[323] Tiedemann (n 267). According to §4 VwGO the committee consists of the president of the court and elected judges.
[324] ibid. This judicial resistance was mainly attributed to the fact that asylum claims were widely perceived as of low prestige and therefore limited career value.
[325] In the Berlin administrative court for example asylum claims by Syrian nationals are distributed to chamber 1,5,11,13, 15, and 18. Those from Afghanistan are dealt with at chamber 10, 16, 24. And those from Iraq at chamber 26, and 29, all others are distributed to various other chambers.
[326] Statistisches Bundesamt, 'Rechtspflege, Verwaltungsgerichte' (2014) Reihe 2.4. 28.
[327] Statistisches Bundesamt (n 324).
[328] ibid; Statistisches Bundesamt, 'Rechtspflege, Verwaltungsgerichte'.

Given the generalist nature of administrative courts, an administrative judge also hears a variety of other administrative claims apart from asylum appeals. However, since 2015/2016 the vast majority of cases judges hear are asylum claims and other asylum or immigration related cases, like Dublin referrals or visa cases. While in 2015, 32,7 % of all cases decided at the administrative courts were asylum proceedings[329] , this number rose to nearly half of all administrative law cases in 2016 (44,5%) and 46.9% in 2018.[330] The administrative court in Berlin for example saw a nominal increase of asylum cases from 2,350 asylum cases in 2015 to 10,600 cases in 2016. For instance, out of the nearly 200 000 cases decided by the administrative courts in Germany in 2018, nearly half were asylum claims and 11% Dublin and other asylum related claims. The next largest number of cases were all in the single digits, with police and public order claims (5.7%) leading the field, followed by immigration law cases (5.2%), civil servants (4.8%) and social and benefits claims (3.7%), tax law (4.6%), educational and sport related claims (3.3%), building, construction and urban planning (3.3%), environmental cases (1.3%) and university admissions and suspension cases (1.2%).[331] These numbers paint a clear picture of the cases that judges deal with. As a result, German judges are closer to the specialised asylum and immigration judges in other countries, than their role as general administrative law judges would make believe. This increase in case load arguably led to time constraints and heightened demands for efficiency (see below) as well as an increase in the number of judges employed in the administrative courts. As such, employment in the administrative courts continuously rose between 2014 and 2019.[332] In 2018 a total of

[329] Statistisches Bundesamt (n 324). The others include: Abgaberecht 13,8 %; Polizei-, Ordnungs- und Wohnrecht 8,4%; Recht des öffentlichen Dienstes 8,4%; Ausländerrecht 6,7%; Sozialrecht (ohne Sozialhilfe) 6,2%;

[330] Bundestag Drucksache 18/12360, 'Entwurf Eines Gesetzes Zur Änderung des Asylgesetzes Zur Beschleunigung von Verfahren'.

[331] Statistisches Bundesamt (n 326).

[332] From 1,393 posts in 2014 to 1,906 in 2018, see Bundesamt für Justiz, 'Personalbestand Der Verwaltungsgerichte 2007 Bis 2018'.

2,286 judges were employed at the relevant courts, with 509 judges in their probationary period. 44% of all judges are women.[333]

III. Political Environment: Legal Developments and Policy Changes

The final part of this chapter looks at the developments that shaped the space in which decision-makers operate, the political transformations and most importantly the policy changes that ensued. As cogently put by Köttgen, "a state's organisation is always decisively framed by the challenges, awaiting this state".[334] During the time this research took place, law and policy makers in Germany grappled with the distinctive challenges presented by the so-called 'refugee crisis' in 2014/2015, predominantly the large numbers of applicants. Driven by the steep increase in the volume of applications for protection received between 2014 and 2016, the same period saw an array of legal changes, directly or indirectly impacting on the rights and obligations attached to those holding and applying for protection status.[335] Since 2015, the German parliament passed a breadth of new laws, including two so-called *Asylpakete* (Asylum Packages), introducing far reaching changes to different areas of the law, amongst others additional safe countries of origin, restrictions on family reunification, changes to housing, residency and deportation requirements, impacting the legal environment in which judges operate. In addition to the formal legal changes above, the *Federal Ministry of the Interior* (BMI), the so-called supervisory authority of the *BAMF*, also issued various internal procedural instructions

[333] Bundesamt für Justiz, 'Personalbestand Der Verwaltungsgerichtbarkeit' <https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Personalbestand_VG.pdf?__blob=publicationFile&v=8> accessed 5 June 2017; 'Richterstatistik 2016' 1.

[334] Arnold Köttgen, *Die Rechtsfähige Verwaltungseinheit: Ein Beitrag Zur Lehre von Der Mittelbaren Reichsverwaltung* (Heymann 1939) III. "Die Organisation eines Staates wird immer durch die Aufgaben entscheidend bestimmt werden, die diesem Staate gestellt worden sind".

[335] In 2013 Germany received 127.023 asylum applications, in 2014 this number nearly doubled to 202.834. In 2015 until 2106 applications for protection rose again from 476.649 (2015) to 745.545 in 2016. The most recent figures (2019) indicate a decline to 165.938 applications received. 'Schlüsselzahlen Asyl 2019' (n 253).

for decision-makers.

The main challenge, the increasingly high volume of cases that require a decision and hence the strive to expedite asylum procedures were at the core of the legal and policy changes.[336] In an initial reaction the government officially pledged to reduce asylum proceedings to an average length of three months in September 2015.[337] In the literature, this type of fluidity with which changes in law and procedural instructions occur, is described as 'dynamism' and posited as a source of inconsistency in decision-making, reflected in an uncertainty as to how legal text and facts relate.[338] It drives the two main developments the following section will explore: Firstly, the simplification of complex individual asylum proceedings through the introduction of summary eligibility clusters and safe country of origin provisions at the administrative level; secondly, the attempt at increasing consistency in decision-making on the judicial level by creating new possibilities for higher level judicial review.

1. Simplification: Summary Eligibility Clusters and Safe Countries of Origin

Since summer 2015, a process of clustering or streamlining to increase the efficiency of the asylum system was set in motion. At the administrative level, the *BAMF* shortened asylum procedures by introducing a 'Cluster System' according to which asylum-seekers are pre-shuffled into specific categories, depending on their nationality, "the expected complexity of the application", as well as the "route of travel".[339] Furthermore, the

[336] Innenminister Konferenz (IMK), Sammlung der zur Veröffentlichung freigegebenen Beschlüsse der 203. Sitzung der Ständigen Konferenz der Innenminister und Senatoren der Länder vom 03. Bis 04.12 2015 in Koblenz, p.26.

[337] Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion die Linke (n 68). While there is no legally binding time-frame limiting asylum proceedings, §24 of the AsylG constitutes that if the decision-making process on an asylum application exceeds six months, the *BAMF* is required to inform the applicant of the time necessary until completion of the application, serving as an incentive for decision-makers to keep the envisaged time limits.

[338] Legomsky (n 9).

[339] BAMF, 'Ankunftszentren' (2017)

Asylum Package I[340], introduced in October 2015 and also coined "Asylum Procedure Acceleration Act" (*Asylverfahrensbeschleunigungsgesetz*) establishes the western Balkan countries Albania, Montenegro and Kosovo as safe countries of origin, which in previous years had made up more than a quarter of all applications for asylum.[341] An attempt to also introduce Tunisia and Morocco as safe countries of origin was later rejected by the *Bundesrat* (Federal Assembly) in March 2017. Applicants from these 'safe' countries may be placed in special housing facilities in order to accelerate asylum proceedings as well as returns. [342] As a result, their asylum applications are often decided within three weeks (including appeals).[343] Similar attempts to fast-track proceedings for the especially 'deserving' were made by federal and state interior ministers, who agreed in October 2014 to accelerate asylum proceedings by allowing written-only proceedings for Syrian nationals (§ 24 Abs. 1 S 4, 5 AsylVfG), meaning that Syrian nationals were as a group exempt from individual examinations of their asylum claims including oral hearings. [344]

Summary eligibility clusters and other procedural mechanisms like these, or other forms

<http://www.bamf.de/DE/Fluechtlingsschutz/Ankunftszentren/ankunftszentren-node.html> accessed 23 April 2017. Cluster A covers all countries of origin with a high protection rate (above 50%), which in 2016 included Syria, Iraq, Afghanistan, Eritrea, Somalia. In Cluster B, countries of origin with a lower protection rate of up to 20% ranging from Nigeria, the Russian Federation, Azerbaijan, Albania, Pakistan and Turkey are included. In Cluster C all complex profiles are covered, including for example nationals from Zimbabwe, Gabon, Congo, Libya, Sudan Uganda, Pakistan, Iran, Uzbekistan and under Cluster D all Dublin III-cases are streamlined.

[340] Asylverfahrensbeschleunigungsgesetz 1722; Gesetzesentwurf der Fraktion der CDU/CSU und SPD 2015.

[341] According to Art. 16a Abs. 3 of the Basic Law (Grundgesetz) and in accordance with Article 37 and 38 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection of the EU Asylum Procedures Directive. In 2015 a total of 120,882 applications were received from all six Balkan countries, making up 27.4% of all applications for asylum. See Bundesamt für Migration und Flüchtlinge, 'Das Bundesamt in Zahlen 2015. Asyl, Migration Und Integration' (n 278).

[342] Safe countries of origin now include Albania, Bosnia-Herzegovina, Ghana, Kosovo, Macedonia, Montenegro, Senegal and Serbia. 'A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.' (Annex I, Directive 2013/32/EU)

[343] European Parliament, 'Safe Countries of Origin: Proposed Common EU List' (2017) Briefing.

[344] BT Drs. 18/6403, 'Schriftliche Fragen Mit Den in Der Woche Vom 12. Oktober 2015 Eingegangenen Antworten Der Bundesregierung' 33.

of exemptions, grouping similar stories of flight together, simplify proceedings for decision-makers and shift the onus from the individual's claim to the claimant's nationality. The applicant is then required to disprove or fulfil the expectations to his or her nationality. Nationality and group affiliation is equated with protection likelihood and thus with the label 'deserving' or 'un-deserving' creating a protection hierarchy in which those with high and very low expectancy of success on the basis of their nationality proceed fastest through the system, enabling faster integration (into language classes and the labour market) on the one hand and fast deportations and returns on the other hand.[345]

Overall, the role that simplification through streamlined clusters and summary eligibility plays, shows that not only legal changes to refugee and asylum law categories, but also surrounding policy changes to how administrative proceedings are organised, shape the context in which decision-makers operate (i.e. caseloads, time pressures, types of cases and countries of origin). The increasing speed of decision-making at the first instance, due to simplification and clustering of cases, has led to a backlog of cases at the judicial level, leading to further attempts to create efficiency in the administrative courts, mainly by increasing consistency in order to decrease the length and back-and-forth of cases.[346]

2. Consistency: Efficiency in the Courts

As a result of the increasing volume in asylum applications since 2015, the number of appeals brought before the administrative courts equally grew in the following years.[347]

[345] In 2016, average times of asylum proceedings by country of origin: Syria: 3,8 months; Afghanistan 8, 7 months; Pakistan 15,5 months; Iraq, 5,9 months; Serbia: 8,9 months, Iran 12,3 months; Russia: 15, 6 months; Federal Government, Response to parliamentary questions by The Left: 18/705, 5 March 2014; 18/3580, 28 January 2015; 18/7625, 22 February 2016; 18/11262, 21 February 2017. Fraktionschefin von Bündnis 90/Die Grünen, Katrin Göring-Eckardt, KW 08 2016, https://www.bundestag.de/dokumente/textarchiv/2016/kw08-de-asylverfahren/409490
[346] Thomas Spijkerboer (n 119).
[347] Statistisches Bundesamt (n 324).

Consequentially, despite a constant decrease in the length of asylum proceedings over the last 15 years[348], the strive towards accelerating asylum proceedings also reached the administrative courts. As Sönnecken shows, the increase in efficiency at the administrative level has spread the burden and administrative courts have become more and more important in asylum cases.[349]

The attempt to increase the efficiency of the courts took place by allowing first instance administrative courts (*VG*) to grant an appeal to the higher administrative courts (*OVG*), in cases where the decision is of fundamental importance or diverges from higher court decisions.[350] Previously, and unlike what the general administrative procedural law provides for other administrative law cases, only the higher administrative courts themselves (*OVG*) were allowed to grant an appeal to the higher-level courts. The bodies representing judges and lawyers[351], who argued for these changes, suggested that the administrative courts of first instance are more apt than the higher courts to assess the necessity for a higher-level ruling because these judges have an overview of similarly contested cases.[352] Aimed at facilitating recourse to the highest judicial authority to

[348] Statistisches Bundesamt (n 130) 23. In 2001 the average length was 21,4 months, in 2008 it ranged at 15,2 months and dropped to 12,2 months in 2009, 9 months in 2010, 8,6 in 2014 and 7,8 months in 2015. All other proceedings (without asylum proceedings) dropped from 17,5 months in 2001 to 10,6 months in 2015.

[349] Soennecken (n 138).

[350] Konferenz der Justizministerinnen und Justizminister, 'Beschluss Der Ministerinnen Und Minister' (2016) 87. Konferenz; Konferenz der Justizministerinnen und Justizminister, 'Beschluss TOP I.1 d Stärkung Der Rechtsmittelinstanzen Im Asylverfahrensrecht' (2015); Konferenz der Justizministerinnen und Justizminister, 'Beschluss TOP I.16 Änderung Des Asylverfahrensrechts' (2015); Stellungnahme des Bundesrates, Entwurf eines Gesetzes zur besseren Durchsetzung der Ausreisepflicht 2017 [Drucksache 179/17 (Beschluss)]; Bund Deutscher Verwaltungsrichter und Verwaltungsrichterinnen (BDVR), 'Stellungnahme Zu Den Vorschlägen Des Bundesrats Zu Dem Entwurf Eines Gesetzes Zur Besseren Durchsetzung Der Ausreisepflicht' (2017).

[351] *Bund Deutscher Verwaltungsrichter* (BDVR), the *Neuen Richtervereinigung* (NRV) or the *Deutsche Anwaltsverein* (DAV).

[352] Neue Richtervereinigung, 'Entwurf Eines Gesetzes Zur Besseren Durchsetzung Der Ausreisepflicht, BT-Drs. 18/11546' <https://www.neuerichter.de/details/artikel/article/entwurf-eines-gesetzes-zur-besseren-durchsetzung-der-ausreisepflicht-bt-drs-1811546-518.html> accessed 4 June 2017; Bund Deutscher Verwaltungsrichter und Verwaltungsrichterinnen (BDVR) (n 348); Konferenz der Präsidentinnen und Präsidenten der Obverwaltungsgerichte und Verwaltungsgerichtshöfe der Länder sowie des Präsidenten des Bundesverwaltungsgerichts am 8. und 9. Oktober 2015 in Kassel, 'Belastung Der Verwaltungsgerichtsbarkeit Durch Die Zunahme von Asylverfahren' (2015) Abschlussbericht <http://www.oberverwaltungsgericht.niedersachsen.de/startseite/aktuelles/belastung_verwaltungsgerich

provide guidelines for a more unified asylum jurisprudence and the possibility to increase consistency both for the courts and subsequently for the administrative level, this new regulation attempts to create consistency for subsequent cases.[353] Despite these changes, however, appeals that hinge on the individual facts of the case rather than overarching legal questions rarely reach the highest courts to get reviewed.[354] As a result, the fact remains, that administrative court judges are rarely overruled by a higher court.[355]

Consequently, divergent interpretations may co-exist for an irritably long time in different state-level administrative courts. For instance, since the beginning of the conflict in Syria both the BAMF and administrative courts in different states have interpreted the situation of those who fled the conflict differently.[356] While the Federal Administrative Court (*BVerwG*) would want to make a unifying decision, the judges themselves highlight, that they are not entitled to do so: "Even in cases, in which Higher Administrative Courts (*OVG)* come to different legal conclusions on the basis of mostly identical facts, the appeal is only possible, if the appeal is of fundamental importance and requires a clarification of the underlying legal question", which the judges assume not to be the case for this question

tsbarkeit_durch_zunahme_von_asylverfahren/belastung-der-verwaltungsgerichtsbarkeit-durch-die-zunahme-von-asylverfahren-137758.html>; Pressemitteilung Bundesverwaltungsgericht, 'Präsident Des Bundesverwaltungsgerichts Nimmt Zur Asylgesetzgebung Stellung' (2016) 7/2016.

353 Bund Deutscher Verwaltungsrichter und Verwaltungsrichterinnen (BDVR) (n 348); Bundestag Drucksache 18/12360 (n 328).

354 Unlike in general administrative law, asylum procedure law does not allow a secondary appeal to the higher (OVG and BVerwG) courts with reference to grave doubts ('*ernstlicher Zweifel*') about the correctness of the decision (normally codified under §124 Abs. 2 Nr. 1 VwGO but lacking in §78 Abs. 3 AsylG).

355 Linda Camp Keith, Jennifer S Holmes and Banks P Miller, 'Explaining the Divergence in Asylum Grant Rates among Immigration Judges: An Attitudinal and Cognitive Approach' (2013) 35 Law & Policy 261. Furthermore, the time limit between the general administrative procedural law of two months between the administrative courts of first instance and the higher administrative courts (§124a Abs. 4 S. 3 VwGO), differs from the one-month limit in asylum procedure law. This has been widely criticised as an unjustified divergence from general proceedings, particularly taking into account the added difficulties, that language barriers, financial strains both on claimants and asylum and immigration solicitors and complex case-law provide for lodging an appeal.

356 Pauline Endres de Oliveira, 'Schutz Syrischer Flüchtlinge in Deutschland - Welche Möglichkeiten Für Einen Sicheren Aufenthalt Gibt Es?' (2014) 9; LTO, 'Stand der OVG zu wehrpflichtigen Syrern' (*Legal Tribune Online*) <https://www.lto.de/recht/hintergruende/h/rechtsprechung-ovg-fluechtlinge-syrien-status-wehrpflicht-subsidiaerer-schutz/> accessed 19 April 2020; *VG Stade, Urteil vom 1542013 – 6 A 1811/12*; *VG Gießen, Urteil vom 1772014 – 2 K 3472/12GIA*; *VG Augsburg, Urteil vom 782013 – 6 K 1330161*; *VG Stuttgart, Urteil vom 2032013 – A 7 K 4284/12*; *VG Düsseldorf, Urteil vom 932012 – 21 K 5844/10A*.

at the moment.[357] As a result, different interpretations and views remain and appellants face varying prospects of receiving refugee protection depending on the state they find themselves in, illustrating not only the impact the federalised system can have on asylum decision, but also the challenges involved in dis-entangling the different often overlapping protection categories.

Conclusion

This chapter set out the legal and political environment in which protection status attribution takes place, highlighting the legal tools judges possess when deciding who deserves which kind of protection. It argues that the legal environment invites space for interpretation and transformation as it is shaped by international and supra-national judicial, political and legal developments, which have created a heterogeneity and fluidity of context. This chapter further described the political attempts at efficiency and streamlining driven by the specific historical context of the so-called refugee crisis and the demands arising for administrative and judicial decision-makers out of the high volume of cases and the division of responsibilities between the different levels of decision-making. As a result, protection categories are intertwined and overlap, arguably inviting policy and decision-makers to develop their own patterns and mechanisms facilitating decision-making. At the core of the legal environment of protection status attribution therefore seems to be a constant negotiation between the complexity inherent in the protection categories, created so as to allow for and ultimately guarantee individual fairness, and the strive to reduce complexity by simplifying proceedings in order to increase the efficiency of the system. The legal environment reflects this negotiation process, ultimately creating a more fluid system for decision-makers to navigate. Beyond establishing the context in

[357] *Beschluss vom 24042017 - BVerwG 1 B 2217* [2017] BVerwG BVerwG 1 B 22.17, ECLI:DE:BVerwG:2017:240417B1B22170.

which protection status attribution takes place and in which cases proceed, this chapter also further highlights the need for researching the everyday processes, patterns, strategies and methods of decision-makers.

The chapter further tried to paint a picture of the organisational and institutional context administrative judges face every day, setting the scene for this inquiry. It also set out the cornerstones of the process a case passes through before it reaches the administrative court, focusing on the way evidence is collected in the *BAMF* and how a case typically proceeds to the appeal stage. Adding to the legal and political environment of the moment, this part explored how the rising number of cases impacts the case distribution in administrative courts and affects the way in which chambers and judges operate. Thereby, I shed light on the context of asylum decision-making and how it fits into and sits alongside the other workstreams present in administrative courts.

Moving into the methodology chapter, which follows, this chapter also showed why Germany arguably presents an ideal place for an investigation of refugee status attribution, as it illustrated the surprising consistency with which life and processes in the administrative courts continued, despite the heightened number of cases and the pressure on the system. Even though courts hired new judges and created additional chambers working on asylum cases, the core procedural tenets of the judicial appeals' process have remained the same. In very practical terms, the abundance of cases in the courts also guarantees ample opportunities for observing a great variety of cases and case constellations, including different countries of origins, judges and chambers. The German administrative courts therefore provide a unique lens though which to analyse a system of refugee status determination in action.

CHAPTER IV – METHOD

The previous chapters introduced the research project, its roots in the wider refugee studies and socio-legal literature as well as the legal, political and institutional context it is situated in. This chapter now turns to the methodological approach taken to investigate how administrative court judges in Germany make decisions in asylum cases. The first part of this chapter expands on the constructivist grounded theory approach this research followed, explaining why and how it fits the research design as well as pinpointing its limitations. The second part describes the process of data collection, the challenges of gaining access to judges and the choice of fieldwork sites. In the final part of this chapter, I exemplify the different phases of coding and analysis the data in order to build the theoretical framework underlying my findings.

I. The Approach: Constructivist Grounded Theory and its Limitations

This research follows a constructivist grounded theory approach[358] based on Strauss and Corbin.[359] Using grounded theory, its methodological aim is to develop a theory or "unified theoretical explanation" in order to understand the process by which a social phenomenon occurs.[360] Theory development is grounded in the data and hence derived from "the participants, who have experienced the phenomenon".[361] Using a data-driven approach complements the bottom-up analysis which places the interview data at the core of my thesis and thereby the perspective of the judges on the process of asylum decision-

[358] Charmaz (n 37).
[359] Strauss and Corbin (n 37); Barney G Glaser and Anselm L Strauss, *Discovery of Grounded Theory: Strategies for Qualitative Research* (Routledge 2017).
[360] Glaser and Strauss (n 357); Strauss and Corbin (n 37).
[361] Strauss and Corbin (n 37); John W Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (SAGE Publications 2012).

making. It furthermore helped to ensure the research moves from a description of a phenomenon to an analytical understanding of the process by which it occurs.

Initially developed by Glaser & Strauss in 1967 grounded theory is constantly evolving following different epistemological schools. This research is inspired by Charmaz' constructivist approach rooted in a relativist epistemology and lying squarely in the interpretivist tradition, in contrast to the more realist view of data taken by Glaser & Strauss.[362] It takes into account the "subjective inter-relationship between the researcher and participant and the construction of data".[363] Charmaz for instance acknowledges the role of the researcher in gathering, reading and coding the data as well as in making decisions about the categories throughout the process, naturally shaped by personal values, experiences and priorities of the researcher.[364] The constructivist approach furthermore allows for a more flexible interpretation of the methodological confines established by traditional grounded theory, taking into account the views, values, beliefs, feelings, assumptions and ideologies of individuals.[365] In the words of Charmaz, "in constructivist grounded theory the guidelines for gathering and analysing qualitative data are systematic, yet flexible and offer heuristic devices rather than formulaic rules".[366] Nonetheless, the core tenets of traditional grounded theory, like rich data, coding, memo-ing and theoretical sampling remain crucial.

This research project features two sets of ambitions that make a grounded theory approach particularly viable: Firstly, researching from the bottom up and secondly,

[362] Thornberg and Charmaz (n 37).
[363] Jane Mills, Ann Bonner and Karen Francis, 'The Development of Constructivist Grounded Theory' (2006) 5 International journal of qualitative methods 25.
[364] Creswell (n 359).
[365] ibid.
[366] Charmaz (n 37); Paul Atkinson, Sara Delamont and Amanda Coffey, *Key Themes in Qualitative Research: Continuities and Changes* (Rowman Altamira 2004).

developing an analytical understanding of asylum decision-making driven by a gap that presents itself in the existing literature.[367] A grounded theory approach attempts to understand and explain processes by capturing participants' experiences with that process and it enables me - the researcher - to place the perspective of judges on this process into the headlight, including not just their legal professional selves, but also the emotive aspects of their every-day work. Grounded theory offers clear procedures for handling and coding rich data, seeking patterns within the data and displaying findings. Furthermore, it allows for a constructive interrelationship between data collection and analysis given the approach's flexibility in which data collection and analysis can take place simultaneously.[368] Following a grounded theory approach hence allowed me to gather, code and analyse the rich data required to answer my research question. Nonetheless, as with any design choice, some limitations to this approach and the wider research design exist. These will be explored in the final part of this chapter.

II. The Data: Gathering a Rich Dataset

I set out to gather a rich data set, comprised of three different data components: hearing observations, interviews and file material. I followed a sequential approach to collect my data, beginning with courtroom observations, followed by semi-structured interviews with judges at the administrative courts as well as the collection of available file material and judgements. My data collection itself was inductive, driven by the concept of 'theoretical sampling', in that there were no initial hypotheses or pre-conceived ideas that I set out to prove or disprove.[369] Therefore, the main sampling point was access to where the phenomenon in question - asylum decision-making - occurred, namely the administrative

[367] Creswell (n 359).
[368] Thornberg and Charmaz (n 37).
[369] Janice M Morse, 'Situating Grounded Theory within Qualitative Inquiry' [2001] Using grounded theory in nursing 1.

courts. According to theoretical sampling guidelines, sampling takes place according to emerging theory rather than pre-defined groups or sets of people, aiming to gather enough data to fully 'saturate' the theory or model developed from the data. [370] I sought 'thick' description meaning full and focused data, that "reveals participants feelings, intentions and actions".[371] One challenge I faced was determining when the dataset was saturated, i.e. when enough data was collected. I chose to use a strategy of 'discriminant' sampling to test whether enough data had been gathered by presenting the theoretical framework I developed to two judges, who did not participate in the research initially.[372]

1. Two Turning Points during Data Collection

A core tenet of my data collection was the simultaneity of data collection and analysis. According to grounded theorists, a first hunch or analytical category might lead the researcher to seek out different sources or types of data, refining data collection in order to deepen the focus on the studied phenomenon.[373] In this particular case, there were two major turning points during my fieldwork: I split my data collection phase into two and after an initial round of interviews, I decided to collect more data, albeit this time at a different fieldworks site, which allowed me to conduct more and differently nuanced interviews. Finally, I followed up with a final interview with un-involved participants to test the saturation of my data after all interviews had been conducted.

Firstly, after the first round of interviews, open coding and analysis, which I conducted after my fieldwork phase at Metropolis, I adjusted my original fieldwork plans to adapt it to what I had learned from my intermittent analysis of the data. In fact, I found that I

[370] Glaser and Strauss (n 357); Claire B Draucker and others, 'Theoretical Sampling and Category Development in Grounded Theory' (2007) 17 Qualitative Health Research 1137.
[371] Clifford Geertz, 'Thick Description: Toward an Interpretive Theory of Culture. The Interpretation of Cultures: Selected Essays (Pp. 3-30)' [1973] New York, NY: Basic.
[372] Creswell (n 359).
[373] Charmaz (n 37).

needed more data points to extend my initial findings and understand how they are relevant in a different context. Following the approach taken by many grounded theory scholars, I chose to conduct more interviews in order to close this gap. I chose my second fieldwork site specifically to allow me to conduct more intimate and case related interviews. Choosing a smaller court like Oasis with around 30 judges in total, enabled me to interview judges more frequently, observing them in different case settings or shadowing them for a day. At Oasis, one chamber would hold daylong hearings alternating between different judges as a result of which I was able to speak to the same judge after several different asylum hearings, allowing me to get closer to the decision-making process with every subsequent meeting, comparing cases and gaining a better understanding of the judicial workload and routines.

Secondly, after further developing my theoretical framework, following the concept of 'theoretical sampling'[374], I took my findings to previously un-involved participants to test the saturation of my collected data. I presented my theoretical framework to the vice-president and press officer of the court at Metropolis - himself a judge - to discuss my findings and interview him. I had met him on several occasions before and during my time at the court, however had never explicitly interviewed him as part of my data collection. With initial findings on hand, my aim was to test the saturation of the theoretical framework, evaluating whether additional data gathering would be required. While this interview was not intended to confirm or deny my findings, it shed light on any remaining gaps in the data. Upon reflection it ultimately led me to move towards the final stage of coding and analysis.

[374] Barney Glaser, *Theoretical Sensitivity: Advances in Methodology of Grounded Theory* (Sociology Press 1978).

2. Access to the Judicial Elite

Judges are often described as a difficult to reach group, due to their "high status and professional remoteness"[375] and getting access to individual judges for in-depth interviews proofed difficult from the outset. The first step in obtaining access meant identifying and connecting with the relevant gatekeepers in the administrative courts where I had planned to conduct my interviews. I identified the press officers as the external point of contact and approached them with a formal letter introducing the research. However, in the first fieldwork site, a large court with several asylum hearings taking place simultaneously every day, this approach did not work out as planned and I ended up choosing a bottom-up approach for accessing judges, which meant I approached judges individually after each hearing, I observed. At the second fieldwork site, the press officer of the court acted as the main gatekeeper introducing me to the president of the court with whom I subsequently agreed my stay and access to the court. The press officer prepared a list of hearings taking place during my stay at the court and announced my presence to the members of the court beforehand. Nonetheless, given judges in German courts identify strongly with their independence, I chose to act similarly to my first fieldwork site, meaning I made sure to introduce myself and the research after each hearing I observed, thereby allowing every judge to consent to taking part in this research individually. In sum, I had to make sure to establish the credibility and relevancy of the research project[376] in both fieldwork sites. However, because my fieldwork phase fell into the time of increased academic interest in the work of courts and in refugee law and policy more generally, this was even more critical in the first fieldwork site, because of its location, prominence and size. In contrast, in my second fieldwork site, which felt more removed from the world of academic and political discussions around asylum, the initial hurdle I

[375] Roach Anleu, Bergman Blix and Mack (n 36) 147.
[376] Roach Anleu, Bergman Blix and Mack (n 36).

had to take to gain access, was lower.

III. The Fieldwork and Data Collection

1. Two different fieldwork sites

For my interviews and observations, I chose two fieldwork sites: The first, which I call Metropolis, is the administrative court in a large city with over 1 million inhabitants in the north-east of Germany. The second, which I call Oasis, is the administrative court located in a smaller town in the south of Germany, with less than 100 000 inhabitants. Choosing two different administrative courts as my fieldwork sites, was born out of the aim of gathering a rich dataset, including more possible variations and nuances in relation to the observed cases and judges.

The selection of the two case study courts arose from a combination of a pragmatic assessment of the availability of research opportunities and considerations of representativeness. Given this research did not follow an explicit case study design, the initial aim in choosing a court was finding a court that seemed representative, meaning one with a diverse range of judges and without a strong reputation either way. Metropolis was a good choice in that due to its size, I would find a wide variety of both judges, chambers and countries of origin to interview and observe. From a pragmatic point of view the size of the court therefore enabled me to both observe a diverse range of hearings and get in touch with different judges within a relatively short period of time.

Metropolis currently holds 38 different chambers, each made up of at least 2 full-time judges as well as in most cases one or two additional fully qualified judges or judges in training (*auf Probe*). In total, the court currently employs 88 permanent judges and 37 judges in training. In particular the number of judges in training can change frequently

as law students who intend to become judges may pass through several different courts during their training period before becoming fully accredited judges and the administrative courts are often one stage of that journey.[377] One consequence of this sizeable number of judges is that Metropolis houses eight chambers which exclusively deal with asylum and immigration cases. Three of these chambers solely decide on asylum applications from Afghanistan, one chamber on Iraq, one on Iran, one on Turkey, one on all the African States and one on a combination of eastern European and African states[378].

This asylum heavy distribution of cases amongst certain chambers is indeed quite unique and reflected in the large judicial body. In order to obtain a more varied picture, I chose to conduct the second part of my fieldwork at a different, more 'ordinary' administrative court. Oasis, my second fieldwork site is one of six administrative courts responsible for one state (*Bundesland*). Aside from methodologically driven considerations for representativeness, there were also very real and pragmatic concerns for access and accessibility similar to those for Metropolis as my first fieldwork site. While I approached several different courts in that state, the relevant gatekeepers at Oasis allowed and enabled my fieldwork stay. At the time of my fieldwork the court had seven chambers employing 26 judges. Even though this court is significantly smaller in size, it is structurally very similar to the larger court. Even Oasis houses one chamber, which exclusively decides asylum and immigration law cases, solely hearing asylum applications from Afghani nationals. This is a reflection of the large numbers of cases that currently reach the administrative courts in Germany (see *Chapter III).* Despite the overall similarities in their structure and set-up, the atmosphere in the two courts was quite different, which meant

[377] As of October 2018.
[378] Azerbaijan, Armenia, Georgia, Ukraine, Gambia, Guinea, Guinea-Bissau, Senegal, Libya.

adapting the way I approached judges and conducted my interviews.

Metropolis

The size of the court in Metropolis is naturally reflected architecturally in that it reminds the visitor more of an office or administrative building than a courthouse. Narrow, labyrinth-like corridors in earthy colours follow on from each other, in which the odd judge passing by in her black robe stands out like a priest in a prison. Every single one of the floors looks oddly alike. Waiting rooms with metal chairs, render the abundance of asylum cases even more visible. Families, relatives, lawyers, social workers, friends and the rare administration representative are all mingling out of necessity. Small hearing rooms with no more than two or three rows of chairs alternate with the judges' offices, which are scattered across the whole building without any apparent order. This means that judges seem to operate more narrowly in their own nucleus and seem more removed from their peers. Before word about the presence of "a strange doctoral student from Oxford" at the court had spread, most judges would inquire about who I was before the start of the hearing and before I could introduce myself. In most cases I was clearly identifiable as the only 'visitor' - apart from family members - sitting at the back of the hearing room. After the hearing, I would then approach the judge asking for an interview. In most cases, judges were glad to share their musings about the case, which for me meant mainly listening and dodging the odd question about 'what I had thought about it all' or 'whether I had believed the appellant's story'.

Oasis

The court in Oasis is located in a stately building, that houses one large hearing room with ornaments, frescos and wooden floors in addition to two new hearing rooms in an adjacent building, which used to be the library, as the president of the court told me. Given hearing rooms need to be booked in advance, other judges would be aware which

hearings are underway. They would ask their colleagues about it in the hallway. Similarly, my presence was introduced to everyone via email before my stay at the court. The judges' offices are all located next to one another on one floor. As a result, I was frequently asked at the start of each hearing with whom I had already spoken and what they might have said. Even though the first judge gave me permission to record his interview, I had the impression that he was holding back, aware of his 'official' capacity of representing the court to me. Only after I turned the tape-recorder off, was I able to engage him in a more open and free-flowing conversation. I thus adapted my interviewing approach slightly to this setting and moved away from the set interviews. With their consent I followed judges around from one hearing to the other, engaging in conversations after a hearing and most importantly taking detailed notes during these conversations instead of recording the interviews. Even though smaller in size, during my time at the court I kept discovering commonalities between the two institutions. What stood out most was the importance of judges' independence and freedom, not only institutionally or even constitutionally, but also practically. Similar to the academic world, judges took pride in their freedom to schedule and conduct hearings when and how they please, their freedom to go about their work as they see fit and for my purposes their freedom to engage and talk to a researcher.

2. The Interviews

Over the course of a year, I conducted 29 in-depth, open ended and semi-structured interviews with judges at the two courts, twelve at each fieldwork site. Interviews at Metropolis were conducted between October 2017 and January 2018. Interviews at Oasis between June and July 2018. The interviews were 60-90 minutes long and sometimes included several meetings, often after or before a hearing to discuss a case. Following theoretical sampling guidelines, there was no pre-defined group of participants. Instead, sampling naturally ensued from case observations and the researcher's presence at the

fieldwork site. Hence, which judge I spoke to depended entirely on who was having a hearing on the given day. I attempted to balance gender and seniority, however, due to the difficulty to predict socio-demographic characteristics of the respondents who ultimately agreed to the interview, this was not always possible. During the time of my fieldwork only one judge declined to be interviewed, because he was moving to a different court the subsequent day.

Due to the larger court structure at Metropolis with over a hundred judges in total, my sample only covers a tenth of the entire judicial body. Whereas at Oasis, I spoke to more than half of all the judges employed at the court. In addition to this core sample of judges, I spoke to a judge at the *Oberverwaltungsgericht* (Higher Administrative Court) as well as to 5 different asylum lawyers based in Metropolis in order to gain a broader perspective on asylum procedures in general. Additionally, I conducted one background interview with a judge at a general criminal court in Germany in order to gather a better comparative understanding of legal methodology, technique and professional training at other courts.

Interview Technique

Because of their elite nature, I used an in-depth interview style, also described as "conversation with a purpose"[379] to guide my interviews with judges. According to grounded theorists, during in-depth interviews, the interviewer can assume more direct and analytic control over the construction of data than in most other data-gathering methods[380], which I believed would be beneficial when speaking to highly skilled, trained and eloquent legal professionals, such as the judges at the administrative courts. In line

[379] Alice Yeo and others, 'In-Depth Interviews' (2014) 2 Qualitative research practice: A guide for social science students and researchers 177; Steinar Kvale and Svend Brinkmann, 'Interviews: Learning the Craft of Qualitative Research' [2009] California, US: SAGE 230; Sidney Webb and Beatrice Webb, *Methods of Social Study* (Cambridge University Press 1975); Paul Atkinson and others, *Handbook of Ethnography* (Sage 2001).
[380] Charmaz (n 37); Charmaz and Belgrave (n 43); Thornberg and Charmaz (n 37).

with this approach, my interviews were semi-structured to allow for the participants to talk about the issues most relevant to them.[381] My interviewing style was also inspired by the 'traveller' metaphor introduced by Kvale and Brinkman, which sees knowledge as something, that does not already exist, but "which is created and negotiated in the interview".[382] This led to a more active interviewing process, where the interviewee and myself embarked on a journey to discover and explore knowledge together.[383] This approach included being aware of my role as researcher and interviewer and continuously reflecting on my own standpoint, position and identity and how this may impact the interaction.[384]

In light of this more active and engaged approach to interviewing, establishing trust between interviewer and interviewee played a major role. Connecting trial observations and interviews was a useful way to establish this kind of trust and repeated interactions with judges between hearings, sometimes on a daily basis, supported this. As a result, I was able to establish acquaintances and familiarity with the judges, as I ran into them on the hallway or was invited in for coffee and a quick chat.

I conducted all the interviews in German, my mother tongue. All translations of the interviews and hearing observations are my own. Where consent was given to record, the interviews were recorded and transcribed verbatim, otherwise detailed notes were taken during the interview.

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[381] Joseph C Hermanowicz, 'The Great Interview: 25 Strategies for Studying People in Bed' (2002) 25 Qualitative Sociology 479, 479.
[382] Yeo and others (n 377); Kvale and Brinkmann (n 377).
[383] James A Holstein and Jaber F Gubrium, 'The Active Interview' (2004) 2 Qualitative research: Theory, method and practice 140.
[384] Yeo and others (n 377).

Interview Structure

In the semi-structured topic guide, I developed before the fieldwork phase and which I refined and adjusted intermittently, interviews typically covered three thematic areas: 1) Process and routines, 2) challenges and feelings, 3) the court as a workplace and institution (see *Appendix*). Most interviews began with questions on the first thematic area covering the routines of the decision-making process from start to finish, beginning with the preparations before a hearing and the work on the file. Moving on to the oral hearing itself, questions revolved around how a hearing is conducted, how and which questions asked, the participants view on the different actors during the hearing and most importantly how and which aspects of an account judges take into consideration. Finally, I asked about the time after the oral hearing, for instance, how judges grapple with open questions, how they develop and organise their thoughts and feelings about the cases and routines for writing and preparing the written verdict of the decision. In addition to these questions of action, routine and process, I followed up with questions about the challenges, emotions and feelings of the judge, for instance in relation to the challenge of repeatedly hearing similar stories and dealing with difficult personal accounts. Finally, in the third thematic area I covered questions on the functioning of the institution more generally, including the judges' experience of working in the chambers, the exchange between judges within those chambers, the organisation of work between them and their perception of their role, responsibility and function as individual judges.

3. The Observation of the Court Hearings

The hearing observations served a dual purpose, both as an access point to the field as well as a starting point for a more in-depth conversation with the judge hearing the case. Firstly, commencing the fieldwork process by attending court hearings and spending entire days at the court allowed me to gain a better understanding of the organisation and

processes, which served to further adjust and develop my interview questions. Secondly, it allowed me to get access to the field and to my research participants and facilitated setting up interviews. Finally, having observed a case beforehand offered a starting point for an in-depth conversation and further enriched the conversation itself as it allowed me to connect a specific case scenario to the thoughts and ideas of the judge.

I tried to ensure a variety of different countries of origin, when choosing which case to observe on a given day. However, due to the unequal distribution of asylum seekers across the states, as well as a disproportionate focus of certain regional *BAMF* offices on specific countries of origin, this was not always possible. In total, I observed 54 cases. One case at the higher administrative court (*OVG*) on Syria. 32 in Metropolis covering Pakistan, Afghanistan, Eritrea, Iran, Iraq, Syria, Gambia, Chechnya. 21 in Oasis including Afghanistan, Iran, Ethiopia, Armenia, Georgia, Azerbaijan, Egypt, Tunisia, Mali, Belarus. Five cases of the observed cases in Metropolis were chamber decisions, which include 3 full-time judges and 2 honourable members, who are similar to jury members in common law jurisdiction, members of the public appointed for a certain amount of time.

During the case observation I sat at the back of the hearing room, taking extensive notes both on the interaction between the judge and the applicant as well as the involvement of other participants, if present. As part of these observational notes, I focused on the structure of the hearing, the order and phrasing of questions to the appellant, the note-taking routines, the judge's interactions with the appellant, the translator, lawyer and other participants as well as the judges' behaviour and speech more generally.

4. The File Material

The third and final element in my data collection, is the file material and the written verdicts. Pursuant to each fieldwork stay, I attempted to collect all relevant and available file material to the cases, I had observed. I was able to obtain official written verdicts for nearly all observed cases (see *Appendix*). Upon my request, I received the written verdicts of 29 of the 32 cases at I observed at Metropolis, in which verdicts had been issued and 20 out of 21 at Oasis. By law, any member of the public may request verdicts for a minimal fee, which in my case was kindly waived as research is deemed to be in the public interest. The verdicts show that out of the 33 cases I observed at Metropolis, 10 were approved and the remaining 23 rejected. At Oasis out of 21 cases only 1 was approved. For five cases I was not able to get a verdict, because either the verdict had not been issued as more evidence was being collected or because there was a deal brokered by the judge between the administration and the applicant in which the administration agreed to offer protection status under the condition that the applicant withdraws his or her claim making a written verdict unnecessary.

In order to protect the identities of claimants the verdicts were mostly anonymised by the court, albeit still identifiable to me by their case numbers and my notes. Through the lawyers and judges, I was also able to obtain a few anonymised protocols as well as preliminary facts of the case (*Tatbestand*). As part of my interviews, I was also able to look at file material and the notes taken by judges. Beyond these additional documents, however, I was not able to obtain any other file material, like the hearing protocols, given the high level of personal rights protection and consent required by the claimants.[385]

[385] However, because of the central importance of the interviews and the corresponding hearing observations for my analysis, this was not a problem.

5. The Ethics

Two key challenges shaped my engagement with my research and my participants: My duty of care towards my participants and my duty of care towards the data. Firstly, my duty of care towards my participants was driven by the concern that participants were able to actively consent to the research, its purpose and remit. Because of the direct engagement and contact I had with judges as well as their awareness and knowledge of academic research, relaying the necessary information appropriately as well as making clear that interviews would be anonymised to ensure consent was informed proved less challenging than expected. However, ensuring my duty of care towards other hearing participants, in particular asylum seekers, who were not active research participants but whose very personal life stories I would nonetheless be witnessing and reporting, raised my concerns. On the one hand, given that asylum hearings are public and at times attended by family, friends, social workers, law clerks or other judges, I anticipated that my presences as such would not constitute an unduly disruptive force to asylum seekers and their hearings. On the other hand, I wanted to find a way to ensure that this would in fact be the case, so I opted to introduce myself briefly to the asylum seekers in the waiting room before the hearing mainly making clear that I was an independent researcher, that my work was not related to them, their case or the government and asking them for permission to stay, which all granted.

Secondly, as part of my duty of care towards the data, the contributions of participants in this research have been completely anonymised and the names of judges have been cleared from my list of court hearings in order to avoid any inferences about their identities from the court observations. In order to further protect their identities, I chose to also anonymise my fieldwork locations. While the verdicts I received in Metropolis were anonymised and in a format in which they would also appear if published, some of

the verdicts I received from Oasis still contained names, which I made sure to black out in the original documents. When citing cases I furthermore refrain from referring to precise dates, locations, names or other markers that would make appellants identifiable. Finally, caring for my data also meant storing my data safely on university servers.

6. Presentation

The interviews are numbered in the chronological order in which they were conducted, and this is reflected in the way in which they are cited. A complete list of judges' age group, degree of seniority including the dates and length of interviews can be found in *Annex 1*.

IV. The Description: Two Phases of Coding

Overall, the analytical process was driven by full immersion into the data set and supported by repeated sorting, coding, comparing and memo writing.[386] I followed an inductive approach to coding, which meant I began with a round of 'open coding', in which I "mined my data for analytic ideas to pursue"[387]. This shaped the broader frame for my analysis. For each data fragment, I used active language, staying close to the data to describe what my interview participants were saying to distil their main analytical import. I used the coding software NVivo throughout the coding process, which allowed me to administer and handle my large data set and flexibly build and develop codes and coding trees.

I began my coding process with fragments of the interview data, focusing only on a limited number of interview sections, that seemed particularly relevant. When I identified a code,

[386] Susan L Morrow and Mary Lee Smith, 'Constructions of Survival and Coping by Women Who Have Survived Childhood Sexual Abuse.' (1995) 42 Journal of Counseling Psychology 24.
[387] Yeo and others (n 377).

I used the memo-ing technique[388] to actively describe and defined the code, writing self-reflexive notes about why I had chosen a specific wording or description and how this code relates to others. These analytical memos further included questions, ideas, thoughts, descriptions of codes and connections between them and deliberations on the emerging theoretical framework. As part of enhancing self-reflexivity in relation to the data and the analytic process, the memos also tried to capture reactions, opinions and feelings towards participant's narratives, "in order to be aware of how the researcher's subjectivity may be shaping the inquiry and its outcomes".[389]

During this initial phase of open coding, I found that my interviewees described different methods, strategies, and more generally ways in which they tried to answer the questions they themselves asked about a case in front of them. Running a word frequency test confirmed this initial finding and showed that the words most often used by participants were derivatives of the verb 'to question' (*fragen*). This aligned with what I witnessed when discussing cases with judges after hearing observations: Not unlike a surgeon, judges seemed to dissect the elements of the claim, weighing each element, progressing in circles of, "if this…then why this?", explaining what to take into account when considering these questions. As a result, I initially came up with active codes reflecting the actions judges employ to answer their own questions, describing every method, strategy or consideration the interviewees referred to. In addition to these active codes, I also used a set of more factually descriptive codes to help organise the large data set, I was handling. For instance, I coded different types of case scenarios judges were talking about, countries of origin and other basic identifiers, like gender or age. In the beginning I was hoping to be able to cluster or correlate these codes with my other codes. However, I quickly found that this

[388] Morrow and Smith (n 384).
[389] Alan Peshkin, 'In Search of Subjectivity—One's Own' (1988) 17 Educational researcher 17; Alan Peshkin, 'The Nature of Interpretation in Qualitative Research.' (2001) 29 Educational Researcher 5.

did not lead anywhere and so these codes remained unused codes chunking up and organising the data.

1. Focused Coding

This type of prioritisation and correlation of different codes formed part of the second phase of 'focused coding'[390], during which I took what seemed to be the most prevalent initial codes and applied them to more extensive parts of the data. However, moving from 'initial' to 'focused' coding was not a completely linear process, as I acted upon what I discovered or kept discovering in the data. Furthermore, I used 'constant comparison' to establish new analytic distinctions.[391] I hence compared data with data and data with codes in order to establish nuances, differences and contradictions within my data. Constant comparison helped to establish greater consistency of the categories across the data as well as rendering descriptions of codes more precise and valid. Here, memo-writing served as a tool to keep track of the changes made to categories, the remaining inconsistencies as well as amended code definitions.[392]

Whereas the initial codes were active codes, closely describing the data, including 'in vivo codes', referring directly to the words and expressions used by the participants, at the final stage, and after theoretical integration, the codes would become more abstract and new hierarchies between them were more clearly established. Through the coding process, I ultimately created the foundation for my emergent theoretical conception.

V. The Analysis: Theory Building

After several rounds of back and forth between open and focused coding, I began a phase

[390] Charmaz (n 37).
[391] Glaser and Strauss (n 357).
[392] Marie-Helène Paré, 'Analyse Multidisciplinaire Des Fémicides d'honneur Au Liban' [2009] Une approche inductive par la théorisation ancrée.

of theoretical integration, which was more selective and aimed at developing a theoretical framework through constant comparison between the data and the existing codes. In this phase, I looked at the codes used to describe the data and began by grouping them into broader categories, creating hierarchies and interrelations. This included testing the categories by applying them to other fragments of my data. I loosely followed this approach, occasionally going back to my initial codes to adapt or change them.

The aim was to push beyond description and towards analytical or theoretical integration, which is more abstract and explanatory than the descriptive phase. Grounded theory scholars have defined theory as, "a set of well-developed concepts, related through statements of relationship which together constitute an integrated framework, which can be used to explain phenomena."[393] Pursuant to this understanding of theory, I classified my codes and grouped them together. I did not employ a pre-defined coding paradigm (as in classical grounded theory) in order to develop my theoretical framework. In fact, I found that the existing codes describe different layers and stages of the decision-making process, which I clustered as such. When linking them with the different elements of the claim and therefore the different tasks entrusted to the judge, I was able to attribute the different strategies to their purpose in relation to the different elements of the claim. This resulted in the development of a decision-making framework, modelling judicial decision-making in asylum cases.

As mentioned above, I conducted an additional lengthy interview with a judge I had previously built a strong rapport with at Metropolis as part of testing the theoretical saturation of my coding framework. I was able to verify whether my categories had

[393] Glaser and Strauss (n 357).

reached the point, in which no new information was required for generating or revising existing categories. Finally, I used the theoretical framework I had developed to code more of my empirical data, testing the applicability of the framework. In parallel, I reviewed and analysed the case observations notes to test my findings on what I had observed judge do during the hearing, painting both a picture of 'what judges say they do' and 'what I observed judges do'.

VI. Positionality and my Role as Researcher

Constructivist grounded theorists generally take the role of the researcher herself into considerations. This is reflected in this particular instance in which my own values, experiences and ideas necessarily factored into the gathering as well as the analysis of the data. Beyond the potential subjectivity of analysis, a further challenge for me as a researcher was allowing the data to speak, setting aside pre-conceived theoretical notions and ideas, so that new analytic categories and ultimately a substantive theory can emerge.[394] Given constructivist grounded theory scholars' acknowledgement that - unlike posited by the older generation of grounded theorists like Glaser and Strauss - a researcher can never fully be a *tabula rasa*[395], I develop mechanisms during data collection and analysis to ensure transparency and awareness of my pre-conceptions. By employing a structured yet flexible approach, using different phases of coding, as well as constant comparison and memo-writing, I hoped to refrain from inputting my own "motives, fears and assumptions to the collected data".[396]

As part of her 'evolved' grounded theory approach Charmaz introduces practical

[394] Creswell (n 359).
[395] Adele E Clarke, *Situational Analysis: Grounded Theory after the Postmodern Turn* (Sage 2005) <http://www.loc.gov/catdir/toc/ecip052/2004022902.html> accessed 3 December 2018.
[396] Charmaz (n 37).

measures designed to reflect on the impact the researcher's presence might have, thereby making any influence more transparent. For instance, self-reflexivity is fostered and encouraged through memo writing and journaling both during data collection and analysis. Charmaz as well as other qualitative scholars, notably Peshkin and Bradbury-Jones, have acknowledged that subjectivity is an invariable component of research, encouraging researchers to actively seek out their subjectivity.[397] One method used to investigate the researchers own subjectivity is by systematically recording the researcher's feelings and emotions raised during the research process.[398] According to Peshkin, being "meaningfully attentive" to one's own subjectivity, gives insight into the underlying assumptions about the world, which influence both data analysis and findings.[399] During my fieldwork I kept a journal and as part of the coding process, I used the NVivo note-taking tool to record my thoughts and choices throughout.

VII. The Limitations

My choices for research design, method, data collection and analysis bring with it two limitations or considerations, which the following section will set out. This section will discuss the impact and relevance of these limitations and how I intend to mitigate them.

1. Egocentric Biases and Self-Serving Thinking

For this research one potential limitation might be a concern around the inability of the researcher to fully grasp the hidden thoughts and potential biases behind the judges' verbalised account of the decision-making process. As such, I was aware of the risk that what the judges told me in our interviews might be a polished version of how the decision-

[397] Peshkin, 'In Search of Subjectivity—One's Own' (n 387).
[398] Melanie Birks and Jane Mills, *Grounded Theory: A Practical Guide* (SAGE 2015); Caroline Bradbury-Jones, 'Enhancing Rigour in Qualitative Health Research: Exploring Subjectivity through Peshkin's I's' (2007) 59 Journal of Advanced Nursing 290; Peshkin, 'The Nature of Interpretation in Qualitative Research.' (n 387).
[399] Birks and Mills (n 396); Peshkin, 'The Nature of Interpretation in Qualitative Research.' (n 387); Peshkin, 'In Search of Subjectivity—One's Own' (n 387).

making process looked and felt like to them. As any other human being, judges will be prone to egocentric biases or the human tendency to exaggerate one's own role, skills or qualities.[400] Judges will be eager to give off a positive impression of themselves and their profession, falling into the trap of self-serving thinking. However, as many of my interviewee responses show, in the course of lengthy conversation and with increased trust on both sides, judges seem frank and almost blunt in their responses. Additionally, judges in German administrative courts hold particularly safe and secure jobs in their permanent positions as civil servants. Hence, even if their egocentric biases might shape their answers on a personal level, there seems to be limited institutional pressure forcing them into dishonest answers. Nonetheless, I tried to analyse and interpret my data 'with a pinch of salt', putting it into perspective with my overall findings and impressions. Other strategies in my research design further enabled me to mitigate these risks, such as speaking to judges shortly after an oral hearing and creating an open and narrative interview structure to give space to create a relationship of trust, allowing for more detailed and personal accounts to occur.

2. Researching the Elite and Complicity

A broader critique, that might be harboured against my research design, could be the absence of the voices of those, who are treading the paths of this system, whose claims are being decided upon and whose futures determined in a seemingly soulless bureaucratic machinery. In no way, does this research take sides or delimit the experiences and challenges faced by refugees, asylum seekers and appellants. Given the focus of this research is deliberately placed on the perspective of judges its focus on the elites can hopefully be justified by the explicit aim this study pursues, which is understanding *how* judges make decisions in asylum cases. Furthermore, it tries to fill a gap in the literature,

[400] J Rachlinski and A Wistrich, 'Inside the Judicial Mind' (2001) 86 Cornell Law Review 777, 811.

which will help to complete the picture of asylum adjudication. As Nader urges, research should not only study down, but a "re-invented anthropology should study powerful institutions and bureaucratic organisations"[401], a call for studying-up or studying power, that is still echoed today by critical race scholars[402], feminists[403] and social justice advocates[404]. Beyond the legitimacy of studying up, I remain conscious of the danger of complicity with my research subjects. [405] Given my position as a researcher who managed to gain access to powerful individuals, like judges and who subsequently holds the power to write about them, my firm intention is not to allow complicity to blind me nor to contribute to the "perpetuation of inequalities when I witness power relations in the field"[406]. During all stages of this research project, my focus hence lies on strategies such as heavy analysis and critical reflection of respondent's perspectives as well as my own role and identity when interacting with my research subjects.[407]

Final Reflections

This chapter set out the thesis' design, its methodological foundations and my journey through data collection and analysis. It described the choices I faced when preparing and

[401] Laura Nader, 'Up the Anthropologist: Perspectives Gained from Studying Up.' 292.
[402] Howard Becker, 'Racism and the Research Process' [2000] Racing research, researching race: methodological dilemmas in critical race studies 247; Michelle Fine, 'Bearing Witness: Methods for Researching Oppression and Resistance—A Textbook for Critical Research' (2006) 19 Social Justice Research 83; Sarah Becker and Brittnie Aiello, 'The Continuum of Complicity: "Studying up"/Studying Power as a Feminist, Anti-Racist, or Social Justice Venture', *Women's Studies International Forum* (Elsevier 2013).
[403] Marjorie L DeVault, *Liberating Method: Feminism and Social Research* (Temple University Press 1999); Sandra Harding and Kathryn Norberg, 'New Feminist Approaches to Social Science Methodologies: An Introduction' (2005) 30 Signs: Journal of women in culture and society 2009.
[404] Joe R Feagin, Hernan Vera and Kimberly Ducey, *Liberation Sociology* (Routledge 2015).
[405] Sandra Lee Bartky, 'Race, Complicity and Culpable Ignorance' [2002] Sympathy and Solidarity: And Other Essays 151; Becker and Aiello (n 400); Barbara Applebaum, 'White Complicity and Social Justice Education: Can One Be Culpable without Being Liable?' (2007) 57 Educational Theory 453; Mark Lawrence McPhail, 'Complicity: The Theory of Negative Difference' (1991) 3 Howard Journal of Communications 1.
[406] Becker and Aiello (n 400) 65.
[407] Becker and Aiello (n 400); Aida Hurtado and Abigail J Stewart, 'Through the Looking Glass: Implications of Studying Whiteness for Feminist Methods' (2004) 2 Off White: Readings on power, privilege, and resistance 315; Lois Presser, 'Negotiating Power and Narrative in Research: Implications for Feminist Methodology' (2005) 30 Signs: Journal of women in culture and society 2067.

engaging in my fieldwork, starting from the ways in which I had to seek and establish access to the courts and to judges themselves as well as the choices I faced when wading through data fragments, analysing and coding. Across all stages of this project, two features of its methodology were key: iteration and self-reflexivity. As shown above, iteration in this project meant that the different stages of data collection, analysis and interpretation were conducted in a fluid back and forth, leading to a constant optimisation of questions and analysis. I used self-reflexivity and memo-ing as tools that allowed me to reflect upon and dampen my concerns around my own role within this project and complicity with my research subjects.

While I had feared the inaccessibility of the judiciary and its judges, judges' strong believe in their independence as well as their interest in connecting with the world 'outside' to reflect upon their daily experiences with asylum law and policy, guaranteed easier access than anticipated. At the same time, this same curiosity and interest in the asylum system of which they were part, as well as the trust and familiarity I had to establish with my research participants to gain access to their world, gave rise to concerns about my complicity with the 'elites' as a researcher studying up. These concerns were heightened by the frequently changing perspectives and emotions I faced during a day at the court: From the security search every morning, when I entered the building, to the glances, smiles and chit chat with appellants in the waiting room, where I learned about their journey and struggles before the judge, playing with their children and taking in their nervousness and fear, while unable to help or explain. Other times I felt hijacked by the appellants' lawyers, who were more interested to talk to a 'colleague' than their clients with whom they were unable to communicate without a translator. While the translator herself often seemed to wander torn between worlds, linguistically and ethnically part of one, but professionally part of the other. All in all, people full of fascinating stories, history

and life, who could all make for a research project in itself. When everyone was called in, the friendly face of a judge, who I had met before would sometimes smile at me, small-talking, but conscious not to seem complicit or make appellants feel unnecessarily nervous or betrayed. At last, during the hearing, I was able to observe, taking a step back to simply take note, while trying to stay close to the ongoing train of thought and reflections on this scene, that I had unwittingly become part of. Consequentially, the memos and notes that accompanied both my fieldwork and the coding and analysis phase form an integral part of this thesis' methodology that allowed me to build a process and a methodology around the creeping sense of complicity and positionality as a researcher.

CHAPTER V - ROLE AND RESPONSIBILITIES: FINDING CONVICTION

"All of it is hypothetical, we will only be answering hypothetical questions. I want to say this very openly here. That's precisely the difficulty of these cases. There are always arguments for and against. The question is, what are we as judges convinced of? What is our personal conviction about the case?"[408]

This first empirical chapter looks to the "chief choreographer"[409] of the asylum process, the administrative court judge. It explores how judges in administrative courts perceive their professional identity as decision-makers and how they define their roles and responsibilities. It reveals the underlying principles that shape how judges understand and do their job. In other words, I describe the professional ideologies on which judges base what they do and say they do and how this perception of role and responsibility impacts upon how judges perceive and experience their job and its challenges. This chapter sets the stage for the subsequent chapters, which dive into the strategies, methods and routines judges employ to come to a decision. In its first part, this chapter unravels a core concept around which judges rally when describing what drives their decision-making and that allows them to deal with the particular uncertainty they experience in asylum cases: the concept of personal conviction or persuasion.

This concept, and its place in judicial work and self-perception, represents the first coalescing point for what I will later identify as intertwined methods and strategies of decision-making that form part of judges' toolbox or 'judgecraft': law and experience. This chapter explores how judges define what it means for them to be convinced and how the concept of personal conviction places the burden of persuasion on the person and conscience of the judge thereby tolerating uncertainty and doubt as equally important

[408] President of a Higher Administrative Court, OVG, during a public hearing on Syria on 22 November 2017.
[409] Lens and others (n 74) 200.

elements of what it means to be convinced. Navigating doubt and uncertainty, I show how judges develop a sceptical view on the truth or the ability to discover the truth, giving rise to a pragmatic approach to their job. At the same time, the concept of personal conviction grants judges the power to make a decision, albeit uncertain or doubtful.

Finding themselves in a place of power and at the same time confronted with the non-enforcement of their decisions, which creates frustrations, the second part of this chapter uncovers how judges navigate their public appearance and the expectations connected to them, which includes the public performance of dispassion and distance. It analyses how judges make sure to perform independence and how procedural principles such as the inquiry of facts and transparency help them do so. As part of my exploration of these principles, I argue that as part of their repertoire of decision-making strategies judges find ways to successfully navigate the boundaries of belonging, speaking to both the power and futility of their role.

I. Finding Conviction

From the perspective of the judge, every decision in an asylum case begins and ends with the question, 'am I convinced?', as it guides his or her journey through the case up until the final words of the verdict are written. As the quote at the beginning of this chapter illustrates, being convinced goes beyond weighing arguments in favour or against. Instead, it leads right to the heart of the person of the judge and her personal or inner conviction about the case. The question 'am I convinced?' is hence a fundamentally individual one and relates back to the principles of judicial independence and the so-called 'free formation of judicial conviction' (*freie richterliche Überzeugungsbildung*). In contrast to the requirement for abstract probability or binding evidentiary rules (as they are known in common law jurisdictions), German administrative judges are obliged to rely on their own

personal belief when assessing and weighing facts and evidence of a case against the legal norm. The judge is encouraged to ascertain whether he or she feels fully convinced and takes the facts of the case for true (*für wahr halten*), rather than assessing whether the rules of probability are satisfied.[410] Judges refer to this guiding principle of their job as decision-makers to set out the ambit of their authority. For instance, as a standard preface or pre-emptory sequence in countless decisions, judges write: "*the acceptance of a real risk of political persecution has to be investigated by law by the court (§86 VwGO) and in order to grant protection, the court has to be fully convinced of the existence of that real risk* (§108 Abs. 1 S. 1 VwGO)."[411] Thus, the notion of personal conviction or inner belief as the driver behind a decision is one of the most fundamental principles of judicial decision-making in German jurisprudence across courts and legal areas[412], fundamentally shaping what it means to be a decision-maker in an asylum case.

A similar concept has existed in French criminal courts since the French Revolution, termed '*intime conviction*'[413], which used to form part of the instruction to juries in criminal law cases.[414] German jurists of the same era first rejected the French notion of *intime conviction*, as in their view too closely resembling an 'instinct of truth' (*Wahrheitsinstinkt*) or a 'dark sensation', instead of a rational deliberation aligned with the Weberian concept of the 'judicial syllogism machine' (*Subsumptionsautomat*)[415] or Montesquieu's idea of the judge as the mouth, through which the law is spoken[416], *en vogue* at the time.[417] Later

[410] Frisch (n 241).
[411] VG 4K 754.16A.
[412] Mark Schweizer, 'The Civil Standard of Proof—What Is It, Actually?' (2016) 20 The International Journal of Evidence & Proof 217; Richard Motsch, 'Comparative and Analytical Remarks on Judicial Fact-Finding' [2009] Festschrift für Gerhard Käfer 241.
[413] It was first coined as such in 1791 and further established in 1808 in the *Code d`Instruction.*
[414] Mark Schweizer, *Beweiswürdigung und Beweismaß: Rationalität und Intuition* (Mohr Siebeck 2015).
[415] Max Weber, *Wirtschaft Und Gesellschaft: Grundriss Der Verstehenden Soziologie* (Mohr Siebeck 2002); Jens Petersen, *Max Webers Rechtssoziologie Und Die Juristische Methodenlehre* (2nd edn, Mohr Siebeck 2014).
[416] "Les juges de la nation ne sont que la bouche qui prononce les paroles de la loi, des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur", Montesquieu, De l'Esprit des lois, livre Xi, chapitre VI (1748).
[417] Schweizer, *Beweiswürdigung und Beweismaß* (n 412); Schweizer, 'Die Logik Der Richterlichen

however, German jurists began appropriating the French concept of intimate conviction aligning it with existing legal methods, like that of judicial syllogism (*Subsumption*)[418]. They argued that - despite its personal and instinctive nature - it could and should be formed on the basis of reason, giving birth to the concept of *conviction raisonné* or reasoned conviction.[419] The personal conviction required of judges before making a decision, hence internalises both: reasonable principles of thought (*vernünftigen Denkgesetze*)[420] and the subjective notion of taking something for true (*subjektives Für-Wahr-Halten)*, coupled with the personal conscience of the judge (*persönliche Gewissheit des Richters*).[421] As Good reiterates, the intimate conviction French or German judges are required to reach before making a decision relates to a personal consciousness, a personal disquiet or discomfort associated with doubt and "the searching for the truth deep down in them".[422] Kobelinsky goes so far as to equate the inner belief of French asylum judges with "reaching moral certainty".[423] Critics of this approach argue that it is both "dangerous and irrational", because of the onus placed on the judges' conscience, viewed as distinct from rational, scientific assessment or fact.[424] In the same vein, highlighting the dichotomy between subjective, affect-driven elements of decision-making and legal arguments, Kobelinsky argues that reference to their 'inner belief' allows French asylum judges to legitimise and

Überzeugungsbildung' (n 39).

[418] Ulfrid Neumann, 'Juristische Methodenlehre Und Theorie Der Juristischen Argumentation' (2001) 32 Rechtstheorie 239; Karl Larenz, *Methodenlehre Der Rechtswissenschaft* (Springer-Verlag 2013).

[419] Schweizer, *Beweiswürdigung und Beweismaß* (n 412) 58.

[420] Schweizer, 'Die Logik Der Richterlichen Überzeugungsbildung' (n 39); Gunter Deppenkemper, *Beweiswürdigung Als Mittel Prozessualer Wahrheitserkenntnis: Eine Dogmengeschichtliche Studie Zu Freiheit, Grenzen Und Revisionsgerichtlicher Kontrolle Tatrichterlicher Überzeugungsbildung (§ 261 StPO, § 286 ZPO)*, vol 12 (Vandenhoeck & Ruprecht 2004).

[421] Frisch (n 241); Karl-Ludwig Kunz, 'Tatbeweis Jenseits Eines Vernünftigen Zweifels. Zur Rationalität Der Beweiswürdigung Bei Der Tatsachenfeststellung' (2009) 121 Zeitschrift für die gesamte Strafrechtswissenschaft 572; Wilhelm Traugott Krug, *Von Der Überzeugung Nach Ihren Verschiedenen Arten Und Graden* (1797).

[422] Good, Berti and Tarabout (n 39) 37.

[423] Kobelinsky (n 17) 54.

[424] Frisch (n 241); Georg Freund, *Normative Probleme Der" Tatsachenfeststellung": Eine Untersuchung Zum Tolerierten Risiko Einer Fehlverurteilung Im Bereich Subjektiver Deliktsmerkmale* (Müller, Jurist Verlag 1987) 47, 102; Andreas Hoyer, 'Der Konflikt Zwischen Richterlicher Beweiswürdigungsfreiheit Und Dem Prinzip „in Dubio pro Reo "' (1993) 105 Zeitschrift für die gesamte Strafrechtswissenschaft 523.

reinforce the 'suspicion economy' of asylum as well as decision-makers' emotional reactions, values and political ideologies.[425] However, as my interviews show, other guiding principles impose limits on this seemingly broad concept. For instance, judges create the basis for a decision by complying with their duty to inquire into the facts of the case and justify their personal conviction by presenting the grounds and reasons for their decision, referencing facts and law. These guiding principles and processes form part of judges' daily routines, professional ideology and public performance of their role.

1. Defining the Boundaries of Conviction

The way in which judges talk about what it means for them to develop a personal conviction about a case reveals how blurry and difficult it is to define this concept. Since conviction is partially based on a personal, intimate, almost sensory quality of feeling, the concept itself and what exactly it entails remains indistinct when judges try to describe it. Much like this judge, who, when he tries to explain what conviction means for him, quickly seems to reach his semantic limits:

> *"I need to somehow form my personal conviction and what you do, is you build your own catalogue of requirements, and try to ascertain, what is enough for me. This catalogue of requirements doesn't exist in the abstract, you form it spontaneously. I can't just simply tick boxes on a list and then say, box ticked, that's it, if I am in fact not fully convinced. Instead, I need to somehow visualise the threshold and take it into consideration when asking myself whether I am persuaded. That sounds really abstract. It's probably not possible to fully reflect on it. But that's what matters in my opinion. I think that my impression, my conviction is paramount and that there somehow exists a limit to how this can be legally and rationally explained, including for myself."*[426]

This quote illustrates the underlying struggle of judges to verbalise what they do when trying to develop a feeling, persuasion or conviction about a case. This judge hints at the limits to rational explanations and its confluence with the non-verbalizable intuitive elements inherent in the process of finding conviction. What is surprising, however, is that

[425] Kobelinsky (n 17) 55.
[426] 171108_06.

this judge does not seem fazed by what he is admitting, namely that there is a limit to the rationalizability of the law and its ability to guide the judicial decision-making process. He thereby reveals how deeply ingrained the idea of a personal conviction is in his understanding and perception of his role.

The blurriness and fuzziness surrounding the concept of inner conviction and the struggle of judges to describe it is a common thread across my interviews. Judges' attempts to define what it means to be persuaded by case, mainly revolve around what it feels like or indeed, what it does not feel like. By focusing on feelings, be it those of doubt, uncertainty or conviction, judges highlight how their process of finding conviction is different from solving a mathematical equation or 'ticking boxes'.

> "*Well, we discussed it as a chamber and we all asked, well, 'what do you think?' And somehow it transpired, that all this is not hundred percent convincing. But it is also not a hundred percent a rejection. If you had to put it into numbers, maybe two to one. Or as one of the volunteer judges said, 'I am fifty-fifty'. And in these circumstances, I think, well this is not like a traffic accident, where you could say, fifty-fifty is not enough. Here, the benchmark is the reasonable fear of persecution, and maybe then, fifty-fifty should be enough. In any case, the story is plausible enough for us to say, there is some kind of danger when he returns. And in that case, we don't want to expose him to that danger. In terms of numbers, if eighty-twenty is enough or sixty-forty? I don't know. You cannot determine that. I think, this feeling, that well, there could be something to it, has to be dominant. And then a certain feeling of disturbance* [Störgefühl] *might remain, and there might even be a reminiscence of doubt. But these feelings aren't strong enough to warrant sending him back and to answer to myself, in case something happened to him over there. Even if, in the case of Iran, of course, this is entirely theoretical, because he won't be sent back. But, as I said, you never know what will happen in the future.*"[427]

By referring to a feeling of disturbance, this judge reveals that coming to a decision about a case is as much about conviction as it is about doubts and the significance of those doubts in the bigger picture of the case. As such, the personal conviction judges search for and aspire to, is in fact not necessarily an entirely pure one. Instead, judges acknowledge the reminiscence of a feeling of disturbance ('*Störgefühl*'), describing how doubt and uncertainty may linger on, even after a decision has been made. Uncertainty as much as

[427] 180121_011.

certainty is hence an integral building block of being convinced and as such of decision-making in asylum cases. This judge also makes clear, that doubt, and uncertainty possess a unique and different quality in asylum cases, given the potentially drastic consequences for the appellant. Finding a conviction within the bigger picture of asylum law, is therefore also about grappling with the potential gravity and impact of that conviction. In fact, this seems to align with how Whitman explains the historical theological origins of the concept of 'reasonable doubt'. He argues that the creation of this guiding criminal law concept was not intended to protect the accused from a wrongful decision, but the souls of those making the decision.[428] A reminiscence to these origins can be seen in the way that doubt and uncertainty are ingrained in a judges' conscience. The aim of the process of finding conviction is hence not to eliminate doubt, but to find the point to which doubt, and uncertainty are still bearable for the judge's conscience and integrity.

1.1. Doubt, Uncertainty and Scepticism

Conscious of the role that doubt and uncertainty play as part of their job, judges seem to entertain a sceptical conception of the truth or at least voice a clear dismissal of the possibility and necessity to uncover an 'objective' or 'absolute' truth about a case. A central part of this scepticism derives from the fact that in asylum cases the events in question occurred in the past and are largely undocumented. As a result, judges automatically deal with subjective, relative or negative truths, meaning their responsibility is reduced to detecting where events as they are being told do not seem entirely truthful. This sceptical conception of truth is apparent in the way judges speak about the truth. Instead of talking about finding or discovering the truth about a case - as one might expect - judges use the expression "holding something for true" (*für wahr halten*) to describe what

[428] James Q Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press 2008).

it means to be convinced.[429] This expression highlights, that from the judges' perspective it is not about what might be true, but about what the judge her- or himself takes for true. In the words of one judge, this means, that "*if I am not convinced about a case, that doesn't mean that I can fully disregard the possibility, that this case or the story of persecution that was told in that case actually exists*".[430]

This conception of truth influences the way in which judges perceive their duty to determine the facts of the case and in a wider sense their role and responsibility as judges in the administrative courts. It underlines the importance of the person of the judge, while at the same time legitimizing doubt and ultimately enabling a decision despite of it. As such, in the eyes of judges their responsibility is not to discover what really happened, instead they see themselves obliged to do as much as they can to find out what might have happened, albeit accepting the possibility, that another 'truer' reality exists and making a decision despite of that. In fact, it seems to be precisely this sceptical conception of the truth that allows them to do their job.

> "*What I do has nothing to do with getting closer to the truth. I won't know what really happened. But I know that I don't believe this story, and that is the truth. Yes, something difficult in the country of origin, a difficult life in Ethiopia, yes. But I won't know. Insofar, I won't be able to discover the truth ever, but I know, that this story is a lie, and I am convinced about that. So, finding the absolute truth, no, that's nothing you can do.*"[431]

Listening to this judge's almost complacent scepticism towards the truth, it seems as if all that was required was indeed whether the judge's own assessment of the story confirms her or his version of the truth or not, re-affirming the importance and power of the person of the judge and her persuasion at the centre of it. This surprisingly narrow view on their role and implicitly on the veracity and universality of their final decision stands in stark

[429] Kunz (n 419) 4.
[430] 171108_06.
[431] 180622_7B.

contrast to the almost religious ideal of metaphysical knowledge attributed to judges in the public eye[432] and the symbolic status of courts.[433] When a decision is committed to writing and published, it portrays certainty, which the public - its audience - assume is based on the truth, not least, because of the considerable impact it might have on the person at the other end of that process. Judges' private acceptance of scepticism and uncertainty might therefore present a disconcerting recognition to the public perception of their role. At the same time, judges' attitude towards the truth reveals an element of realism or indeed pragmatism towards their job that one might conceive as rational, given the ideal of absolute truth or certainty is effectively unattainable, ever more so in asylum cases. Given the conflict that emerges between the importance that loftier notions of truth and justice play in the public eye and the inner reality of decision-making, it equally shows the importance for judges to publicly perform independence and impartiality (*see below*).

Refugee and asylum scholars have previously identified the scepticism of decision-makers on the administrative level branding it as a result of over-worked, bored, biased or inherently sceptical human beings embodying a 'culture of disbelief'.[434] In contrast, the scepticism accompanying judges' work in the administrative courts reveals more about the nature of asylum law and its uncertainties as well as the judicial attitudes that ensue. According to Damaska legal indeterminacy contributes to the elusiveness of truth and in order to handle these facets of the law judges turn towards the legal definition as well as accepted or shared knowledge in society. [435] However, in asylum cases, both these anchor

[432] Adalberto Jordan, 'Imagery, Humor, and the Judicial Opinion' (1986) 41 U. Miami L. Rev. 693, 659; Richard Hyland, 'A Defense of Legal Writing' (1985) 134 U. Pa. L. Rev. 599; Debra Lyn Bassett and Rex R Perschbacher, 'Perceptions of Justice: An International Perspective on Judges and Appearances Twenty-Third Annual Philip D. Reed Memorial Issue' (2013) 36 Fordham International Law Journal 136. This omnipotent perception of judges as the 'oracle' of the law reflects a formalist conception of law and legal professionals. Judges' admittance of their scepticism hence fits with the realist portrayal of judges as "the human beings they have always been".
[433] Scheffer, Hannken-Illjes and Kozin (n 34).
[434] O Jubany, *Screening Asylum in a Culture of Disbelief: Truths, Denials and Skeptical Borders. Screening Asylum in a Culture of Disbelief: Truths, Denials and Skeptical Borders* (2017); Jubany (n 12).
[435] Damaska (n 45) 289.

points offer new challenges: the legal definition of a refugee is broad, abstract and judges are required to adjudicate about the facts presented by an individual that might not have been part of the society and its shared knowledge. As a result, judges need to find new waypoints, anchors and approaches focusing on the process and performance of independence, as well as what is required to make sense of a case, focusing on the coherence rather than the veracity of statements (see *Chapter VI*). Therefore, the way in which judges reveal their approach reflects and confirms more accurately the asylum literature's findings of complexity and the strategies and practices of decision-making that ensue than a creeping 'culture of disbelief' as such.

1.2. Pragmatism, Judicial Attitude and Approach

In philosophy pragmatism is primarily understood as a way to clarify concepts and hypotheses by looking at the consequences of an action, theory or metaphysical problem.[436] In legal thinking, pragmatism is argued to mean recognising the uncertainty inherent in the law,[437] as well as the fallibility of truth[438], the abundance of choice inherent in the decision-making process as well as the social and political considerations that may direct the judicial process.[439] As Thomas points out pragmatism can be understood "as a mix of attributes that add up to an attitude" of which a core tenet is a scepticism towards truth and the ability to find truth.[440] In practice, this scepticism arguably takes effect in a pragmatic attitude towards judges' role and responsibilities, that focuses on professional methods and obligations and the importance of their portrayal and performance to the

[436] William James, *Pragmatism*, vol 1 (Harvard University Press 1975); William James, *Philosophical Conceptions and Practical Results* (n.p 1898) <http://archive.org/details/philosophicalcon00jameuoft>.
[437] EW Thomas, 'The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles' (*Cambridge Core*, September 2005) </core/books/the-judicial-process/A2ABC1074C190B7275D2376861B34A51> accessed 22 May 2018.
[438] Richard A Posner, 'What Has Pragmatism to Offer Law' (1989) 63 S. Cal. L. Rev. 1653, 1661; Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence* (JSTOR 1990).
[439] Posner (n 436); Thomas (n 435) 301.
[440] Thomas (n 435) 307.

outside.

According to one judge at Oasis, this particular attitude is what differentiates him as a judge from any other person looking at a case:

> "*This is the only thing that differentiates me from you: I have heard some things more often and therefore I'm more sceptical. But fundamentally, I am no different. We are all probably the same when we are confronted with a story and posed with the question, do you believe it? As a judge you probably have a certain distance, carry a certain skepticism with you and you know how to differentiate between empathy and factual testing. But all in all it is not fundamentally different.*"[441]

As this statement shows, judges' pragmatic approach towards judging not only differentiates the judge from the 'ordinary' member of society but also has a ripple effect for the different components of judging, like fact-finding and case solving (*Chapter VI & VII*). It also brings to the forefront the principles on which judges say their role and responsibilities are based: independence, inquiry and transparency. These principles not only shape and determine the way in which judges view themselves and their role, but also how they want to be perceived. The next part of this chapter will go deeper into understanding how the performance of these principles looks like and how judges use them to navigate their role and its complex boundaries.

II. Judicial Independence and its Boundaries

As described above, the judges' inner conviction and the way to finding it are at the centre of what it means to make a decision. The concept of inner conviction, belief or persuasion that judges seek when making a decision inevitably places the ultimate responsibility on the judge to make a decision and formulate a verdict despite possible uncertainty. In light of the adverse effects of a wrongful decision on the appellant, this might mean a burdensome responsibility to effectively decide between protection or deportation. Some

[441] 180103_008.

of the judges reflect on this responsibility by explicitly framing it as part of their job or duty: *"You have to make a decision…That's the job. In the end, you just have to decide."*[442] or "*I think like this: So, if I work on a case and I thought about it, I took everything into consideration and then I form an opinion on it, then that's it, I did my job. If I for example get the feeling, that I am of this particular opinion and let's say, my conclusion is, that it is justifiable, that he or she returns to his or her country of origin, then, I can at least say, I did my duty*."[443]

By explicitly framing it as their duty to make a final decision, despite uncertainty or doubt, judges acknowledge the power inherent in their job. As one judge explained, the concept of 'having power' (*Macht haben*), for him inherently includes being able to make or do something (*etwas machen*), be it making a decision or making a difference. When he, as a judge investigates a case, collects the facts, listens to the appellant's story and ultimately identifies his personal conviction about the case, his role then allows him to make and proclaim that final decision. In asylum cases in particular this most likely means making a difference to an appellant's future for better or worse.

At the same time, judges seem eager to point out that there are limits and boundaries to the power inherent in their job as decision-makers. They do so by explicitly distancing themselves and their role and responsibilities from that of the lawmaker and the executive. When talking about their duties and role as decision-makers, judges emphasise, that they are not the ones making the law, but are only using and interpreting it to make a decision. This distances them from the executive - not necessarily in the sense that one might expect, in being the one to hold the lawmaker to account - but rather in re-enforcing the idea that judges have limited capacity to influence the origins and the effects of the law. As one judge describes his position of impotence and dependence from the lawmaker:

[442] 171114_03.
[443] 180621_06.

Only if the law is contrary to the constitution can the judiciary disregard it by submitting a question to the Constitutional Court, otherwise, "*you can't do anything and just have to hope the lawmaker will come to the rescue, if he wants to*"[444]. By distinguishing their powers and duties from those of the lawmaker, judges portray themselves as independent, potent individuals who are at the same time constrained, while absolving themselves of any blame for simply "doing their job". By delimiting their role as such, judges therefore manage to distance themselves from the (sometimes enormous) personal and political consequences of their decision. Consequently, judges routinely navigate ambiguities viewing themselves and their role in asylum adjudication as both powerful and impotent, emotionally involved and professionally impassioned.

1. Navigating the Nuances and Complexities of Belonging

In the literature, this particular position between power and impotence that judges seem to find themselves in, is discussed as part of the moral and legal debates around one of the most fundamental questions in asylum law and scholarship: 'who is a refugee?'. Given the decision of who deserves protection and incidentally of who is admitted to the national community is an exercise of power by the state or the political community, judges - willingly or not - form part of that process. When the state or its institutions chooses to protect a specific person from persecution, the administrative process enabling this decision constitutes in fact a question of distributive justice.[445] According to Walzer, in a bounded world, the distribution of the good of 'protection' rests upon the decision of the people within the political community, committed to sharing their social goods, which "offers room for political choices".[446] Limited by moral[447], as well as international

[444] 180116_10.
[445] Walzer (n 1) 31–51.
[446] ibid 50.
[447] Joseph H Carens, 'Who Should Get in? The Ethics of Immigration Admissions' (2003) 17 Ethics & International Affairs 95; Joseph H Carens, 'Refugees and the Limits of Obligation' (1992) 6 Public Affairs

humanitarian and legal obligations, the attribution of membership and the granting of protection is therefore at the core of democratic self-determination"[448] and judges are decisive parties to this process.

Judges' description and deliberation of their role and responsibilities reflects this special situation in which they find themselves within the political community: they are at the same time ordinary members of the *polis*, representatives of the state in the eyes of those seeking asylum, as well as integral part of the institution making the decision of who belongs. They are on the one hand constraint by laws, regulations and choices made by the lawmaker and on the other hand independent decision-makers and gatekeepers in individual cases. As one judge describes it, empathising with the situation of the appellants from Pakistan:

> "*It is definitely not easy. If you see - like in this case - they get here, they have been on the move for a really long time. The whole family put together their savings to pay the smuggler, so they could come here. And in most cases, it is probably more likely they're coming for economic reasons. If you are just a little bit of the view, that you cannot blame them for coming, then of course, it is not the greatest job to sit here, having to reject one claim after another*".[449]

At the heart of this judge's irritation and frustration with his job, is what Douzinas and Warrington question more philosophically: "A just interpretation and statement of the law is accepted without more as just action. But is this assumption justified? Does the correct interpretation of the law - if it exists - and the right answer to a legal problem - if we can find it - lead to moral and just praxis?"[450] One judge acknowledges her moral concerns, by saying "*I didn't deserve to be born here. And there is also this theory, about no borders, no nation states and everyone has the right to be everywhere, so… you get into a very challenging philosophical space. And that's also something that constantly concerns me and makes me feel deeply insecure. I can do*

Quarterly 31.
[448] Carens, 'Who Should Get in? The Ethics of Immigration Admissions' (n 445) 96.
[449] 171127_07.
[450] Douzinas and Warrington (n 118) 117.

my job, but (...) that's not normal work. This is different."[451]

Adding to the politically and morally demanding questions inherent in asylum decision-making, is the fact that there is no possibility for negotiation or compromise in asylum law. It seems to operate according to a binary system of *in* or *out*, acceptance or rejection. There is no middle ground, no mitigating sentence, no bail or parole only a complex array of different protection statuses. As a result, judges are forced into a decision, even if the political reality behind that decision proves to be more complex and the questions of belonging they navigate more nuanced.

In sum, judges embody the power to make politically salient decisions and grant protection. At the same time, judges perceive their responsibilities to be delimited by the boundedness to laws over whose origins they did not have any power and hence feel impotent as to their sometimes unsatisfactorily one-directional result.

Non-enforcement and its effects

During my hearing observations and interviews I was able to observe how judges deal with this peculiar position they find themselves in. In fact, judges' entanglement between power and impotence seemed to become most salient in cases where politics 'visibly' encroaches on the judicial process. The most prominent case constellation that best serves to illustrate how judges react to the ambiguous situation in which they find themselves in, are cases from Afghanistan. In short, many adverse decisions or rejections of asylum claims from appellants of Afghani origin are ultimately un-enforceable, because of differing views on the general humanitarian situation in Afghanistan and therefore the justifiability of returning failed asylum seekers back to Afghanistan by the political parties

[451] 180620_03.

in power in each federal state.

Even though asylum decisions are initially made by the *BAMF*, a federal institution, each state (*Bundesland*) is primarily responsible for migration enforcement, as result of their authority in matters of integration, which includes both granting work permits or residency titles as well as enforcing returns or expulsions. Partially because of different political parties in power in each state, return policies vary and so does the number of failed asylum seekers, who are in fact deported.[452] In the case of Afghanistan, this difference between federal states as well as between federal rules and state practice is most salient: Despite a bilateral return agreement (*Rücknahmeabkommen*) with Afghanistan formalised by the federal government in 2016 and the general stance of the federal government to allow returns back to Afghanistan, many states chose not to participate in the collectively organised return flights (*Sammelflüge*), others chose to only return those who have criminal convictions. This gap between the courts' decision and its enforcement arises, because each state government assesses the humanitarian situation in Afghanistan differently and whether it allows for returning people.[453] As such Berlin and other social-democrat-led (SPD) states do not officially return failed asylum seekers to Afghanistan, while conservative CDU-led states mainly do. This is reflected in the actual numbers of Afghans deported. According to an unofficial document published by the NGO *ProAsyl*, more than half of those 629 Afghans, who had to return to Afghanistan since December

[452] It is difficult to compare the absolute numbers of those deported, because the number and countries of origin of asylum seekers living in the states vary, but according to 2017 statistics: Bayern – 36%, BaWü – 57%; Saarland – 114%; NRW – 33%; Rheinland-Pfalz – 57%; Hesse – 29%; Thüringen – 111%, Sachsen – 35%; Sachsen-Anhalt – 48%; Niedersachsen- 32% - ; Hamburg – 35%; Schleswig-Holstein – 34%; Bremen – 16%; Berlin – 25%; Mecklenburg – 78%, See Matthias Stolz, 'Abschiebequote' *Zeitmagazin* (1 August 2018) <https://www.zeit.de/zeit-magazin/2018/32/abschiebequoten-bundeslaender-deutschlandkarte>.

[453] "Auf der letzten Innenministerkonferenz hatten sich die SPD-Innenminister darauf verständigt, weiter nur bestimmte Einzelpersonen direkt nach Afghanistan abzuschieben: Gewalttäter oder Personen, von denen eine akute Terrorgefahr ausgeht. Entschieden werde jeweils nach einer Einzelfallprüfung", See Ronja Ringelstein, 'Berliner Straftäter Nach Afghanistan Abgeschoben' *Der Tagesspiegel* (Berlin, 6 July 2018) <https://www.tagesspiegel.de/berlin/fluechtlingspolitik-berliner-straftaeter-nach-afghanistan-abgeschoben/22773042.html>.

2016 came from Bavaria and less than 1% from Berlin.[454] Despite a more active enforcement policy from states like Bavaria in comparison to other states, overall returns to Afghanistan for failed asylum-seekers are rare. While more than 6000 Afghans were refused asylum in 2018 alone, only 284 of those decisions were enforced and individuals forced to return to Afghanistan during that same time.[455]

This practice not only places many lives in limbo, leaving failed asylum seekers with an unstable legal position, but also shows the gaps that emerge between the administrative court decision in an asylum claim and its actual life consequences. Despite being formally obliged to leave the country by way of the court decision, the local immigration office normally moves to grant a short-termed 'Duldung' (see *Chapter II*). As a result, the appellant lacks the corresponding rights, which are particularly relevant with regards to the possibility to successfully integrate, the ability to participate in language courses or the granting of working permits.

For judges working on asylum cases from Afghanistan, this misalignment between federal law and state practice already materialises during the asylum proceedings and judges are acutely aware of it. In the words of this judge:

> "*You can't play law-maker. You can't act as a politician and say, 'I disagree and will make my own political decision'. At the same time, you do realise, that it is difficult for some people [to return]. But if the lawmaker defined the benchmark not as 'you are not doing well in your country', but as 'a real risk of persecution'…then Afghanistan is one example, where you say, 'it is not a pretty country, but we decided, young men, can endure going back, they can stay above water and that is the benchmark. As a judge, you then sometimes get angry, when a politician says, but we think it is not bearable, we don't deport them from Berlin. Then you get angry, because if the law*

[454] Some numbers may vary slightly because of the unofficial nature of the statistics. The proportions of failed asylum seekers deported from other states, include Baden Württemberg – 8,42%; NRW – 5,4%, Hamburg - 5,9%, see ProAsyl, 'Statistik Sammelabschiebungen Afghanistan' (2019) <https://www.proasyl.de/wp-content/uploads/Statistik-Sammelabschiebungen-Afghanistan_August-2019.pdf>.

[455] Bundesamt für Migration und Flüchtlinge, 'Asylgeschäftsbericht Für Den Monat Dezember 2018' (2019) 12/2018 <http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/201812-statistik-anlage-asyl-geschaeftsbericht.html?nn=7952206>.

> *intends it that way, and it is federal law by the way, and you investigated it as a court using all the evidence and information and you reached the conclusion, then your decision is according to the law. Then you don't really want the government to come and say, 'well, now, we don't execute it'. Ultimately, a couple of years later after you have made this judgement, you will then get a follow-up application* [Folgeantrag], *because the previous judgement was not enforced, and the appellant is still here. And then you have to do another proceeding, and everything starts again. As a judge, you simply want to urge the government to either make a new federal law, where they change the benchmark, so we can do it differently from the start or to promulgate a federal halt to deportations for everyone or whatever. Because it is quite silly if one state, because of its political orientation, just says, we won't do it* [return failed asylum seekers]."[456]

This quote reveals the frustration judges experience with regards to the political reality of making asylum decisions and the effect this has on judges' reflections on their job. The practice of non-enforcement of decisions seems to not only frustrate judges personally, but also frustrate their attempts at finding a conviction based on a uniform application of process and law. In other words, judges form a conviction and by not enforcing it, the political reality frustrates the law. It also shows that judges react to this frustration by highlighting their distance to the lawmaker, their immunity to politics and at times the distance to the job itself. "*If we look at ourselves really attentively as judges in this network, I think at some point we can no longer work. If you try and really give an account of all the factors that move you … and then there is this tiny 'nutshell' Germany in the world. I think sometimes you can only do this job with a good measure of suppression".*[457]

The case of Afghanistan is only one example where the judges' impotence causes particular frustration because of the after-effect of a decision. As such, even though Bavaria, where my second fieldwork site - Oasis - was located is one of the states, that under its conservative-led (CDU/CSU) government returns failed asylum seekers back to Afghanistan, judges voice similar feelings of frustration as those judges in Metropolis, because of very practical challenges to enforcing asylum decision. These arise because of federal bans on returns, like that for Iraq[458], the perception of a general lack of

[456] 180116_010.
[457] 180620_03.
[458] Out of those living in Germany (in December 2018) with a Duldung due to a federal ban on deportations

enforcement, due to a lack of cooperation from countries of origin, that fail to issue new identity documents[459] or that require a signed 'Freiwilligkeitserklärung' (*voluntary declaration)* before issuing new travel documents, like Iran. All these factors external to the judicial decision-making process might render enforcement of asylum decisions impossible in practice and give rise to more fundamental questions around who is 'deserving', who is in need and who is allowed to integrate.

> "*What used to be frustrating in the past, is that we worked for the paper bin, because people would not be deported or could not be deported or whatever it was. Even though Bavaria deports more to Afghanistan, there are definitely still countries to which people are simply not deported back to, like Eritrea for example*".[460]

As this quote shows, judges employ a variety of metaphors voicing their frustrations, like the "*paper bin*", referring to the sensation of deciding in vain. "*The problem is the enforcement, we are lacking hundreds of staff in the immigration offices, the police and the BAMF. In reality, I am producing things for the paper bin here, there is simply no consequence to what I do*".[461] Or put even more florally, "*what is special about cases from Iraq, is that no one gets deported. So, what we do here is basically l'art pour l'art*."[462] One judge goes as far as calling the situation "schizophrenic",

> *"It is totally schizophrenic: On the one hand, the BAMF says, you have to return, on the other hand, the government says, we cannot deport you, it is too dangerous. Totally schizophrenic! And that's why, ultimately our work is for the trash bin, which makes it extra frustrating. Even though, to be honest, it also saves me a little bit, because I think, well good, even if I reject this appellant, he won't go back to a possible death, because he won't be deported. So ultimately, what I really decide, is who will be able to integrate faster. Because that's what it is all about at the end of the day. Who gets a proper legal status as an asylum seeker, on the basis of which he can build a life*

(§60a Abs. 1 AufenthG), most were from Iraq. See Deutscher Bundestag, 'Zahlen in Der Bundesrepublik Deutschland Lebender Flüchtlinge Zum Stand 31. Dezember 2018' (2019) Drucksache 19/8258 11 <http://dip21.bundestag.de/dip21/btd/19/082/1908258.pdf#page=38>.

459 At the end of 2018 there were over 74.281 failed asylum seekers, living in Germany with a (*Duldung*), because of a lack of travel documentation, out of just over 180 000 *Geduldete* in total. The countries of origin with the most *Geduldete* without documents (in numerical order from top to bottom): Afghanistan, Pakistan, India, Russia, Iraq, Lebanon, Turkey, Algeria, Serbia, Kosovo, Syria. See ibid 38; Mediendienst Integration, 'Abschiebungen Und "Freiwillige Ausreisen"' <https://mediendienst-integration.de/de/migration/flucht-asyl/abschiebungen.html>; Christian Unger, 'Tausende Abschiebungen Scheitern Am Papierkrieg Der Behörden' *Morgenpost* (26 March 2018) <https://www.morgenpost.de/politik/article213842199/Tausende-Abschiebungen-scheitern-am-Papierkrieg-der-Behoerden.html>.

460 180629.

461 180121_011.

462 180103_08.

here and who does not?"[463]

This judge also reflects critically on a situation which originates directly from the question of 'who is a refugee' or who the political community wants to offer protection. Referencing how he really decides whether someone will get the chance to integrate, this judge shows an awareness of the tools and powers of his job navigating the boundaries of who belongs, which balances the idea of a perceived impotence and constraint with the ability to negotiate substantial political issues. The perceived futility and frustrations of their role are hence coupled with a decision-making power which judges can navigate with the help of their decision-making strategies and experience, which include the public performance of independence. As one judge put it, very bluntly,

> "*Well, sometimes, you think, this person would be a valuable member of our society. We need people like this. But then, especially in Afghanistan, we have to check (in relation to the protection from deportation status), will this person manage to survive there. And then, of course, you say to those: You are smart. You know how it works. You will manage there. Whereas we end up leaving those here, who are sick, illiterate, who can't tell right from left hand, people we don't really need for our country. Those, we leave here. That is completely schizophrenic, but that's the law and that's why we might think that, but it does not have any impact on the decision, of course. It's just, [breathes in audibly] 'oh my god, now again, I leave this person here and the amazing one, I return.' That's terrible. That's just the general pain of this type of work, but it does not impact the decision. It cannot impact the decision.*"[464]

This judge describes exactly the negotiation Walzer refers to as part of his idea of distributive justice, asking who should become a member of the political community. This inherently political and hence powerful decisions judges are in charge of, without being able to change the terms and conditions, adds to their necessity to define their role in contrast to that of the law maker. Like this judge, who highlights the distinction between his personal thinking and his decision as a judge, giving rise to a 'double independence', as judges affirm their independence from the lawmaker and their independence from their own, very personal thoughts and political ideologies. The feasibility of this has been called

[463] 171114_03.
[464] 17111403.

into questions by former judge and academic, Herz, who argues, that it is "unnatural and unrealistic to divide the judicial subject into two hermetically sealed boxes of the public and private self"[465], making the public performance of independence even more necessary.

So how do judges deal with this conflict, navigating their public and private self, in an area of law where politics and personal fate often merge into the judicial process? My interviews show that judges follow two strategies that revolve around performing their independence in the public sphere: Firstly, judges clarify the extent of their authority by referring to asylum law and its specific purpose, thereby balancing a need for both involvement and dispassion. Secondly, judges use the procedural requirements they are bound to, like the structure of the hearing or the dictation, as a way to escape a daunting emotional involvement with the appellant and the case. The following section explores how by performing independence through dispassion and distance judges re-enforce a perception of law-boundedness that helps them to distance themselves from the political and personal after-effects of their decisions.

III. Performing Independence: Distance and Dispassion

Surprisingly, judges are officially allowed to be politically active according to the leading norm in German law (§39 DriG), which specifies the realms of judicial independence. Instead of aiming at the 'actual' political activities of a judge, the focus of the norm lies on the perception and representation of independence: "Inside and outside of office, a judge is required to act in a way which does not compromise his independence – including when politically active". This shows the importance not only to act independently, but

[465] Leslie J Moran and others, 'A Review of Ruth Herz, The Art of Justice: The Judge's Perspective' (2013) 7 Law and Humanities 113, 114.

also to project such independence, to seem neutral and objective to the outside world. In fact, in the literature, judicial independence has been dissected and defined in different ways with the main distinction being drawn between formal judicial autonomy and independent judicial behaviour.[466] This distinction is useful for this analysis and its attempt to understand the role and responsibilities of judges in asylum cases. According to Hilbink, formal judicial independence relates to the rules of appointment, discipline, tenure or budget.[467] But, some scholars argue, that even with these rules and regulations promoting independent behaviour or judicial assertiveness, truly independent behaviour by judges does not necessarily follow on from this.[468] Similarly, my interviews reveal how judges go beyond formal reference to their independent position and instead make sure to represent and perform independence, including by navigating the extent of emotional involvement they show. In the words of Seybold, "while the principle of judicial independence already limits control of the external result of the adjudication process, it is almost impossible to control the internal process of applying the law that takes place only inside the judge's head. Thus, it is up to each judge to ensure objectivity by internally binding themselves to the conscious application of methods – therefore constituting an ethical demand."[469]

1. Hiding behind Law-boundedness

Judges affirm their independence from the lawmaker and their own personal ideologies not just rhetorically but also visibly, which can be observed during oral hearings. One frequently used strategy by judges in order to clarify the extent of their authority, is by

[466] Lisa Hilbink, 'The Origins of Positive Judicial Independence' (2012) 64 World Politics 587.
[467] ibid 588.
[468] Daniel Brinks, 'Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium' (2004) 40 Tex. Int'l LJ 595, 597; Hilbink (n 464); Diana Kapiszewski and Matthew M Taylor, 'Doing Courts Justice? Studying Judicial Politics in Latin America' (2008) 6 Perspectives on politics 741.
[469] Steffen Seybold, Julia Sandner and Philipp Weiß, 'Richterliche Selbstbindung Durch Methodenlehren– Eine Frage Der Ethik' (2015) 101 Archiv für Rechts-und Sozialphilosphie 319.

reference to asylum law and its specific purpose. For instance, "*I have not completed the verdict yet, but even if some people have a difficult life, the purpose of asylum law is not to help those people, even if they might need help. That is not what asylum law is for or what it intends to do.*"[470] This professional distance culminates in the distinction carefully drawn in each interview between the personal opinion about politics or the 'refugee crisis', including the handling of immigration as such, and their professional judicial duties.

In a similar vein, judges regularly make clear, that they only *"apply the law and need to see, whether the legal pre-requisites are met"*[471] or that they are "*assessing the claimant according to asylum law*"[472] or "*looking at the claimant through the lens of asylum law*"[473]. Another judge makes sure to read the requirements for refugee status directly from the text of the law[474] at the start of the hearing. Clarifying what the ambit of asylum law is, judges tend to highlight that they are only interested in the individual persecution of the appellant, in contrast to a more general sense of fear, threat or misery. "*A small note, this is about your reason for asylum, your mother's situation does not play into that here. I have to decide about your right to protection and whether you can theoretically go back. Your mother's illness does not play into that here*"[475]. This interaction between a judge and an appellant, where the appellant from Afghanistan uses his final words to ask the judge why he was rejected by the first instance, makes this clear:[476]

The judge: *They* [BAMF] *don't think you are persecuted.*
Claimant: *Why?*
Judge: *They examined it, like I do.*

[470] 180625_08A.
[471] V33.K60.16A.
[472] VG16K 356.17A.
[473] VG16K 740.17A.
[474] V33.K60.16A.
[475] B4K 17.31470.
[476] B6K17.31066.

Claimant: *I would like to say, that someone with a good job, an academic title, like me, doesn't just leave their home country like that.*
Judge: *You know, we have around 500 cases in this chamber alone and every one of them had a reason to leave, and despite that we need to test whether they also had a reason to flee* [Fluchtgrund] *and therefore grounds for asylum.*

This insistence on the significance of asylum law and the reliance on a reason to flee (*Fluchtgrund*) seems to be an immediate reaction to questions raised by appellants in an attempt to prevent unnecessary disappointment for the appellants. Judges seem happily bound by the law, because it alleviates from the personal difficulty of making some decisions. This protective professionalism extends to the importance that logic plays when assessing facts and legitimising decisions. The testing of facts according to logic and professional methods creates a similar certainty and allows to hide behind the law and its methods (see *Chapter VI*).

A Case Example that Exposes Underlying Ambiguities

In one case, the ambiguous position of the judge between power and impotence takes on an almost theatrical quality, reflective of the "surrealism" or "coercive structures of absurdity" Carlen describes occurring in Magistrate Court procedures in Britain.[477] In this case, the young appellant from Iran decided to abandon his script and not play along with what was expected of him by the asylum system, causing the simmering contradictions in the judge's role to come to the fore. Not represented by a lawyer and outspokenly refusing to fabricate an asylum story, the appellant creates a situation in which the curtain falls to expose the ambiguity inherent in the judge's role and the tools and strategies judges possesses to navigate it. Both - judge and appellant - are seemingly constrained by their roles: the judge can only evaluate the appellant according to the

[477] Pat Carlen, 'The Staging of Magistrates' Justice' (1976) 16 British Journal of Criminology 48.

standards set in asylum law and the available protection categories, while the appellant is 'obliged' to use the avenue of asylum law in order to be able to receive a residency title in the first place. However, instead of playing along, this appellant admits to there being no other reason for leaving his country than his desire to work and educate himself in Germany. The judge, openly appreciating the appellant's honesty, then makes clear that on the one hand he is unable to deviate from the dictates of the law, as he is constrained by the different protection status categories at his disposition. On the other hand, as part of his judicial independence, the judge is also at liberty to handle the case, as he sees fit, which is what he does, amounting to a lengthy conversation about the claimant's options for staying in Germany.

Speaking very good German, the appellant explained to the judge in the first minutes of his hearing that he in fact did not have a problem in Iran.

Judge: *The asylum procedure serves those who are politically persecuted. You completed this procedure here and you also worked here*.
Appellant (speaking German): *If Germany allows it, I want to continue, I want to stay in Germany and go to university, I am an oil and gas engineer. But the government told me, that I am not a refugee, so I cannot stay here in Germany.*"[478]

Because of the discrepancy between what the law requires the judge to assess and what the applicant wants the judge to assess, namely his qualifications and willingness to integrate, this hearing turns into a conversation that seems out of the ordinary and in fact reveals a negotiation about belonging that seems to motivate other cases as well. The judge explains several options to gain legal status to the appellant evaluating their pros and cons, including leaving Schengen to get a visa, marry and have children with a German woman

[478] VG 21K 55.18A.

- according to the judge by far the most effective way, but also the most difficult to realise - or voluntarily returning to Iran to then apply for a student visa, in case of which, dropping the administrative court case might be a sign of goodwill, according to the judge. Ultimately, the judge admits, "*we can talk freely here, you won't have to go back to Iran*."[479] He says this, after making clear, that the legal basis for what the appellant needs does not exist: "*My own political opinion does not play a role, we do not have an immigration law, so what you want, I cannot give to you*." In this public hearing turned surrealist performance, because of the appellant's honesty and disregard for the confines of the role the system assigned him, the judge is put into a position where he openly needs to navigate the ambiguities of his role. He projects his independence to the government and lawmaker as well as his detachment to himself as the private individual, with a personal political opinion, at the same time performing his judicial duties and legitimising the fact that he cannot give this appellant what he really wants.

2. Hiding Behind Procedure

Judges not only hide behind their law-boundedness, but also behind procedure. The 'surreal' case above exposes the duality between power and impotence, as well as between emotional involvement and dispassionate distance, that judges navigate in the public hearing. Despite at times expressing a deep understanding for the choices appellants had to make, in particular the choice of leaving the home country as well as the difficulties surrounding an asylum application ("*I often hear, 'that's so long ago, I don't know any more whether it was Monday or Tuesday.' That's obvious, I am totally aware of that. I mean, what did I do a year ago? I don't know.*"[480]) judges show and project that the empathy they feel on a personal

[479] See above, Iran requires signing a "voluntary agreement" [Freiwilligkeitserklärung] before issuing new identity documents and allowing for the return of their citizens. As a result, Iranians are rarely forcefully returned to their home country.
[480] 180629_09.

level is detached from their professional duties.

Procedure also allows judges to prioritise the relevant questions of the case, brushing off the more personal interactions as not legally relevant. Using the Dictaphone as their tool and the procedural obligation to keep track of the hearing as their motive, judges add another layer of dispassion and professionalism by transforming the spoken word of the applicant into a legal fact-finding account (*see below*). However, the emotional pleas of some appellants challenge judges' attempt to fully retreat behind his or her dispassionate allures. The tradition of the final or last word, manifests as a strategy that seems to help some judges to navigate emotional involvement and dispassionate professionalism, in that it opens up a space for a more personal statement, giving, as one judge said, "*the feeling that they can say anything here*"[481], even though, in reality, these statements will not be relevant for the legal assessment of the case. As one judge put, "*The claimant having the final word, I think that it is a very nice tradition, if you have anything else on your heart.*"[482] Situations like the following one, illustrate the balance judges try to find between an open display of empathy and conformity to their role: The judge asks the 14-year-old daughter of the claimants, whether she would like to say a final word.

Claimant (Daughter): "*I already hurt myself, when I was 10, I cannot live anymore. I don't want to lose my life at 14. I could not study, it's like that in all schools. Now, I also have psychological problems.*"
The judge then dictates into the Dictaphone: "*The daughter claims, she has psychological problems, at the age of 10 she already carved herself.*"
Claimant (Daughter): "*I don't want to go back to this country, it is very bad. I beg you.*"
Judge: "*Thank you. The hearing is over.*"

In another case, the claimant describes the route of flight he took, telling the judge that he originally had not planned on leaving Greece to come to Germany, but that the living

[481] 171106_05.
[482] B6K17.31066.

conditions there were incredibly hard. The judge then interrupts him, in the name of relevancy, trying to focus on her immediate role, which is related to finding out whether the appellant is persecuted in the country of origin, while also keen on showing, that she is not oblivious to the difficulties refugees face:

Claimant: *Then I went to Athens to meet a friend there and this is where I was baptised. I wanted to stay in Greece, but the situation there…*
Judge: *Yes, the situation and living standard there, that's for sure, we don't even need to talk about it. I would like to dictate all this now, before moving on.*
After the judge dictated the previous passage, the translator intervenes and asks: *Did you dictate that he met someone in Athens?*
Judge: *Non, but I don't need that, that's not decisive for me, it's not important.*[483]

Furthermore, hiding behind procedure allows judges to deal with the traumatising, stressful and often deeply personally touching stories, as it offers a strategy to keep empathy in check. Judges frequently describe the oral hearings as physically exhausting, given they are hearing cases back-to-back involving powerful, if not traumatising stories. One judge expresses how he is incapable of doing anything after the hearing, due to both the stress and adrenalin level. This is heightened by the repetitiveness of cases,

> *"I don't really think it's great just to do asylum cases. In Rheinland Pfalz, the court in Trier is the only court responsible for asylum cases and only deals with those. For me that would be pure horror, you are going to go bonkers. Sometimes, I am really happy when I can do a simple case of driving license law or something like that. You need that to gain some distance. In many ways…For one, because some cases, they get to me personally, because I think about them for a long time, back and forth and back and forth and ahh…".*[484]

This is reminiscent of the psychological concept of secondary trauma or secondary traumatic stress, which has been found in psychological studies based on the self-reporting of judges.[485] As a means of self-preservation, as with secondary trauma normally, judges

[483] B2K 17.30335.
[484] 180629_09.
[485] Charles P Edwards and Monica K Miller, 'An Assessment of Judges' Self-Reported Experiences of Secondary Traumatic Stress' (2019) 70 Juvenile and Family Court Journal 7.

are therefore encouraged to dissociate from the cases that affect them. One strategy of doing so, is by hiding behind law and procedure. As one judge emphasises the importance of procedure to him, despite the fact that it is very exhausting to keep going, "*Often I have a whole day with hearings and in the evenings, I am simply shattered and exhausted. But in the end, whether I am exhausted at 5 or 6 and to no use for anything else, doesn't matter. Then at least, I can hope that the hearing was satisfying in terms of procedure, even if it might not be with respect to the ultimate result.*"[486]

As these interviews show, hiding behind procedure offers a strategy to create certainty and much needed psychological distance for the judge. This goes beyond what the anthropological literature on judges and the judicial process describes, which focuses largely on the external ritualising quality of the hearing and its procedures, understanding judges' robes, language and archaisms, is often understood as a form of ritual cultivating dispassion, formalism or indifference to the outside.[487] Hearing these judges talk about their empathy and frustration as well as observing the same judges perform during a hearing highlights the importance of procedure for the judge him-or herself beyond its apparent outside function. The asylum process renders this particularly obvious, since judges perform mostly in front of empty seats, which reduces the necessity to perform dispassion for an audience and highlights the internal reasons for doing so.

3. Distance and Dispassion as a Risk

Drawing the line between involvement and dispassion is a balancing act. As too much distance, also means a loss of focus and interest, inadequate in light of the importance the

[486] 171023_02.

[487] Bruno Latour, *La Fabrique Du Droit: Une Ethnographie Du Conseil d'État* (2004) 251; Bruno Latour, 'Scientific Objects and Legal Objectivity' [2004] Law, anthropology, and the constitution of the social: making persons and things 73, 107; Max Gluckman, 'Politics, Law and Ritual in Tribal Society'; Good, Berti and Tarabout (n 39) 119.

case has for the appellant. Judges frequently describe how their empathy and emotional involvement changes over time leading to increased emotional distance. As this judge puts it bluntly, "*You become dull after a while. It happens, that you end up saying, 'Again, someone who killed his uncle, oh well'. And the first time, you still said, 'oh my God, he killed his uncle'.*"[488] As these descriptions show judges seem particularly prone to a feeling of repetitiveness and boredom in asylum cases, which seems to arise for three reasons: Firstly, the selectivity of cases at this particular stage. Given that the courts constitute the appeal stage, dealing exclusively with previously rejected cases, and the fact that appeals - if lodged without a lawyer - are essentially free of charge, the overall number of rejections is likely to be higher than at the administrative stage. Secondly, the attempts by appellants to increase their chances of success means that misinformation and rumours, that circulate among refugee networks, are taken up, together with a lack of sufficient legal support, which distorts the authenticity of stories or arguably heightens the sensation of overly similar claims. This is, thirdly, further increased by the organisation of courts into chambers that focus solely on a select number of countries of origin, which increases the feeling of repetitiveness.

As a result, one judge calls his work 'assembly line work' (*Fließbandarbeit*), talking about conversion cases.[489] He admits, "*I find it very challenging in fact, to do this for a year, and listen to the ever-similar stories day in day out…*"[490] and goes on to explain, how as a District Court judge, he would face a similar challenge with identical claims, often involving the same parties or witnesses and how his disinterested attitude affected the way he held the hearings. Only that in those cases, the parties involved would be arguing about damages to a car worth 450 Euros. As the judge himself affirms, "*In these asylum cases, the appellant sits here for the first time, maybe for the only time and he tells a story, which might be true and then for me*

[488] 171114_03.
[489] 180121_011.
[490] 180121_011.

to face him ostensibly disinterested, that's not ok. For me, that's the biggest challenge, to remain concentrated and keep it up." He goes on to offer a football analogy, "*like when the FC Bayern Munich, is winning and the score is 6:0, Manuel Neuer* [the goalkeeper] *can't just sit down in front of his goal and start smoking a cigarette. He also needs to stay alert, concentrated, and make sure he keeps going and that really is the biggest challenge*."[491]

The Emotional Components of Judging

This shows that judges are and have to be empathetic, as a result, they navigate an intricate balance between the personal and human demands of their job and the necessity of professional distance as a sign of independence. As the judges' balancing act between involvement and dispassion reveals, the public display of independence by judges seems to be intimately connected to the "cultural script" of dispassion[492], as judges are supposed to show neutrality in their "mechanical application of the law"[493]. In contrast, emotions in law are seen as "suspect" and "unwise"[494], challenging the authority of the judge and "signifying a failure of discipline, impartiality and reason"[495] Even though the law and emotions scholarship successfully challenges these assumptions, they still seem to play a role for judges themselves and the way they chose to (re-)present themselves in their public office.

In fact, the literature on law and emotion highlights the importance of emotional involvement, in particular compassion in judges, as it "aids decision-makers in understanding what is at stake for the litigant. In this sense, compassion is closely tied to humility: both are reminders of human fallibility and of the limits of individual

[491] 180121_011.
[492] Terry A Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99 Calif. L. Rev. 629; Jeffrey M Shaman, 'The Impartial Judge: Detachment or Passion' (1995) 45 DePaul L. Rev. 605.
[493] Bandes (n 4).
[494] ibid 7.
[495] Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (n 490) 629.

understanding."[496] This type of humility can indeed be seen in German judges and it trickles down to the pragmatic ideal of truth they are after when looking at cases. Aware of the limits of individual cognition especially in relation to those experiences most asylum-seekers might have, judges claim to not aspire to finding the absolute and only truth or understanding all of the appellants motivations. At the same time compassion and empathy can also be paralysing for judges, when they feel constraint by what the law and their role requires them to do, while aware of the difficult decisions on belonging and integration they navigate as part of their role. As Posner further argues, empathy does not mean "inviting the judge to show partiality", but indeed the opposite, to "bring home to the judge the interests of the absent parties".[497] Distinguishing between empathy as "wearing the heart on the sleeves" and bringing into the mind of the judge future or invisible impacts of a decision. In fact, empathy is "one of the best examples of the cognitive character of emotion"[498]: The cognitive element being imagining the situation in which another person is in and the affective element adding to this rational state of mind is feeling the emotional state "engendered in that person by his situation".[499] This focus on the role that emotions especially detachment and involvement play in how judges live, perform and interpret their role shines a new light onto what asylum decision-making entails. It further reflects how judges pro-actively use and navigate emotions, revealing the cognitive elements of emotions. Judges use emotions to distance themselves from the case to do their job, they employ empathy to create and foster an understanding of the appellant's situation and through their emotional involvement of the case they motivate themselves to keep doing their job.

To sum up, this section set out the balance judges seem to seek between involvement and

[496] Bandes (n 26).
[497] Posner (n 5) 323.
[498] ibid 329.
[499] ibid.

dispassion and how this translates into the performance and perception of their role and responsibility as asylum judges. As Kaufman states, "the question for judges is not whether to detach, but how much detachment will permit us to take heed of the law while simultaneously recognizing the human element implicated in the dispute?"[500]. Beginning with the concept of finding conviction, or *conviction raisonné*, this first part initially draws out what judges aim at when deciding a case, setting out the ambit of their role. Followed, by the first, and most important principle – judicial independence – it further defines and sets the boundaries to the task of finding conviction as well as shows how it shapes the identity of judges more profoundly. As independence not only defines an internal purpose but includes the performance of independence to the outside as well, which in turn hinges on a display of neutrality and dispassion, despite a deep involvement with the political realities of asylum decisions as the cases from Afghan asylum seekers show. These themes remain potent markers in the second part of this chapter, as we move to explore in more detail the two remaining principles for performing independence: the duty to inquire and transparency.

IV. Performing Independence: The Duty to Inquire

As some of the quotes in the first part of this chapter have shown, judges view not only the formation of a personal conviction as their duty, but they also perceive investigating the case, and collecting the facts of the case as a core part of "doing the job". This duty to investigate goes back to the formally enshrined principle of *Amtsermittlung*, the duty to inquire (ex officio), codified in §86 VwGO. Investigating the case is both a vehicle for judges to perform independence as well as a procedural obligation delimiting the powers of the individual judge in administrative law and in particular in asylum cases. Unlike in

[500] Irving R Kaufman, 'The Anatomy of Decisionmaking' 33, 15.

other areas of law, like civil law, where the two parties to the claim are responsible for bringing evidence to court and the judge is only required to decide on the basis of the evidence provided in court, administrative law doctrine explicitly prescribes a duty to investigate on the judges' account. This means collecting, weighing and taking into account all evidence and independently drawing on sources of information even if not actively submitted by the parties to the case. Not only does this requirement constraint the abstract-seeming ideal of finding a personal conviction, because it requires the collection and formal provision of a factual foundation before making a decision, most importantly, it shapes the way in which judges perceive and define their role and responsibilities: Namely as investigators and factfinders.

Generally, the duty to inquire means collecting the relevant evidence, acquiring any further knowledge or corroboration required, be it about the country of origin in question or seeking out more specific information for example in relation to the possibility of treating certain illnesses, conflicting parties as well as requesting - where possible - further information from other sources as part of fact-finding. As one judge put it, when explaining what his job entailed, "*all I do is asking the questions that remain open*"[501]. In that sense, the process of fact finding (*Chapter VI*), in particular the way in which judges ask questions and structure the oral hearing is crucial in defining judicial responsibilities and portraying independence and rule-boundedness.

Placing the duty to inquire on the judge hence delivers an element of fairness, because it diminishes the adversarial nature of the trial and guarantees a homogenous baseline of fact-finding. In theory the quality, thoughtfulness or alertness of the lawyer should not matter, neither should the appellants' preparedness to volunteer all relevant facts in clarity,

[501] 171106_G.

because the judge has a duty to inquire and find out what happened, no matter whether it is presented or how it is presented. In practice, this can mean that lawyers rely heavily on the questioning of the judge.

> "*Normally, lawyers should also ask questions, that is part of their job. But as you see, this lawyer, did not say anything the entire hearing. She saw that the initial hearing at the BAMF was a bummer, and her client is attending church and saying he is a Christian. That's basically all she said. And like most lawyers, she thinks everything else, all the fact-finding and testing is the courts job to do anyway. So that's why she came in, not very well prepared and in the end, she was surprised and claimed we hadn't asked many questions…".*[502]

In cases where claimants are without any legal representation, judges tend to take over the role of the lawyer even more explicitly and actively, making sure the correct legal basis for the claim is used and explaining the proceedings in more detail than usual. For instance, "*Just as an explanation, I will record the most important things into this device. I will discuss the formalities and the facts, like at the BAMF. Then Mister D from the BAMF can ask questions and if your lawyer comes, he can ask questions as well.*"[503] During the course of the hearing, the judge then adds, "*When the translator translates back, please listen attentively, and if you notice a mistake, let me know. And generally, if you have questions or don't understand anything, please also let me know.*"[504]

1. Defining the Duty to Inquire

The principle of inquiry, therefore, forms an integral part of how judges perceive their own role and responsibilities. However, the interpretation of the extent of this duty to inquire varies between judges. As one judge put it, inquiry is not just simply checking a questionnaire, but has to be dynamic and adaptable to the individual case. [505] It is closely

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[502] 180116_010.
[503] VG6K 759.17A.
[504] VG6K 759.17A.
[505] *Yes of course, it has to develop dynamically, to say it again. Because otherwise, simply working off a script of questions and completing it, that is not the task. I try to have a script of questions, if I have to hear four cases a day, which I normally do – yesterday, I only had three, because of the cases already seemed longer – but when I have four cases a day, then at 3pm I won't remember the entire facts immediately, to be able to create questions. That's why I develop a script of questions to then improvise on the basis of. Like that I can quickly get back into the facts. I write down the facts and can look back at it, which I do, to make myself aware of what it was about. What were the particularities? But otherwise, catalogue of questions, yes*". 171023_16.

linked with what is expected from judges at the end of a case, namely a written verdict and transparent rationale that deals with the relevant elements of the legal norm. These requirements run through the oral hearing and determine when judges consider the inquiry sufficient to be able to provide a rationale for the written verdict. In that sense, the transparency of the written verdict and the need to provide a reason and rational, rather than simply the outcome of the decision, not only structures but also drives the hearing and the depth to which the different elements of the claim are investigated, questioned, understood.

Nonetheless, the views of judges vary about what they consider their duty of inquiry to consist of. For some, their core duty merely consists in coming to a lawful decision whereas for others, the proceeding itself caters to a societal and individual need to be heard and granting appellants this space to be heard. As one judge observed by sitting in on other judges' hearings: *"People have very different styles. Some ask more questions, others less, including the way in which they lead the hearing. There are very different approaches. Every human being is different, I guess. That's why it is a good way good to see how others do it."*.[506] Because of the complex relationship between procedural duties and judicial independence, which effectively grants the freedom to conduct cases and proceedings freely (safe for the 'immediate compliance with official duties'), it is difficult to ascertain how narrow this duty to inquire is to be interpreted. The different approaches judges take towards what the duty to investigate includes, can be seen for instance in the length of hearings, the extend of questioning as well as the point at which judges find their research duties to have been fulfilled.

[506] 180619_01.

2. Developing a Shared Baseline

Amongst judges, a shared baseline of what the duty to inquire involves, seems to relate to the existence of some form of previously acknowledged facts or in the words of one judge, "*the court is not obliged to investigate 'into the blue'* [indiscriminately]" [507] meaning judges do not need to do the work of the claimant or the lawyer, attempting to try and discover facts for which there is no initial occurrence. In fact, by law the core of the duty to inquire is the "reconstruction of the individual case"[508]. What goes beyond this baseline therefore depends more and more on the individual judge.

In the oral hearing, different styles of questioning can therefore be observed: Some judges start with open-ended questions, such as, "*You can tell me anything here. Please tell your story well and in a lot of detail. Please take heart and tell me with as much detail as possible, what happened?*"[509] During this hearing the judge then reiterates, the importance of hearing the entire story to assess whether she believes the appellant or not.[510] In a similar vein, but more legalistically, another judge asks: "*You read the letter from the administration, could you please tell me again from your point of view, why the decision of the administration is wrong?*"[511] Others are guided by the file and what they already know, like this judge, who says: *"I reviewed the BAMF files, that's why it is not necessary to repeat the entire story of flight. I have specific questions for you but will start by giving you the facts now."*[512] The judge's first question is then a very targeted one, in this case, she asks, "*When did you see your mother last?".*

A Personal Need for Certainty

One decisive factor of the extent of inquiry judges engage in is for example: how much

[507] 180622_07B.
[508] https://verfassungsblog.de/das-wissensproblem-im-asylprozess-und-wie-es-behoben-werden-kann/
[509] V33.K60.16A.
[510] V33.K60.16A.
[511] VG21K22.18A.
[512] B7K17.33411.

certainty judges personally need before making a decision.

> "*Often you get the feeling, at the core [of the story], there could be something to it. But when there are these details that don't fit and that get you into trouble… Then you start thinking, how can I, myself try and bring it all together, even though that of course, is not really the legal benchmark, but it really helps me with finding conviction. If you are sure about how it all really went about, then you get a better feeling with the decision, instead of just saying 'well, it all doesn't fit. I have doubts, ok, then I just reject'. Probably that will be the legal consequence anyway, but it feels better, if you say, I actually know what happened, it happened like this or that, and as a result, I can make sense of it and it becomes understandable…But ultimately it is not the court's task to consider how it all went about. If you feel like it doesn't fit, then you have to say, well it probably didn't happen like that.*"[513]

Despite the fact, that in her understanding of her role and duties, the extent of her inquiry goes beyond what is necessary for her to do, she describes her own personal ambition to understand the story and what happened, as it helps her to gain conviction. More so than simply a procedural requirement, inquiry therefore also forms part of the strategy judges employ to reach conviction, which includes creating a feeling and perception of certainty. The better the facts of the case are understood, the clearer the mental image of the story and of why things happened, the better a judge's feeling about a decision. A good inquiry and understanding of the case seem to propel certainty.

Hearing the Appellant's Story

Some judges go even further and take a more principled approach as they include being heard and giving space to the appellant's story as important aspects of their duty to inquire. As one judge explained at length:

> "*You could also say, I don't care about all of this, because it's completely irrelevant legally. But I am of the opinion, that if someone has experienced such strokes of fate, then I want to inquire about it. Firstly, because I want to check, whether it is credible or not and if the administration has talked about it in their rejection letter, then I also want to honour that. But there are other colleagues, who say, all of this is not relevant for the decision, and I only inquire about what matters. In those cases, the hearings are often significantly shorter. In my experience, however, if you let people speak and ask them about their fate, then they leave with a good feeling and they feel taken seriously. Whether in the end it is relevant for the decision, that's of course, a different question. Well, anyway, everyone*

[513] 180116_010.

has their own style."[514]

Talking about a case he decided earlier that day, about a woman, who had experienced abuse by different members of her extended family in the past, including rape, but who had subsequently lived unharmed for many years, before deciding to leave Morocco in 2017, he says, "*I could also just have asked, why did you flee? Or why did you leave in 2017? The appellant then would have said, 'well, before that I was in a village for two years, where everyone was really poor and that's why I left'. And then I could say, 'ok, well, then, that's it, done'. But, normally, I would chose not do it that way."*[515]

However, this ideal of giving space to the appellant to make his or her claim is not unconditional. It seems a claim needs to at least pass the threshold of possibility. In cases where it is exuberantly clear that there is no possibility for success, judges ultimately limit their efforts to investigate. "*Sometimes lawyers think we don't ask enough questions. But that depends on what we get, if we don't get much from the appellant, then I don't need to inquire too much, because I wouldn't even know where to start.*"[516] The question is, how much of an onus can judges place on the claimant her- or himself? Here judges seem to draw a balance that changes from case to case. The most radical position places most of the onus on claimants, including expecting him or her to be familiar with the rejection letter (in German): "*Maybe there are colleagues and suitable cases, where you don't need to ask any more questions, the claimant knows the rejection letter, what does he have to say about it?*"[517] Others ask their own questions, after preparing the case extensively, however, give up questioning fairly easily after the appellant accrued a certain number of contradictions:

> *"The most important element is a fair process, and everyone has a constitutional right to be here. But I do not have to pester someone and continue questioning the appellant for three more hours, if I already have 10 contradictions. You don't do that. Today I had two proceedings at the end, and*

[514] 180619_01.
[515] 180625_08A.
[516] 180116_010.
[517] 180622_7B.

> *we finished quite quickly, at 1pm. There were quite a lot of…there was nothing really to the claim. Even if in the preparatory phase these claims were quite extensive and time consuming, because you had to first understand, to see whether there might be anything to them.*"[518]

Nonetheless, judges accept, that at times it can be difficult to assess, whether it would have been necessary to inquire further. One judge for instance describes an appellant from Afghanistan, who relied on a specific honour code for explaining why he had to leave the country, after his relationship with a neighbour's daughter. She explains, "*This honour code however is alien to our legal system and our thinking…so in this case especially, it is difficult to assess whether I should have investigated further or whether, it is sufficient for me to say, I don't believe it the way he presented it*".[519] As such, in contrast to civil claims, where the burden sits with the claimant to clear up the facts, judges in asylum law do remind themselves of their duty to inquire. The role perception is that the burden really lies on the judge in these cases, they have to remain emotionally engaged despite boring, repetitive cases, aware also of the meaningfulness of the case for the applicant. This shared understanding of the duty to inquire therefore seems to constitute a way into staying emotionally and intellectually involved in trying to understand the facts.

> "*You have to make sure not to look through the files and think 'oh not again a conversion case', 'I love Jesus' and 'ciao'. No, you need to make sure to study and really look at the file to see whether there might be any indications, that make the story of conversion plausible even in the file. And it happens, for example, when people talk about how in Iran they had contact to Christians or one appellant told me, that he used to work as a seaman on the Caspian Sea and he frequently met Russian colleagues and sometimes one of them had a bible. Of course, how come he could understand it? Then I would ask, 'do you speak Russian?', and then he would say, 'of course, at least, I can read it well.' That's what it is about, remaining sharp and continue reading and investigating. Not just thinking, 'there is a contradiction, ok, the appellant needs to come forth and explain it' but trying to clear it up. Especially because here, it is not just about a bump in your car, like in civil law, here you really need to give people a chance and make a step towards them when questioning them.*"[520]

Finally, being part of the asylum system and the second pair of eyes evaluating a case, judges define their responsibilities with regards to the duty to investigate in relation to the

[518] 180622_7B.
[519] 171114_03.
[520] 180121_011.

job of the administration. In general, most judges describe their work of inquiry as similar to that of the administration, with the exception that at the court judges have more time and less pressure to complete a certain number of cases in a given timeframe:

> "*We only look at the story, and we can do that with more effort. You cannot say that about the administration, otherwise they would have to do two hearings or something like that. But in principle, we don't work very differently than them. But we are not under the same pressure as them. They have requirements for completion. There the president can just ask them to complete 100 000 cases in half a year, or something like that.*"[521]

Thus, taking more time than the administration and working under a more independent banner than the administration, seems to suggest to judges that they fulfilled their brief, by 'doing more' than the administration.

V. Performing Independence: Transparency

Finally, the judges' performance of independence is helped by one of the most fundamental judicial principles in democratic society, namely that of transparency and accountability. Transparency infuses judicial decision-making at different stages of the process, further defining and delimiting judicial independence, because above all it enshrines public scrutiny. I have observed judges performing their role under the auspices of transparency in three distinct yet overlapping ways, each opening up a new layer of meaning to this fairly elusive concept: Firstly, judges guarantee publicity by ensuring that all hearings are publicly accessible or observable. This secondly extends to judges observing their duty to keep records of the oral hearing, publicised in the written verdict and thirdly, leads to judges' championing the court's and chamber's public relations function.

[521] 180103_008.

1. The Oral Hearing and its Procedural Formalities

At first glance, transparency as a way to perform independence simply relates to the fact that in principle hearings as well as written verdicts are publicly accessible. This means that both anyone can attend a public hearing or request an anonymised written verdict of an asylum claim, as I have done for this research numerous times. Even though in practice, the number of cases in which a member of the general public attends a hearing might be small, it is not uncommon to have family members, friends, employers, social workers, members of the church community or priests to accompany asylum appellants to their hearings. In my observations this did not seem to directly alter judges' behaviour during the hearing process, apart from some judges actively double-checking whether the 'guests' could be witnesses as a result of which the judge would suggest they leave the hearing room so as not to taint their statements. However, the possibility of the public attending seemed to generate a broader feeling of 'publicity' (*Öffentlichkeit*), which is diligently observed. For instance, judges make sure to call out cases via the intercom system, even if all required participants are already present in the hearing room. Other times judges would interrupt the hearing to make sure the porters are still on duty after hours in order to keep the 'publicity' of the hearing intact (*die Öffentlichkeit wahren*) and allow anyone who would like to join the hearing to enter the building.

The ideal of guaranteeing transparency or publicity extents to the general procedural formalities of the oral hearing, like record-keeping.[522] While record-keeping by summarising the appellant's account and dictating it into the Dictaphone serves largely as a memory tool for judges, it also lays the foundation for the written verdict at a later stage and thereby forms part of ensuring transparency. In the literature, record-keeping has

[522] Keeping a protocol is mandatory for all administrative law proceedings, §105 VwGO iVm §159 ZPO, §165 ZPO.

been described as creating a link between the oral and the written, moulding the oral account so as to then utilise it as part of the legal proceedings.[523] Scholars, like Scheffer, argue that in some ways the judge becomes the author of the story, because he or she has the capacity to design, structure, re-word or edit.[524] Most importantly, the protocol tries to speak to what is expected as part of the legal discourse and what can be used in the verdict. Focusing on a clearly targeted game of answer and reply, all other elements of the hearing and thereby of both the judges' and the appellants' humanity are removed from the story. The stuttering, the tears, the silences, the repetitions and struggles to find the right words no longer form part of the proceedings. Scheffer describes this as removing the bodies from the story.[525] For instance, some of the judges I observed did not necessarily write down exactly what the appellant said but rather chose to dictate what can be written down. In doing so, judges often change the perspective of the story, from a story told in the first person to a third person account in indirect speech. Thereby judges not only remove the appellant's 'body' from the story, but also distance themselves from the account. As this judge admits, "*Yeah, well, that's one of the things. I mean, some things you just kind of rephrase. Because you think that this could be reproduced in a slightly shorter way than it was. Even if in that case, it might not come across in such a simple way as it was told but might sound a bit stiff or stilted*".[526]

Moreover, the obligation to keep written records also transforms the oral hearing itself.[527] As a single judge, keeping an oral record while asking questions, staying attentive to the needs of the appellants as well as the demands of the lawyers can be a difficult task. Judges

[523] Thomas Scheffer, 'Übergänge von Wort Und Schrift: Zur Genese Und Gestaltung von Anhörungsprotokollen Im Asylverfahren' (1998) 19 Zeitschrift für Rechtssoziologie 230.
[524] ibid 251.
[525] ibid 261.
[526] 171127_007.
[527] Scheffer, 'Übergänge von Wort Und Schrift: Zur Genese Und Gestaltung von Anhörungsprotokollen Im Asylverfahren' (n 521) 231.

have their own varying strategies to cope with their procedural duties, some dictate very regularly, almost word-by-word, others sum up, at the end or at the end of each 'topic' and by doing so they already chunk up the story into what they perceive are the decisive topics.[528] Judges thereby navigate between giving the appellant space to narrate and tell his or her story, without being constantly interrupted, and at the same time managing the information overload and staying true to the appellants discourse. In that sense, taking something into the protocol can also serve as a way to strike a compromise, because by offering to take something into the protocol by saying, "*this is not really relevant here, but I will take it into the protocol anyway*"[529] judges can satisfy their role of granting the appellant the space to be heard. This reflects the view in the literature, that the protocol represents the ideal of 'being heard', as it suggests that the proceedings satisfied the conditions necessary for the appellant to narrate her case, i.e. without time pressure and with full attention.[530] At the same time, the protocol serves an outside function, showing the impartiality and fairness of the judge. Judges not only leave out comments that might hint at doubts or frustration, but also make sure to obey all procedural obligations, so that lawyers cannot find any loopholes to attack the decision in an appellate court. Therefore, the protocol and the process of summarising the appellants' story into legal language and recording it for the protocol are used as powerful tools to portray due process, fairness and objectivity, rule-boundedness and legality during the oral hearing.

At the end of the hearing, the recorded audio is normally played back and translated back to the appellant for confirmation. However, in the interest of time judges often ask the appellant and his or her representative, whether they voluntarily forgo their right to re-confirm the protocol. Even though appellants and lawyers often agree to forgo this right

[528] 171127_007.
[529] VG17K 11.17A.
[530] Scheffer, 'Übergänge von Wort Und Schrift: Zur Genese Und Gestaltung von Anhörungsprotokollen Im Asylverfahren' (n 521) 258.

without much thought, the power of the protocol remains undisputed. As Luhmann notes about all things written down in the legal context: "Written down, it becomes a norm, as a result, it is more difficult to contest and can only be contested with special reasons".[531] This power of the written word becomes apparent in the way in which judges deal with what has been documented as part of the first instance hearing. When questioned about elements of the first instance decision appellants regularly contest the protocol of the first instance decision, claiming for instance that translations were inappropriate, accounts omitted or falsely recorded. Even if judges show themselves sympathetic to such contestations, by the mere fact that something was documented during an administrative process, it inevitably became part of the case, as a result of which judges are obliged to discuss it or speak to it making it difficult for them to accept the appellants' claims to the opposite.

This attitude towards existing protocols can be seen during the following interaction between a judge and appellant from Pakistan seeking refugee protection:

Judge: *"Well, let's leave it at that for now. Now I would like to return briefly to your hearing at the BAMF."* The judge briefly looks at her hearing transcript. "*So, you told the BAMF that you were framed for the murder. But before that you also said that you were attacked by Shiites because you spoke out against them."*

Appellant: "*I remember the interview very well. I did not say anything like that. I said exactly the same thing as I said here today*."

Judge: *"Okay, one more question then. At the Federal Office you were also told to tell your escape story and there you said that you had left Pakistan because there was no work there and that you could not earn any money there and that that was the reason for leaving. That means that at first there was no talk of problems with Shiites and murder. Why didn't you tell them about these problems?"*

Appellant: *"Because the interpreter at the BAMF said that this was only a small hearing and that I can*

[531] Niklas Luhmann, *Legitimation Durch Verfahren* (Neuwied und Berlin: Luchterhand 1969) 93.

keep it short and later I can explain everything if it is important."

Judges (using the Dictaphone to take note for the protocol): *"When asked why he first only mentioned economic reasons at the Federal Office and only later talked about the religious reasons for his flight...."*.[532]

This interaction between judge and appellant during the oral hearing illustrates both the value judges place on written accounts, in particular that of the first instance, as well as the power judges exert over a story through the specific words used to re-tell it. In this case, the judge refers to the appellant's 'economic reasons' as a way to summarise the appellant's mention of his difficulties of finding work. By summarising his story as such, it immediately brings about assumptions about the 'real reason' behind his flight and places him into the category of 'economic refugee' overshadowing other possible explanations or considerations.

Record-keeping therefore forms an integral part of constructing the claim and producing a case. It serves a double function in providing a reference point for the written verdict as well as offering structure and emotional distance. It further creates the bridge to the deliberations that happen outside the public eye in order to then re-appear in the form of the written verdict and its reasoning. I will discuss how judges go about constructing the story and the case in more detail in the following chapter (*Chapter VI).*

2. The Written Verdict and its Public Reasoning

Following on from what judges document in the protocol, the written verdict represents the second phase in which judges perform transparency and show their independence. The written verdict, as much as the oral hearing, is a hallmark of publicity in itself, as it is publicly accessible, albeit in most cases only upon request. Courts also publish

[532] VG6K 759.17A.

'landmark' decisions, however without any clear or uniform guidance on what and why a decision was published. Beyond that, in the written verdict, the judge is required to provide rational arguments to justify and clearly communicate the reasons behind a decision, which initially aims to protect the verdict from being open to attack by the higher courts. This means that even though the judge is required to form a personal conviction of the case, in the verdict he or she needs to explain how and why this conviction was reached. This underlines the idea of a conviction *raisonné* (see above). The verdict not only publicises the outcome, but justifies and explains it to a wider audience, limiting its perceived intuitiveness. This means, not unlike any academic essay or paper, providing a rational, a logic, an argument, structure and references to ascertain the claims made. The process of writing therefore seems to be integral to adjusting reasoning and intuition. How judges use writing as a tool to align legal reasoning and intuition to personal persuasion will be discussed in *Chapter VII*.

The effect this requirement for transparency in the written verdict has on a decision is best described by this judge's statement: "*You always got to write the content of the verdict in a way that gives you the feeling others could just copy and paste it.*"[533] One judge explains how certain observations can be phrased or put into words, establishing almost a code, legible only for those that understand the observations and convictions that lie behind the rationally seeming legalistic phrases: "*There are assessments, that are definitely subjective and which I can justify. I could say for example, the story is unrealistic/quixotic* [lebensfremd] *or I use a word like, 'does not seem plausible to the court'. That wraps it up nicely, of course.*"[534] In the literature, this transformation of the difficult to verbalise conviction into justifiable, legal representation is most eloquently described by Hassemer, who distinguishes between the context of

[533] 180116_010.
[534] 171106_05.

discovery and the context of justification:[535] "Surely, you cannot justify everything, that can be imagined or hoped for. In that, the phase of representation throws its regulatory shadow over the phase of production. Of course, we hope that the judge will not digress too far from the production to the representation when it comes to the content. As a result, the judicial methods are not in itself methods of finding [the law] but of justifying judicial decisions under the law".[536] Similarly, Tata argues that much of the literature on discretion is concerned with the incoherence between thinking and writing, trying to figure out the 'real' reasons for a decision, inherently assuming they are different from those reasons given in the written account.[537] Instead, he argues that a judgement is purposive, in that it can never be a 'pure' account, because "we cannot observe the thinking of others in the absence of language and expression".[538] According to this conception, which is based on Wittgenstein's understanding of language as a shared experience, expression is intimately intertwined with thinking, including as part of the process of making a decision and everything it entails. As I will show in the subsequent chapters the interconnection between thought and expression goes even further when judges discuss a case with colleagues or when they use writing as a strategy for making a decision (*Chapter VII*). While the language used to describe what lies behind a decision might indeed be different from the one used privately, this is expected given the verdict takes place in the representative or performative sphere. Transparency hence not only happens at the end when the verdict is publicised, but equally drives the collection of evidence, the investigation and assessment of the claim.

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[535] See also Neumann, drawing on natural sciences terminology: Neumann (n 416) 235.
[536] Winfried Hassemer, 'Juristische Methodenlehre Und Richterliche Pragmatik' (2008) 39 Rechtstheorie 1, 19.
[537] Tata (n 14) 440.
[538] ibid; Joachim Schulte, 'Wittgenstein. Eine Einführung'; Ludwig Wittgenstein, *Philosophical Investigations* (BBlackwell 1967).

3. Chamber Decisions and their Public Representation

Finally, the wider public and democratic function of the court drives how judges perform their roles. According to the accounts of some judges, especially the decisions taken as a chamber can have a 'public relations' function. As a result of the increased visibility of the chamber in its entirety, the authority portrayed by the court seems to be strengthened. Scheduling a chamber decision, rather than deferring the decision to a single judge, can therefore be used as a tool where additional publicity or a demonstration of independence or authority is needed in a case. This might be the case where complex issues need to be settled so that individual judges can then refer back to chamber decisions when making similar decisions on their own. During one such chamber hearing, the president of the chamber described it as wanting to "*devote ourselves to this topic in order to put our point of view in writing so as to position ourselves and give space to this.*" In this case, the chamber planned to decide on the issue of so-called group persecutions of Hindus in Afghanistan, which according to its president, the chamber had "*dealt long and extensively with*" and was now aiming to set a conclusive precedent.[539]

Some judges claim that in addition to the three ordinary members of the chamber, the presence of two so-called voluntary judges (*Ehrenamtliche*) as part of the five-person decision-making body can enhance the representativeness of a decision. One judge describes the effect of these voluntary judges in one particular case. Referring to the case as 'politicised', because of the appellant's intimate relationship with the mayor, she says,

> "*Even before the case there was a lot of opinion-making and that's when I said, 'if we hear this case, then we do it as a chamber'. Because then you can confront it with a certain number of people, including the volunteer judges. I find that really important. Because sometimes, the 'in the name of the people' is very important with the volunteer judges. In general, we do that way too rarely, because of the lack of time. But the volunteer judges are in fact multipliers. I just have to repeat that here. No matter what you think about asylum decision-making on a case-by-case basis. You cannot say that it happens in obscurity or with too little time effort. If the appellants have supporters, I often*

[539] VG20 K8.17A.

> *tell them, let them give you the power of attorney and you can get insight into the file and everything you like. That's all we can do, work transparently.*"[540]

Indeed, in the literature a similar view persists that judging is in fact a social and collaborative process.[541] In his seminal work on the UK Supreme Court, Paterson focuses on the dialogues happening at different levels and between different actors, one of which is with the public. This reflects the dialogue or show of transparency that can be observed as part of the chamber decisions in German administrative courts. In comparison to the judges in the UK Supreme Court who might be perceived as removed, secluded or elitist, judges in the German administrative courts deal with both appellants and the public much more frequently. Courts regularly have several judges on duty as press officers, who especially since the 'refugee crisis' managed and generated a heightened focus on the courts, as judges demanded more staff and resources, articulating their grievances with the rising numbers of asylum claims.

Similarly to what Moorhead found for criminal trials, during the hearing judges frequently make an active attempt at bridging the communicative divide between the bench and the court room.[542] This becomes most visible in cases where claimants are not represented by a lawyer.[543] In contrast, in the presence of a lawyer the hearing is almost divided into two distinct conversations: the interaction with the claimant and the legal discussion with the lawyer. While judges often struggle to communicate to the appellants what they do, lawyers and judges seem to be more naturally aligned. As one judge explains in relation to the challenges of adequately communicating with the appellants: "*We cannot save the*

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[540] 180620_03.
[541] Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Bloomsbury Publishing 2013); Alan Paterson, *The Law Lords* (Springer 1983).
[542] Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16 Social & Legal Studies 405.
[543] ibid 406. "The raw interface between social and legal definitions of fairness calls into question the legitimacy of legal process as a fair resolver of disputes. The risks of substantive injustice forces judges from the relative safety of passivity towards a degree of intervention that seeks to reconcile two competing demands: the needs of the unrepresented litigant for help and the needs of all parties for a system that is perceived as even-handed."

world, so we try to play our part, but at the same time we constrain our part in it in order to be able to play our part. But all this complexity, we simply cannot convey in the hearings".[544] This struggle to communicate adequately with the different actors, in particular the appellants, is reflected in the literature: Moorhead, for instance, argues that litigants in front of the judge challenge the theoretical notion of 'impartial arbiter', requiring communicative skills on the part of the judge.[545] Consequently, judges face difficulties to try to make the legal proceedings understood to those attending.[546]

The visibility and public function of judges is reflected in the strong reputations individual judges or chambers have in the wider legal community. Most of the lawyers I spoke to gave poignant descriptions of the different judges and chambers they dealt with on a regular basis, like:

> "*That is (...) we know in many cases, there are totally stubborn judges, with whom one cannot push through anything anyway and then (...) it is also wasted work. And then there are chambers at courts (.) so we know that there (.) for example there are three chambers which are responsible for Afghanistan and there we know that so to speak there is nothing to get from one chamber and with the other there is a bit more leeway*."[547]

This same lawyer describes how when one judge moved into a different chamber, "*it totally changed the jurisprudence, it gives us a lot more chances in this chamber*"[548]. From the perspective of judges these statements underline their visibility and most importantly the performative aspects of their role.

Conclusion

This chapter embarked upon a first exploration of the principles and ideas that shape the way in which judges in administrative courts in Germany make decisions in asylum cases.

[544] 180620_003.
[545] Moorhead (n 540).
[546] ibid 406; Carlen (n 475) 48.
[547] 180125_12.
[548] 180125_12.

It centres around the core idea behind what judges do - finding conviction - and explores the ambiguities that arise from this conception. Thereby, this chapter begins to establish this thesis' core theme: an integrationist approach towards the different strategies and methods that form part of the judges' repertoire and which show the fluidity between seemingly binary concepts like rules and discretion, reason and emotion. This is reflected in how judges deal with the ambiguities present in their role, which is defined as much by judges' self-perception of their role and responsibilities, as by their representation to the outside, as they navigate their stance between emotional involvement and dispassionate distance, motivation and frustration, empathy and routine. As Charles Clark, a judge himself, once wrote: "A judge is on his own. The litigant experiences the outcome of a case directly; the judge, through his sense of responsibility, feels the results indirectly. Each decision is inevitably and perpetually subjected to re-examination by reference to the judge's internalised notions of justice."[549]

Because the idea of a personal conviction is at the heart of judicial decision-making, so is the person of the judge. While this means considerable power for the individual judge, in the case of asylum decisions the consequences for the appellant impact the decision-making process and thereby the role and responsibilities of the judge. Judges find themselves torn between the power and duty to make a decision and the constraints they encounter when faced with the political realities of belonging. As a result, the political afterlife of a decision encroaches upon the judicial decision-making process, which leads judges to attempt to distance themselves from the political nature of their decisions highlighting the constraints of their role. I argue that the performance and public representation of independence by hiding behind procedure and referring to the purpose of asylum law as well following procedural principles like inquiry and transparency offers

[549] Charles E Clark, 'The Limits of Judicial Objectivity' (1963) 12 Am. UL Rev. 1, 12; Kaufman (n 498) 16.

a way for judges to do so.

Even though the identity and role perception of judges takes centre stage, this chapter is about more than narcissistic navel glazing and judicial identity politics, as it lays the groundwork for what judges do when faced with an appellant and a case. It discusses the scepticism judges harbour towards their power to discover the 'true' facts behind a case, revealing a pragmatic attitude towards their jobs that focuses on how the job can get done. This brings the principles into the limelight which both limit and guide judges in their daily practice. It shows how - despite the importance of the person of the judge, including her individual approach to judging - the performance of independence through the duty to inquire and the importance of transparency create a shared understanding and a shared baseline for doing the job.

Thereby the chapter not only reveals who judges are or think they are, but also the role that the particularities of asylum law, as well as its social, political and personal aftereffects play in shaping the judges' job. This chapter therefore speaks to the asylum literature and the way it reflects on the complexities and issues at stake in asylum decisions. In this chapter this can be seen in the way that politics encroaches on the judicial sphere, like in the cases of non-enforcement or 'paper-bin'-cases. Most importantly, however, I try to show how judges deal with this, navigating the boundaries of belonging both personally - in their emotional reactions to the work they do - as well as professionally - in their focus on what is required of them to do. In other words, it shows judges' awareness of the "outside" and the political and societal needs and hopes connected to asylum decisions, which "create a schism between a formalistic legal order and commonly held notions of social justice."[550]

[550] Kaufman (n 498) 16.

Following on from this exploration of how judges view their roles and responsibilities, the next chapter will look into the first element of decision-making, namely establishing the facts of the case, constructing the applicant's story and ultimately attempting to make sense of the case.

CHAPTER VI - EVIDENCE AND PLAUSIBILITY: MAKING SENSE OF A CASE

"I decide, if someone from a country, which I don't really know, from a culture, which is completely foreign to me and whom I have never met before, if this person is telling the truth. That works sometimes, when people completely contradict themselves or get tangled up in contradictions. And that works sometimes, when you think the story is completely smooth and coherent. When you think, yes, this works, it makes sense, it convinces me. And even then, you could be completely wrong."[551]

When a claim reaches a judge at the administrative court, it arrives from the first instance, the Federal Office for Migration and Refugees (*BAMF*) with a file of more or less considerable dimensions. This file contains all the documentation of an otherwise much less tangible story. It contains the first instance (*BAMF*) decision, as well as the protocol from the interview at the first instance (*BAMF*), other relevant documents submitted by the claimant (like passports, photographs, letters, reports etc) and the more or less lengthy submissions of the lawyer for the claimant, if included. Besides these (well)-documented cornerstones of the case in the claimant's file, exist a myriad of other, more general sources of evidence, offering knowledge and information on different aspects of the claimant's story. The judges' overall aim is now to make sense of the claim by directly verifying those fractions of the claim for which documentary evidence exists and testing the plausibility of those elements of the claim which are deeply connected with the story of the applicant and for which no direct proof exists.

Even though the way in which different sources of evidence come together might vary from case to case and from country of origin to country of origin, this chapter tries to systematise how judges apply, use and weigh the different types of evidence available to make sense of the appellant's story. In a first part, this chapter outlines the different sources of evidence that exist, the weight attributed to them and how they are used to

[551] 171114_003.

either test the validity of specific elements of a claim or to form a general understanding of a country of origin. At the same time, this part also uncovers the fallibility of evidence, its limited nature and the inherent lack of sufficient direct evidence in asylum cases. It explores how judges cope with this challenge by finding other ways to make sense of the claimant's story. The second part of this chapter then analyses how judges make sense of the claim in front of them by testing its plausibility to find contradictions in the claimant's story. It explores the role 'common sense' and cultural preconceptions play for determining credibility and describes the strategies judges use to make sense of a claim.

I. The Sources of Evidence

The sources of evidence or *Beweismittel*, as judges call them in their legal terminology, can be best described as 'pieces of evidence', which include witnesses, experts, other participants and documents of proof.[552] In asylum law, these 'pieces of evidence' materialise in three different forms: Firstly, expert evidence, including reports and country of origin information. Secondly, documents provided by the applicant and thirdly, witnesses, of which the most important one is the claimant herself, albeit not officially considered a witness. The following sections will explore these three sources of evidence in turn, illustrating how they are used by judges and how judges assess and determine their weight and importance for the case at hand.

1. Expert Evidence: Reports and Country of Origin Information

One of the most important documentary sources of evidence available to the judge are the so-called '*Erkenntnismittel*' or country of origin documents, which literally translate as

[552] This exhaustive list is codified in §96 VwGo (Zeugen, Sachverständige, andere Beteiligte, Urkunden).

'sources of enlightenment' or in other words, 'bundle of knowledge'. As the name suggests, judges use these documents either to verify a specific element of the story or to shed light on the general context in a country of origin. This 'bundle of knowledge' consists of an extensive list collating all relevant, official or semi-official expert reports available on the country of origin in question. Depending on the specific regulation at the administrative court or chamber, these reports are for the most part collected by the members of the chamber and updated regularly. Most bundles include official government reports, most importantly those country reports regularly published by the German Foreign Office (*AA*), NGO reports, academic expert reports as well as official European and international institutional sources.

However, the availability and use of these reports by judges is in no way uniform. Different countries of origin have varying quantities and qualities of available reports as they cover a range of different sources. Moreover, the weight these reports bear for judges varies, depending on their origin and the case at hand. The best example of this is the case of Afghanistan. Ironically, even though there is no diplomatic representation in Afghanistan, Afghanistan is one of the best-documented countries when it comes to asylum cases, according to a number of judges at both fieldwork sites. As one judge put it,

> "*There is information on anything you can image in relation to Afghanistan. I don't think there is any country, that is as well explored as Afghanistan at the moment. Since the beginning of this year [2018], if you take together all the publications, you will see, there are at least 3000 pages. Just this excerpt on blood feuds and honour killings has 200 to 300 pages. It's incredibly thick, and those are only the documents concerning individual targets, like gender-based targeting, dress codes, the role of women, domestic violence. Every group of persons, Hindus etc, each of them is investigated according to the degree of threat they face. I have never seen this in any other country of origin. Then there are special inquiries for example on Pashtuns, because they have a different relation to blood feuds. It is incredible, all this information out there.*"[553]

However, it percolated during the hearings and especially in the interviews, that more

[553] 180620_03.

information does not seem to automatically equal more knowledge about a country of origin or eventually more certainty about the situation in that country on the part of the judge and ultimately more certainty about the credibility of the appellant's story. As a result, the mere existence of information does not seem to make testing the facts of a claim easier and the decision-making less complex. This is reflected in a concurrence of seemingly contradictory statements, when judges talk about a case and the country of origin information: A judge might describe the country of origin information simultaneously as helpful, because of its existence, and at the same time as useless, because of the lingering ambiguity of the facts despite the availability of these reports. The difficulty with the 'bundle of knowledge' (*Erkenntnismittel*) is therefore to find the needle in the haystack, meaning to find the relevant information in the bulk of information, to apply or weigh it, to assess it or to simply resort to assessing the logic of the core facts of the case. This seemingly contradictory concurrence of an abundance of information and a lack of evidence becomes visible in this interview excerpt, where one judge explains how the over-complexity as a result of an abundance of reports, leads him to over-simplify, recurring to the only technique he actually finds helpful: "proper questioning of the applicant". He thereby alludes to other strategies judges use to make sense of a claim, which the second part of this chapter will explore.

He says,

> "*Let me caricature it for you: A Danish General travels through Afghanistan and looks at everything around him. He comes back and writes a wonderful report. And I think, well, good for you. But for me, what's important, is that I question the claimant properly and take my time to do so during the oral hearing, like you saw yesterday. And then I form my opinion. Of course, in the back of my head I have all those reports. Because, of course, you can't just go ahead and question the claimant like you would question your next- door village fireman. Their world is foreign to us. But to read all those reports in full and up to the last paragraph, that's just too much. That would be an overflow of information*."[554]

[554] 180621_06.

So how does this process of linking the general knowledge derived from the reports with the judicial practices of questions work? How do judges deal with the expert reports and country of origin information they receive? How do they apply, weigh and assess the expert reports and other sources of country of origin information at hand? As the next part of this chapter will show, a first step judges take when confronted with the breadth of reports is weighing them following more or less instinctive criteria of 'objectivity'.

1.1. From the Foreign Office to 'ProAsyl': Weighing the Evidence

The case of Afghanistan, again, is illustrative of the way in which judges give weight to the different reports in the 'bundle of knowledge'. For example, the most recent list of materials for Afghanistan enumerates a total of 123 different reports[555] and was altered and updated five times within one year (January 2018 – January 2019). Beginning with the official reports by the German Foreign Office (*AA*) it includes documents published by various stakeholders: International organisations (*United Nations High Commissioner for Refugees*, UNHCR; *International Organisation for Migration*, IOM; *United Nations Assistance Mission in Afghanistan*, UNAMA), European institutions (*European Asylum Support Office*, EASO; *European Reintegration Network*), large international NGOs (*Amnesty International*; *Human Rights Watch*), national government institutions (UK Home Office; U.S. Department of State, USDOS), national refugee support organisations (Swiss -, Danish Refugee Councils, Immigration and Refugee Board Canada, ProAsyl Germany) and reports by individual academics. In addition, the list may include more specific inquiries made by other courts across the country to experts or to the Foreign Office. However, in practice, most widely referred to and most widely cited are the frequently updated country reports by the German Foreign Office. As a German government institution, judges view

[555] VG Berlin, Erkenntnismittelliste, 06 September 2018.

it as objective, trustworthy and well informed. Especially in contrast to other non-governmental organisations, which some regarded as possibly having an agenda. As one judge put it,

> *"For me, as a German judge, what the Foreign Office says, is particularly believable. Even though, I don't know…It simply doesn't seem to be as partial. Of course, it is equally partial in some respect, because it is written for the government, but theoretically, it is written by people, who share our assessment, who have our benchmarks and who hopefully report it objectively. Of course, it is also interesting to see what Amnesty International writes, but they are of course slightly tendentious. You have to always look at everything in detail and weigh who says what. But generally, Amnesty is of course a big and well-respected organisation. Therefore, it's not like, their reports are of no value at all, but you just have to use them under the assumption, that these reports are slightly tendentious".*[556]

A word frequency search of all judgments on Afghanistan in my fieldwork sites supports the observation that there exists a hierarchy of weight attributed to the different reports, with the reports by the German Foreign Office and international and European organisations bearing significantly more weight than those published by international and national NGOs or refugee support organisations: The so-called situation report (*Lagebericht*) or situational assessment (*Lagebeurteilung*) of the German Foreign Office (*AA*) was cited throughout all 16 judgements on Afghanistan in Metropolis. In 12 out of the 16 cases the reports were cited as frequently as 16 and 26 times. This might be due to the fact, that *AA* reports are published in German and therefore more easily accessible to judges. Another argument for their frequent use might be due to the fact, that there are more reports available covering more wide-ranging topics than the often more specialised reports by NGOs like Amnesty or Human Rights Watch. However, when looking into where and how these reports are cited, they are used both in relation to establishing general facts about the situation, like unemployment rates, life expectancy, but also more specialised fields, where other reports would have been available (like the situation of

[556] 171114_003.

returnees, education, health and justice system, role of women, corruption, infrastructure or the situation in different provinces). In the four (out of 16) cases in which the Foreign Office reports were only cited twice, they instead served to verify those parts of the decision most significant for the outcome of the case, namely establishing a general threat to civilian live and the security situation in Afghanistan. The UNHCR guidelines and Explanatory Notes to the Ministry of the Interior (*Anmerkungen an das BMI)* are used similarly often and for similar purposes as the Foreign Office Reports. In 12 cases they were cited between 20-34 times and in the remaining four cases less than 20 times. The reports by European Asylum Support Office (EASO) are also frequently used, however in most cases in relation to specific factual statements, like the number of inhabitants of cities or provinces. Similarly, International Organisation for Migration (IOM) reports are cited in the single digits in each case, almost uniquely in relation to the situation of returnees to Afghanistan. In contrast, Amnesty International, Human Rights Watch, ProAsyl never appear as citations in any of the written judgments, of the cases, I observed on Afghanistan.

This is not to say that these reports might not have factored into a decision, but that the pressure to conform to a standard usage of evidence within the chamber might have outweighed their added evidentiary value. One case in particular shows the importance of this outside perspective on the value of certain reports: Hearing the case of a mother and son who had fled Chechnya, the judge in the case draws the value of a report from the Danish Immigration Service from a guiding verdict of the Federal Administrative Court (*BVerwG*) on the issue, which cites and positively reflects on the report by the Danish Immigration Service. Similar to many other case constellations, the key question here was what would happen if the appellants returned to Russia and whether they could live safely in a different part of the country. In order to answer this question, the crucial piece of

evidence concerned the process and documentation required when renting an apartment in Russia.

> Judge: "*Here in their judgement, the Federal Administrative Court evaluates many of the available reports. I have checked in there again* [She pulls the judgement out of a pile of documents on her desk, it's several pages long and has many yellow markings]. *You don't have to move to your place of residence and the Danish Immigration Service is quoted here, they are relatively 'fit'* [able]. *I mean they have a lot of information. You have to look at how it would work practically, renting a house. But that's how it is in asylum cases, we only have the reports and then the question is can he speak to that."*[557]

The judge's view on the value of the report is reflected in the final verdict which frequently references both the Federal Administrative Court (*BVerwG*) judgement as well as the Danish Immigration Services report reflecting the significance of the confirmation of its value and unbiased nature by the Federal Administrative Court. Both appellants (mother and son) were awarded refugee status.

The Procedural Value of Evidence

Some reports might bear additional weight for judges beyond their immediate content, because referencing them during the proceedings serves a procedural purpose. Paradigmatic for both the weight attributed to certain types of reports as well as the procedural function this type of evidence can play, is the reaction exhibited by judges towards a specific academic expert report on Afghanistan by a certain Dr. Friederike Stahlmann. This particular academic expert report on Afghanistan was commissioned and then submitted as part of a case in the Administrative Court of Wiesbaden in Hesse. According to judges, it seems to be one of the rare reports that expressly states that no region in Afghanistan is safe enough for anyone including so-called "young healthy male adults" to return. During my fieldwork stay, this particular report and its findings, which

[557] V33.K60.16A.

were contradictory to some of the findings presented by other reports, made waves independently in both courts. Since lawyers - similarly to judges in their chambers - are frequently part of a tight network in which impactful or positive decisions and their arguments are shared, they tend to utilise these cases to try and built a more successful case for their clients. Lawyers have the right to make a call for the submission of additional evidence in any case, if they can successfully make the argument that the judge has not taken into account all relevant information available, called 'motion for the admission of evidence' (*Beweisantrag*). This is one of the most powerful tools for lawyers to draw out proceedings and generate an appeal. As a result, judges are obliged to deal with the country of origin information and reports submitted by lawyers and take a view on them. Therefore, formally introducing a report like that by Dr. Stahlmann into the proceedings not only serves to collate all available evidence, but most importantly fulfils a procedural function.

> "*Some reports are helpful to some extent, at least for procedural purposes, because it would be difficult for someone to make a call for the admission of additional evidence in relation to Afghanistan. But ultimately it remains a question of assessment. Like in this case, I still have to assess the evidence.*"[558]

As this statement shows, some pieces of evidence bear weight by merely shielding the decision-maker against attempts by lawyers to introduce new sources of evidence, trying to either delay the decision or make the decision susceptible to review by the next instance, the Higher Administrative Courts (*OVG* or *VGH*). Even if irrelevant for the current case at hand, formally including a report into the proceedings establishes a shared foundation of information about the country of origin in question. This links to the performance of independence and public display of objectivity and dispassion which I explored in the previous chapter. When judges make sure to stay close to procedure or even hide behind

[558] 180620_03.

it, referencing different sources of evidence enables them to proof that these have been taken into account. In other words, judges also collect evidence for an appearance of procedural fairness, balance and objectivity.

1.2. Two Ways of Looking at the Evidence: Direct and Indirect Use

Apart from the different weight attributed to the various country of origin reports, the 'bundle of knowledge' provides a collection of documents from which judges can pick and choose based on the specific evidentiary questions that arise in the particular case at hand. In general, judges describe using this pool of knowledge in two different ways: On the one hand, judges might use the country of origin information to directly verify specific facts of the case. On the other hand, the available information might be used to form an understanding of the general context in the country of origin in an attempt to be able to ultimately make sense of a story.

1.2.1. Direct Use: Factual Verification

Where possible, the country of origin information is often used to verify the existence of factual details, such as the existence of political parties, persons of interest, politicians, as well as the occurrence of more widely documented events, such as elections, terror attacks, sieges or else. This type of (semi-)verifiable facts may constitute a first reference point in a case, which helps to establish the foundation of a story or situate the claim within its wider context. For example, in cases for the protection from deportation on the grounds of an illness which cannot be treated in the country of origin, the available reports might be used quite literally. Judges describe, for instance, using the International Organization for Migration (IOM) lists, which specify the availability of medication, drugs and treatments for different types of illnesses. In these types of cases, documentary evidence by local doctors might also be available, which leads judges to view the evidence as

sufficient and these types of cases, as time consuming, but 'easy'.

> *"There is a lot of good information by the Foreign Office and the IOM, which immigration offices use as well to describe the situation. That's pretty good. I mean, whether it is a 100%… you will never have a 100% certainty. Because in some countries the administration does not work as smoothly as here. So, in some countries, a lot is written down on paper about the rights people have, but whether there is a way to make your rights heard, that might of course be a different story."*[559]

The availability of (semi-)verifiable facts reduces the complexity of a case by anchoring it safely to available data points, whether truly accurate or not.

Non-official Sources of Evidence

Where no similar data points are available, judges might attempt to verify elements of the story by introducing other non-official sources as country of origin information, especially if they are relevant to the key issue of the case or other regional or historic developments or incidents. For instance, in a case from Afghanistan, the judge specifically introduced two news reports on Taliban activities in that region and the threat to schools from the *New York Times* as well as *tagesschau.de*, the German daily TV news program in order to speak to the elements of the story concerning the recruitment activities by the Taliban in a particular region in Afghanistan. During the oral hearing, the judge explained the introduction of these additional documents: "*I am not an expert on the situation of schools in Afghanistan, therefore, I need to further educate myself on this topi*c."[560]

Another non-official source of country of origin information judges use to gather additional insight into different elements of the story are almost mundane seeming search tools, like Google, Google Maps or even Wikipedia. Judges might use these before, during or after the hearing to verify the existence of geographical locations, distances and even the size of towns, villages and other relevant places (churches, hospitals etc). In one hearing, the appellant claimed to have travelled from his hometown to Karachi in ten to

[559] 180629_09.
[560] VG 16K.351.17A.

eleven hours. The judge, verifying this afterwards via Google Maps, realised that the distance between those two places was nearly 1300 kilometres, meaning the journey should have taken closer to 20 hours. According to her, "*this makes you wonder, whether he completely misjudged the distance. However, normally you should know whether you travelled half a day or also a whole night. I mean, you should know whether you had a night journey.*"[561] Her recollection of the appellant's misjudgement of distance also shows that not all additional information is immediately helpful or creates certainty, because the question of what it means for the case remains. Was it just an oversight, simple forgetfulness or intentionally misleading?

In order to assess the meaning of information for the plausibility of a story, the claimant's reaction to this form of fact-checking exercise might be used as a first indication One judge, for example, recounts the differing reactions expressed by two claimants, when he showed them their hometown using Google Earth. He recounts pulling up a map of Ethiopia on an interactive screen during the hearing. He searched for the home of the first claimant, who had told him that his town was comprised of around 5000 houses. However, on the screen only a few houses appeared. The judge recounts, how "*the claimant got really angry, telling me, that he included the surrounding villages in his estimate.*" The same day, the judge heard another case, in which the appellant said his village had around 100 inhabitants or 100 houses. Looking on the map, the judge was able to find the village and according to his recollection, "*the claimant looked incredibly happy, relaxed and blossomed, pointing to the main square and even his own house*." The judge described this as, "a *vivid reaction, which I bought and believed. Well, at least his origins, not the rest of the story*."[562] This shows not only the relevance of different types of evidence of each part of the story, but also the way in which - beginning with the appellant's origins - every factual detail of the story is verified and

[561] 171127_007.
[562] 180622_7B.

tested while judges begin to draw conclusions on the overall plausibility and credibility of the claim.

Official Inquiries

Judges also have more direct ways in which they can verify details of the story, without having to recur to Google Maps or Wikipedia, namely through official inquiries. The availability of these direct forms of inquiry or investigation varies between countries, depending mostly on a functioning diplomatic representation in that country and their possibility to investigation 'on site'. This might include verifying whether a location, like a marketplace, village or church or a judicial, police or hospital report exists. Judges might also recur to the local German authorities for other types of forensic inquiries. In one case, I observed at Oasis, the judge submitted the claimant's police and hospital reports from Egypt to the local criminal police in Germany, who used criminological techniques to assess whether the hospital reports were in fact originals. In particular, by zooming into the seals stamped on the documentation, they were able to show that the stamps instead of being stamped had been printed onto the documents, suggesting the documents had been forged. In this case, the judge used the results of this inquiry into the facts of the case as a strong indication for disbelieving the story.[563]

1.2.2. Indirect Use

Judges not only turn to the country of origin information available as direct proof to test specific facts of the case, but when judges describe how they use the available evidence, it seems it often merely serves as the undertone for the wider context in the country in question. Only when new or specific information is required in a case, do judges actively

[563] B4K 17.31400.

refer to and review the reports and information:

> "*Normally, in a totally normal case, I just wait and see. I go into the oral hearing, with what I have read* [in the file] *and summarised. And if, in an individual case, there is something special, then I go and read on that in the country of origin information. But typically, I know about the relevant information in question already*."[564]

Anecdotal Evidence: The Claimants' Knowledge

Judges build their general knowledge about a case from the available reports and information, often indirectly using the claimant's knowledge about his or her home country. In some cases, involving claimants with a higher degree of education, judges use the opportunity to gain additional knowledge of the country of origin for other cases. This type of 'insider' evidence gathering and knowledge building occurred in this particular case from Afghanistan[565]: Because the claimant, who had finished high school in Afghanistan, was comparatively well educated, the judge used this opportunity to gain a better understanding of the educational system in Afghanistan, building on what he knew from the country of origin information and reports. During the oral hearing, the judge asked (even though not relevant for the claimant's case itself): "*Some time ago, I had another case involving the school system in Afghanistan, I would be really interested to know, when does the schoolyear officially start in Afghanistan*?". Later during the hearing, when the applicant recounts his experience with the Taliban and their forced recruitment attempts at his school, the judge again uses the opportunity to ask a more general question about forced recruitment by the Taliban, "*This does not concern you or your case directly, but I sometimes read that the Taliban also give money to families. Is that true*?" Both times, the claimant seemed irritated by the judge's question and replied that he did not know the answer. This type of knowledge gathering not only raises the question whether it unduly involves the

[564] 171114_003.
[565] VG 16K 356.17A.

appellant but also what the value of this type of anecdotal knowledge is for future cases.

The one positively decided case in Oasis, involving an Ethiopian claimant, is a prime example for this kind of indirect evidence gathering to broaden the judge's own general - or private understanding about a country of origin. This claimant, nearly fluent in German, university educated and well-represented by an engaged immigration attorney almost served as an equal interlocutor to the judge. Talking about his membership in the Ethiopian diaspora organisation in Germany, the judge asked: "*Actually, what is the difference between Patriotic Front and Ginbot 7*?" A question, only tangentially relevant to the appellant's story.

The claimant responding in German corrects the judge: "*There is no difference, they formed a union in 2016 with other opposition groups*."

Judge: B*ut the Ginbot 7 was originally founded in the United States*?

Claimant: *No, originally in Ethiopia in 2005*.

Judge: *Ok, but the big leader is in the US*?

Claimant: *The leader is in Eritrea, but there is support from the outside*.

Judge: *But there is a large representation in the US, so I read*.

Claimant: *Yes, there is a big diaspora in the US*.[566]

This interaction exposes the claimant as a source of corroborative or in this case corrective intelligence. The claimant in this case qualifies or rectifies most of the judge's statements, a constellation which is concerning given in the majority of cases judges lack the ability to question or trust the appellant's knowledge. In most cases the judges' knowledge and experience will need to suffice as a backdrop and marker against which to assess or corroborate the elements of the story. The information previously gained from more

[566] B7K 16.30724.

educated or knowledgeable claimants like this one, might have helped to shape the general understanding of the context in the countries of origin in other situations, but it is knowledge ultimately built on anecdotes and experience. While collecting and testing information in this way might be beneficial to the judge, this practice raises the question how the evidence obtained in previous cases will eventually shape the assessment of a new case. The answer this applicant gives about the school system in Afghanistan or the set-up of the Ethiopian diaspora will ultimately shape the way in which a judge perceives the plausibility of a story in the future. Using the claimant's knowledge as an evidence gathering tool is therefore a helpful corrective to avoid misinformation but can also be detrimental to future claimants.

To sum up, varying qualities and quantities of expert evidence on claimants' countries of origin exist, making it necessary for the judge to develop ways to filter, weigh and assess the available reports. Even though not formally established, certain sources of evidence, like those of governmental, international and European institutions bear more weight for judges than those published by some NGOs. Similarly, the way in which expert evidence is used varies between the story and its requirements. Evidence might be used to probe specific facts of the case or referred to so as to establish a general understanding of the situation in a country of origin. In that regard, unofficial sources, like media reports and other claimants' knowledge, gain importance, forming a more subtle foundation of evidence on which judges build individually in each case to test the different elements of the story.

2. The Applicant's Story: Finding Facts and Collecting Evidence

2.1. The Lack of Proof

In other fields of law, the most important source of evidence are documents pertaining directly to the case at hand and submitted as part of the claim. However, asylum cases differ in their lack of (credible) documentary evidence specific to the case. Judges describe how the files they receive lack for the most part any relevant forms of proof, supporting or related to the claimant's story. Even if the story itself includes or refers to details, like arrest warrants, employment contracts, 'threat letters' or hospital reports, these might not be available or their authenticity doubtful. As one judge describes scanning his files for proof,

> "*Well, you can ask the questions, did this really happen like this? Or was it more like that? It probably sounds good in my asylum claim, if I'm wanted by the police and if there is an arrest warrant. And if you take a look in the file, until now, there was never much proof for anything. I mean, you look for something, that somehow proofs what they say, something they submitted. But, as I said, in my files, in the ones I received until now, that was never the case.*"[567]

When judges explain the unsatisfying nature of documentary evidence in asylum law, they often make the comparison between asylum and other areas of administrative law, for instance construction law. By comparing an asylum law case to a construction law case, judges allude to the fact that in their regular line of administrative law work, cases are judged along a mostly well-documented administrative process (*Verwaltungsakt*), the cornerstone of administrative law, where building plans, expert reports, extensive file documentation is presented and where - most importantly - the construction site in question can be personally inspected. In contrast, in asylum cases the file is considered almost meaningless, apart from the first instance hearing protocol and the administrative

[567] 171127_007.

decision. The role that the administration plays in construction law cases is also different, because they are the ones who document and hold large parts of the information, like building plans, freehold registers, making the administration or first instance an integral part of their own decisions and its evidence and file. In asylum cases, the administration is in the same position as the judge, because they do not have any additional evidence and can only recur to the same methods as the judge, interviewing and recording the applicant's story. While they might have taken a different view on its meaning or plausibility, the type and quality of evidence on which this assessment is based, is similar. In addition, judges report the 'special' or fundamentally different approach the administration choses to take in asylum cases. In contrast to other administrative proceedings, the administration rarely attends the appeals at the administrative court even though with the case load decreasing the administration's attendance seems to slowly increase. In the words of one judge, the lack of attendance from the administration in asylum cases also extends to a lack of submissions and more generally a lack of involvement in the case overall.

> "*I really have to say that, even during the court proceedings, nothing comes from the Federal Office. They do their standard briefs, they apply for the complaint to be dismissed without justification, they don't even go into it or speak to it. For them, the case is over when they issued their ruling. What it says, well yes… only if I find it necessary for them to comment on an individual question and if I ask them to say something concretely, then they might write something from time to time. But it is not like in normal administrative court proceedings, where there is a statement of claim in which the lawyer explains over 5 pages why and what and then the administration responds. That's not how it is here at all.*"[568]

In addition to this two-fold reliance on the claimant's oral evidence, any documentary evidence submitted by the claimant is frequently considered meaningless, because unverifiable and the claim itself based on a story, in a country, which cannot be physically

[568] 180629_09.

or personally visited. As one judge sums it up,

> "*Asylum law is determined by the lack of evidence. The claimant allegedly experienced things in his home country, which he cannot proof, so he needs to make his story credible. That's a particularity of asylum law. In construction law, for example, you don't get this, that things depend so massively, on whether someone convincingly, smoothly, understandably and coherently recounts his story of flight, so that I can believe it. In construction law, when someone applies for a building permission, you have got hard proof, whether you can build there or not. There, the personal experiences and representation of the claimant is not that relevant. I mean, I cannot go and call up the country of origin, the state, which persecutes the claimant, whether they are persecuting him or her. That's not possible. Because if they would actually persecute the claimant, they probably wouldn't say. Because of all this, the oral hearing is so important."*[569]

As this statement illustrates, as a result of the lack of reliable documentary evidence, the oral hearing and the claimant's story gain significance, together with the knowledge and information about the country of origin available in order to make sense of the claim. The case therefore culminates in the oral hearing, with the judge getting a 'second look', hoping to elicit more or better information than the administration. While the second part of this chapter will move to analyse the role the oral hearing plays in making sense of the claimant's story, this next section will first explore how judges construct the appellant's story, assessing and collecting the documentary evidence presented in the file.

2.2. The File: Constructing a Story

When the file arrives at the judge's desk or more accurately on the judge's screen, it seems like a significantly sized document. However, as one judge explained, scrolling through 126 pages, filled mostly with administrative or procedural documents of little evidentiary value:

> "*This is also a lot of rubbish; you don't need to read all this. These are tables of contents…some kind of control sheet… that is Arabic, of course you don't need all that. This is the residency permit he got, then there is some charge he got. Then he appointed a lawyer for himself, that's a copy of the lawyer's request for access to the files. Well, I am scrolling through it now, I've already seen it all, it's all such routine stuff. If you do it more often, you know you don't need it. What you need is the*

[569] 1806220_7B.

hearing and the notification of the first instance decision."[570]

Similar files often also include a basic questionnaire which most appellants were required to fill out immediately upon arrival at the height of the 'refugee crisis'. While wary of its brevity and frequent lack of appropriate translation, judges consider this "*quite interesting*", because unspoiled by later consultation "*you can see what someone has said directly*".[571] This is often followed by photographs of passports or other identity documents as well as all the summons and decisions received by the appellant, which include lengthy standard procedural instructions, scheduled hearings or proof of receipt as well as - if relevant - documents that relate to 'Dublin' procedures.[572] Scrolling down further, finally the core piece of the file appears, the hearing protocol of the first instance, sometimes followed by a submission from a lawyer and any other evidence submitted by the appellant (*Bezugsbeweismittel*). These might be photographs or copies of reports, letters, pictures or certificates. However, in some cases the appellant only brings these documents to the court hearing with her for the interpreter to translate during the hearing. The judge would then take these document 'into the file' highlighting the fact that the file is a living instrument that continuously grows with every procedural turn in the case. Echoing her colleague above, the order of importance of all these documents would be "*the first instance hearing protocol, the documentary evidence and finally the notification of the first instance decision* [Bescheid]".[573]

Similar to the way in which judges employ country of origin information, if documentary evidence was submitted by the claimant, it can be both damning and fruitful for the case, depending on how judges assess its value. When judges evaluate the documentary

[570] 180118_009.
[571] 171023_01.
[572] 180622_07B.
[573] 171023_001.

evidence submitted by the appellant to build and construct the story of the case, they seem to place the evidence submitted into the wider context of what they know or think they know about a country of origin. Similarly, to other elements of the story when judges try to make sense of it (see second part of this chapter and *Chapter VII*), experience plays a crucial role. As such, I observed three different constellations, which affect the way in which judges view the evidence submitted and ultimately rendered the evidence in question less credible. Unlike what one might expect, the crucial factor in each scenario is not the type of evidence submitted but the frequency of similar documents in similar cases or the submission of a comparatively 'different' document to other cases.

2.2.1. Too Similar: A Common Document

In cases where a document is submitted that is commonly submitted as evidence in similar cases, the value attributed to this particular piece of evidence tends to decrease. The strongest example of this can be seen in so-called conversion cases. Most recently these are cases brought by Iranian nationals, who base their asylum claim on their conversion to Christianity either while still in Iran or more frequently while already in Germany. In many cases priests or church members submit letters of proof and support to the court in a bid to verify the appellant's case. Given that there are only a handful of churches where a large number of Iranian Christians are active and most priests readily support their members' asylum claims, judges perceive these letters of support as abundant. Voicing his skepticism, one judge refers to the priest in question as a 'celebrity': "*And the priest had certified him [that he was Christian]. That's vicar M., he is already a celebrity and he has given over a thousand interviews, he has converted over a thousand Iranians, which he has baptized, and he has built up a huge church.*"[574]

[574] 180116_010.

The same is true for certain diaspora groups, for instance the afore mentioned Ethiopian diaspora organisations, who often provide their members with similar letters verifying members' political activities in exile (*exilpolitische Aktivitäten*) or proofing membership payments. A slightly different type of evidence but no less abundant in asylum cases are letters by the Taliban making more or less specific threats against the claimant or his family. All these documents share the same predicament: They are submitted in nearly every case, and often by the same individuals (i.e. priests) or organisations (diaspora organisations or 'the Taliban'). As a result, they lack value in the eyes of judges. *"That just doesn't work. The evidentiary value of such a letter is zero. There is literally no case where these letters aren't submitted, including in the first one today. Or letter where certain people certify that something happened by hearsay. It's useless."*[575] In addition, these types of letters are typically more generic than specific which stands in contrast to the idea of the individualised and targeted persecution required for refugee protection. Moreover, judges perceive these letters as easy to obtain or even fake. As one judge explains,

> "*These run-off-the-mill letters by the Taliban, which I see in the dozens, without dates and with just anything…I tried to verify them once and the Foreign Office said, that a) their existence is not reported in the expert situation reports and that in Afghanistan you can get anything with money and b) they can't go and verify these letters with the Taliban.*"[576]

Or as another judge puts it highlighting the consequences that arise from the uncertain evidentiary value of these so-called threat letters: "*Well, I can say for example (...) someone has received a threat letter from the Taliban. Then the question is: do I accept this? And say that's terrible, he received a threat letter or I say, threatening letters can be bought at any market in Afghanistan, it's probably fake*."[577]

[575] 180620_03.
[576] 180620_03.
[577] 180621_06.

2.2.2. Too Different: A 'Different' Document

In one particular case from Afghanistan, the applicant submitted a threat letter written by the Taliban and addressed directly to the claimant and his father. During the oral hearing, the applicant mentioned this letter and showed the judge a printed photograph of the letter. The claimant read the letter out loud in Pashto, the interpreter translated it for the judge, who made notes. The letter referred specifically to the father's occupation as headmaster of a girls' school in Afghanistan and the fact that his son had left the country and was "attending the crusader's schools in Germany". The letter went on to advise the father to bring his son back to Afghanistan in order for him to attend the "Emirate's apprenticeship", threatening that, "if you don't listen to our calls, killing will be allowed". After reading this letter, the judge seemed startled by the fact that the Taliban knew about the whereabouts of the claimant. The judge asked the claimant, how the Taliban knew that he was currently living in Germany. The claimant responded, saying that "*the Taliban are everywhere, even in the village and they know everything.*" The judge then shared his experience from other cases with the claimant: "*I am often dealing with these kinds of threat letters, but this is the first time that I see a threat letter, in which they know about somebody's exact whereabouts.*"[578] In an interview, I conducted later with the judge in question, he confirmed his astonishment, saying that,

> "*This really startled me. That does not mean all of it is untrue, but it has more the character of a supporting letter, which is often submitted by the village community, because they already reflect on a situation, in which someone has left the country. And they use this opportunity to explain what happened before that. The threat letters are usually rather in the present, they live in the moment. Someone is not there or there is someone, whom we want, and he needs to come otherwise this or that will happen. But to kind of fast-forward, timing wise, saying, someone is not there anymore, and he is in Germany now, but we still want him… That's very untypical. That kind of bothered me, yes, maybe. That's surely not a threat letter to which I attribute a lot of weight.*"[579]

[578] VG 16K 351.17A.
[579] 171108_006.

By comparing this threat letter to the format, style and context of those he previously saw in other cases, the judge in question makes an adverse assessment of the value of this piece of documentary evidence for the case at hand. The role that a judge's experience and the use of other cases as a benchmark for comparison plays will be discussed in more detail in the next chapter (*Chapter VII*).

2.2.3. Too Little: Partial Submission of Evidence

In cases where documentary evidence was only provided partially, the weight attributed to the missing pieces of evidence is often bigger than the weight attributed to those pieces of evidence that were present. For example, in one Afghan case, the claimant alleged that he had worked for an international NGO in Afghanistan until 2015 and that for this reason he was now being persecuted. He claimed that his contract had been renewed and extended after 2015 up until he fled the country. However, he merely submitted proof of a contract covering the initial period until 2015. As a result, the judge explained how the selectivity of evidence made her suspicious, shifting her focus from the available documentary evidence submitted, to the unavailable evidence, taking it as an indication for suspicion. As she put it, "*He only submitted until 2015 and he didn't submit the extension of his contract. And in these cases, when they submit only selectively, I'm always quite sceptical.*"[580] Interestingly, as a reason for her suspicion, she referred to her experience with Immigration Law, where applicants selectively submit certain identity documents favourable to them. For example, a driving licence without date of birth instead of a passport, or a school certificate instead of an identity card.[581]

[580] 180620_03.
[581] The role that a judge's experience with other cases plays in assessing a case at hand, will be discussed in more detail in the next chapter, *Chapter VII*.

3. Constructing the Story: The claimant

The lack of sufficient documentary evidence submitted by the appellant ultimately leads to a unique and consequential aspect of asylum law, namely the importance of the claimant as the main source of evidence. Unlike in other areas of law, the main witnesses and therefore, the main source of evidence in asylum claims is the claimant him- or herself. In asylum law, there are rarely any other witnesses who were present in the country of origin and who happen to be present in the host country as well. Most cases I observed consisted of the 'typical' single male or rarely single female case. Even if families arrived together, judges did not formally nominate other family members as witnesses. Instead, common practice was to combine the cases and conduct one hearing, during which the judge would ask each claimant to be heard alone, in order to increase the credibility of their accounts and construct a shared narrative of their story. This is called informational hearing (*informatorische Anhörung*), referring to the fact that it is part of the information gathering process, but not a formal witness statement. As the different legal categories of protection status prescribe, it is the claimant's own experience of persecution and the potential, individualizable threat against the claimant which is crucial for the asylum claim to succeed. As such, the claimant herself is always the main witness in and of her case.

In other legal areas, the distinction between defendant and witness is often unavoidably explicit, because certain rights, like the right to remain silent in criminal law, are connected to the status of defendant. In contrast, in asylum law the distinction between claimant and witness is not at all clear-cut. In asylum law cases the claimant is not officially considered a witness, even though, the clamant is the only one, who can provide evidence on the facts of the case. Hence, there is no formal shift during the hearing where the judge moves from treating the asylum-seeker as the appellant to treating her as the witness. It is rather a fluid process. Consequentially, judges frequently refer to the claimant's

submissions as the claimant's 'story'. By using this terminology, judges seem to reflect on the unique way in which life story, legal claim and witness statement converge in asylum cases, exposing the complex political, social or geographical context that led to the appellant's flight and refugeehood. Expressing his uneasiness with this unique combination of fact and circumstance reflected in the word 'story', one judge pointed out:

> *"I sometimes try to avoid the word 'story', even if it is common. There is always has something prosaic about the word 'story', and that's not what this is about. It's the facts of the persecution, it's autobiography or story and sometimes a little bit in between. But of course you actually say the 'story of persecution'* [Verfolgungsgeschichte]. *I only sometimes say facts of persecution* [Verfolgungssachverhalt], *that is technically distanced."*[582]

With the claimant as main witness, not only her story, but also the person of the claimant herself takes centre stage. For some judges, scars or other forms of visible physical attributes seem to render the claimant's story visible, beyond its mere words. One judge, for instance, told me about the one case from an African country that she ever approved. In this particular case the individual claimed to be persecuted for reasons of being the only heir of the head priest of a particular voodoo cult in Sierra Leone. As heir, his refusal to take over leadership of the cult, was quashed and as a repercussion his finger cut off. For the judge in question the decisive evidential factors seem to have been threefold: Firstly, the missing finger as bodily evidence, meaning visible proof of the threats against him. Secondly, country of origin information from the Foreign Office, a highly regarded form of evidence establishing the existence of these cults in Sierra Leone and verifying a unique practice, which aligned with the story of the applicant and confirmed the alleged practice. Thirdly, a claimant, who did not contradict himself in his testimony. Taken altogether the combination of physical evidence, background reports and a coherent account resulted in a positive decision, granting the claimant subsidiary protection. As the

[582] 121108_006.

above example shows, judges rarely rely on one source of evidence to assess a claim, but rather try to align the different forms of evidence available - country of origin information, expert reports, documentary evidence, witness statements or physical evidence - around the claimant's story.

In sum, this first part of the chapter has shown the different sources of evidence available to judges, including how they are used, and the weight regularly attributed to them. The second part of this chapter will explore how judges align these different forms of evidence and most importantly, how they dig into the story of the claimant, the most crucial part in asylum cases, in order to make sense of it. One of the most important tools for doing so, is the protocol from the first instance, which serves as a foundation for the oral hearing before the judge. Unlike in other areas of law, where the file that reaches the judge might include a plethora of different kinds of documentary evidence and party submissions, when an asylum claim reaches the courts, the most important part of the file according to judges, is the interview transcript of the first instance oral interview. Even though this interview was led by the administrative decision-maker at the first instance, reflecting their particular line of questioning, it remains a first oral account of the claimant's personal history. As a result, it might not be entirely coherent, logical, chronological or explicitly speak to the requirements of the legal norm, but it provides a first verbalisation and formalisation of the story into a legal document, allowing the judge to use it so as to compare and contrast it with the claimant's account during the oral hearing. Coping with the lack of direct evidence, a case can only be created by bringing all sources of evidence together and aligning it with the claimant's story in order to make sense of it.

II. Making Sense of the Claimant's Story

For judges the main challenge seems to lie in evaluating and linking the available sources

of evidence with the claim or story. This requires a certain occupational skillset, which means investigating and abstracting the facts of the story to establish its logic, interpreting the evidence and aligning the two. In relation to jurors a relatively well-established body of research has described this as the 'story model', which argues that juries construct a story about the facts of the case: the narrative of 'what happened'.[583] While administrative court judges seem to proceed similarly when collecting evidence, they do not possess an explicit manual for doing so. Instead, the judges I observed and spoke to seem to turn to their legal training more generally in order to make sense of a claim and ultimately form their conviction about a case. These methods therefore form part of a more fundamental skillset. They are neither unique to administrative nor to asylum procedures. They are based and drawn from an occupational skillset underpinning all judicial work.

In other legal areas, some of those methods might be more visibly defined, discussed and codified. In German criminal law, for instance, jurisprudential and scholastic guidelines around the collection of evidence and the credibility assessment of witness statements exist, culminating in the academic field of *Aussagepsychologie* (psychology of testimonies). However, the judges I spoke to never explicitly or consciously defined or coined the skills and techniques used in their decision-making. As it seems, making sense of a case is naturally part of their professional training or 'craft'.[584]

According to the judges' testimony of what they do to make sense of a case, the core driver behind a judge's 'craft' or method is an attempt to create logic. Independently of testing the application of the legal norm, this consists in forming a clear understanding of 'what happened', of 'who did what', when and why. In its most basic sense, it is about

[583] Nancy Pennington and Reid Hastie, 'Explaining the Evidence - Tests of the Story Model for Juror Decision Making' (1992) 62 Journal of personality and social psychology 189; Pennington and Hastie, 'A Cognitive Theory of Juror Decision Making' (n 29); Bennet and Feldman (n 29); Cunliffe (n 31).
[584] Kritzer (n 30).

storytelling. Relevant stumbling blocks, contradictions or incoherencies in the story are brought to the fore and questioned. The aim is to find certainty and clarity about the details of the story. In the words of one judge, "*In most cases it makes sense to be guided by the story of the claimant's flight and ask questions surrounding it. That's how now after the hearing, I have a higher degree of certainty than before. Before, I thought, this is incoherent and somehow difficult, but now it is so much clearer to me.*"[585] It also has to be noted that the quest to make sense of the facts of a case is only the first step and distinct from that of ultimately weighing all aspects of a case and solving the case to form an overall conviction (see *Chapter VII*). As such, judges distinguish on the one hand between their willingness and ambition to get the facts straight, to understand the situation and to reach clarity about what happened. In that they are driven and motivated by their responsibilities and the public performance of independence and transparency (*Chapter V*). On the other hand, judges harbour a more private assessment of the whole case narrative, which in this case ultimately left the judge in doubt:

> "*I let the claimant draw his house, so that I would gain clarity about the situation and the location of the story. At the end, I did not award protection status, because the story was incomplete in different parts and left me with a lot of doubt, so I didn't award anything. But this part of the story, I could visualise a lot better and illustrated more clearly where the weaknesses in the story were. So, for me, this was helpful.*"[586]

1. Dissecting the Oral Hearing: An Example

In making sense of the case, judges view the oral hearing as the most reliable and crucial element in establishing or testing the logic of a case. It seems to be the anchor point for ultimately developing a conviction or persuasion about the case. Ideally it can shift the judge's perspective from perceiving a story as incoherent or complex to making sense of it, to then developing an assessment as to whether it is plausible or not. At the same time,

[585] 180622_7B.
[586] 171108_006.

during the oral hearing those skills and techniques used to make sense of the story become particularly visible. In the following, I will try and give a detailed account of an oral hearing I observed:[587]

In both fieldwork sites, I was startled by the surprisingly informal setting of the hearing. This was especially so in Metropolis, where hearing rooms are small and office like, with no more than three or four rows of chairs at the back of the room, dark carpets and plain tables in front of the judge's bench. At the time of my fieldwork, the administration - officially the opposing party - no longer regularly attended asylum hearings, mainly because of a lack of qualified personnel together with an abundance of appeal cases. As a result, no naturally adversarial seating arrangements exists in the hearing room, which would sometimes lead judges to encourage lawyers or translators to reshuffle the tables to create one long bench, giving the hearing an intimate and almost informal feel. Beginning with a short greeting and introduction, the judge might ask the appellant whether there were any general comments he wanted to make or anything in particular he wanted to make the court aware of. The tone then shifts to being more formal, when the judge reads out the facts of the case, marking the beginning of the judicial proceedings. In his factual voice the judge sets out the corner stones of the case, based on what he was able to deduce from the file. In this case, the judge reads, "*The appellant made an application for international protection. He is 19 years of age. Afghani national from the province of Nangahar, Pashtu ethnicity and Sunni Muslim faith. On the […] he entered Germany on foot and made an application for asylum on the […]. His interview at the Home Office (BAMF) was on the […].*" These sentences are identical to the first paragraphs of the written judgement published later. The judge then turns directly towards the applicant and goes on to say, "*Everything you told them at the first instance or didn't tell them there, we will discuss in a minute. Because you have received a rejection, which you have*

[587] VG 16K 351.17A.

appealed against." Maybe because the appellant in this case is not represented by a lawyer[588], the judge then continues to explain the four grounds for international protection, against which he would assess the applicant's claim. Again, stating, "*we will talk about this in a minute, so that I know how to deal with these legal prerequisites*". After dictating the opening section into his Dictaphone, the judge switches back to a more personal tone, saying "*Now we can talk with each other about it*". Going back and forth between a formal and informal speak, the phrase "talking with each other about it" actually stands in stark contrast to what will follow during the proceeding. Instead of a conversation, the next two hours will be driven by the questioning of the judge. His questioning is well targeted, because it is shaped by what he already determined from the file and the interview at the *BAMF* as well as what he knows he needs to find out in order to satisfy the requirements of the legal norm.

The way in which the information in the file and the available evidence pre-determines the questions can be seen in the frequency this judge refers to what he read. For instance, "*You have worked alongside school, as I have read*." The judge further uses the oral hearing to clarify and inquire about certain elements of the claimant's story, which remained unclear after the interview at the first instance. In this particular case, confusion surrounded the existence, name and occupation of the claimant's two uncles. In the first instance hearing the claimant had mentioned two uncles. One seemed to have been a baker, the other one working for a ministry in Jalalabad. The judge said, "*I don't quite understand this thing with your uncles yet, you need to help me. At the BAMF you said the uncle you stayed with in Jalalabad was a different uncle.*" Even after several attempts at resolve this apparent misunderstanding the issue remained mostly unclear. From the outside it was unclear whether the claimant had

[588] There are no official statistics on the number of unrepresented claimants before court. However, during my case observations roughly 10% of all claimants were not represented by an attorney. This meant out of the 21 cases I observed at Oasis two claimants were unrepresented and out of the 31 cases I observed at Metropolis three had no officially representation.

truly mixed up something or was having trouble expressing and making himself heard or whether the judge simply misunderstood him. Finally, the claimant apologised for the confusion, while the judge referred to the written submission of the claim - a document in German included in the file and most likely written by a lawyer or someone else - as final reference point, which the claimant in turn did not seem to understand.

Furthermore, the inquiry into the case and the judge's attempt to make sense of the story and test the plausibility of the case can be seen in the abundance of when, who, what, why questions. For instance, the judge asked when the applicant learned of the abduction of his friends by the Taliban. Further questioning was then driven by determining a more precise understanding of the incident: "*Where were you, when the Taliban came?*", "*How did you see the cars?*", "*When did the headmaster inform you*?" When the claimant raised new issues, the judge immediately tried to clarify those, by inquiring further and setting them in relation to the claimant and his situation. For instance, when the claimant mentioned how the Taliban said they intended to take the oldest pupils, the judge asked: "*But were you one of the oldest*?" Leading the claimant to explain, that his school did not have a senior grade, and that he in fact was one of the oldest pupils there. These attempts to specify the story continue during the hearing. For example, when talking about the claimant's uncle, the judge repeatedly asked, where exactly he worked, trying to clarify the confusion surrounding the two different uncles, their names, occupations and hometowns.

Because of the judge's leading questions, the hearing stringently followed the outline of what the judge wanted and needed to know in order to make sense of the applicant's case or in this instance what the judge needed to know to confirm an idea of the story he had already constructed from the file. This led to the applicant's enthusiasm or willingness to correct, share or inject information and details of his story to be curbed. For example,

often one or more details of the judge's account would trigger a response or reaction on the part of the claimant. However, when he set off to interject in order to clarify or explain, the judge frequently moved to halt these urges and postpone clarifications for later, following a more stringent chronological order of events. By structuring the hearing in this way, the inquiry is being constructed for a legal audience delimiting and, in some cases, even dominating over the more natural reactions driven by the life story and experiences of the claimant.

This case illustrates *what* judges do as part of their inquiry into the facts of the case in order to make sense of it. In this next part, I will look at *how* judges make sense of a case, by exploring the different techniques and methods for seeking clarity and testing plausibility. These techniques to make sense of the case seem to revolve primarily around seeking comparisons and contradictions within and outside of the story in order to establish plausibility and coherence. As a result, judges firstly look for contradictions inherent in the story (1), which can occur by simple comparison or corroboration (A), by eliciting details that enrich the story (B) or by seeking explanations and clarifications for contradictions in the story (C).

Secondly, judges look for contradictions between the story and the other available sources of evidence (2), which revolves around the question of "what would be plausible for a person to do?" (A) as well as around the question, "What would be plausible for a person in a certain country to do?" (B).

2. Plausibility: Corroboration and Comparison

When judges question the claimant during the oral hearing, they often focus on specific details in his or her story, using the most salient resource for comparison they have: the

claimant's own previous testimony recorded in the first instance hearing protocol and decision. As one judge put it,

> "*At the time of the oral hearing here at court, at lot is probably already set in stone, because the hearing at the first instance has already taken place, and that is what is decisive for me. The hearing at the first instance is the core of the asylum claim. If the claimant recounts a story at the first instance, which is not coherent, then it is difficult to come to the oral hearing here one year afterwards and simply say, 'my story is completely different, now I have got the correct one, this one is credible*'."[589]

The protocol of the first instance hearing hence serves a judge at different stages of the process: It is an initial template along which judges prepare the questions for the oral hearing, even though some judges remain wary of its salience and expect surprises. It serves as a reference point to challenge the applicant during the oral hearing and finally it establishes the basis for an argument when writing the judgement after the oral hearing. It is therefore not surprising that judges say it is the only piece of evidence they actively look for in the file.

2.1. Different Types of Detail: What is 'authentic'?

When making sense of a story by way of finding contradictions judges do not only focus on direct comparisons between what the appellant told the first instance and what he or she described at the oral hearing, but also try to clarify ambiguities of the story to form a coherent picture. For judges the details of a story play an important role when assessing its plausibility. For most, richness in detail seems inherently connected to authenticity. Therefore, judges do not simply look for just any additional detail, but a certain kind of 'authentic detail'. One judge describes this moment of authenticity, when one claimant told her how he had been abducted and locked into the trunk of a car. The only thing he remembered of the hours he spent in that trunk were the liquid drops of condensed air

[589] 180622_7B.

on his face. According to the judge, this detail startled her as something only someone could know, if he had really lived this moment. Similarly, a judge, dealing mainly with cases from Ethiopia, describes how he tries to elicit these specific details during the oral hearing rather than asking the applicant to re-tell her entire story:

> *"Some time ago, I had a case, where the claimant said she had been raped. Apparently, she stood in front of the church when it happened. When I asked her what happened next, she said, 'then the men came'. I asked her again, that I needed to know, what happened next, very precisely, every detail. Then she told me something, that didn't make any sense whatsoever. In these cases, I need to know, did they come towards her, did they hit her? Did they drag her somewhere? Where was she? Was she still at the church? Was she in her home village yet? I need to know the circumstances, how it all came about. And if she has already talked about it during the interview at the BAMF* [first instance]*, then she obviously forgot about it. And that's where I come in and say, I need to know this in more detail.*"[590]

Listening to the expectations this judge projects onto the victim's account, it seems highly debatable this level of detail could be known or if so, adequately re-told in a court of law by someone who has lived through a similar situation. A growing body of literature on criminal law trials reveals how a focus on inconsistencies and the conceptualisation of rational behaviour as a 'normal way to act' serves to enshrine expectations about the narrative at trial.[591] While this body of literature relates mainly to rape trials, where gendered notions of rationality can play an even more important role than in asylum cases, similar questions can be raised here as to the imposition of gendered assumptions by this judge about the events that took place.[592] This reflects debates in the asylum literature, where Herlihy et al for instance refer to the assumptions asylum decision-makers make about 'normal' behaviour or the internal consistencies of a story.[593] Others show how this type of oversimplification of evidence is driven by a binary assumption that

[590] 180622_7B.
[591] Smith and Skinner (n 46); Mary R Rose, Janice Nadler and Jim Clark, 'Appropriately Upset? Emotion Norms and Perceptions of Crime Victims' (2006) 30 Law and Human Behavior 203.
[592] Helen Baillot, Sharon Cowan and Vanessa E Munro, 'Second-hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context' (2013) 40 Journal of Law and Society 509.
[593] Herlihy, Gleeson and Turner (n 7).

a witness either misrepresents information mischievously or has a memory failure.[594] Testing the consistency of a story therefore gives off an ideal of logic and rationality, arguably central to the legal tradition despite "decades of evidence that human memory is inconsistent" as Nicolson contests.[595]

Even among the judges I spoke to, there seem to be differing opinions about the reliability of an approach that centres on consistency and what judges can expect as a result of it. The main obstacle to this seemingly 'logical' way of testing by comparing and contrasting is the differing nature and quality of the first instance interview in comparison to the court proceedings. According to some judges, the first instance hearings often lack investigative quality, as interviewers focus on asking open questions, without back-checking or following-up. With increasing pressure on the administration for speed and efficiency at the height of the 'refugee crisis', the quality of interviews seems to have suffered in some cases. As a result of this varying reliability of first instance hearings, judges have contradicting views on what can be expected from this approach and most importantly, what it means for the outcome of the case: On the one hand, some judges expect to hear at least the same story - if not more clearly then at least with more detail - during the oral hearing. On the other hand, judges also express their worry that added detail to a story might be the result of extensive preparations in the lengthy period between first and second instance. As one judge put it,

> "*You have to acknowledge that the administration doesn't question as diligently. Maybe due to the mass influx. It is more along the lines of, well tell me how it is looking for you and then that's it, no more questions. Full stop. That makes it difficult for us. Especially, if the claimant arrives at the oral hearing with a detailed presentation. Why is that? Does it reflect the truth, or did he just*

[594] Rosemary C Hunter, 'Gender in Evidence: Masculine Norms vs. Feminist Reforms' (1996) 19 Harv. Women's LJ 127.
[595] Donald Nicolson, 'Gender, Epistemology and Ethics: Feminist Perspectives on Evidence Theory', *Feminist perspectives on evidence* (Routledge-Cavendish 2000); Smith and Skinner (n 46).

elaborate his story, while he had time? That's really difficult to tell."[596]

2.2. Clarifications and Explanations

A strategy judges often use to throw light on the matter, distinguishing plausible from implausible cases, is questioning whether the appellant can explain the contradictions uncovered in the story. Often, the general impression or general believability of other statements or the availability of other sources of evidence to corroborate the claimants' account help the judge in answering the question whether the story fits with everything else they know. One example for the impact a claimant's explanation can have on the plausibility of the story, is the case of an Armenian family, I observed at Oasis. The family's son, a teenage boy, had been physically harmed by unknown assailants, because of his father's political involvement in Armenia. The judge recounts how she was sceptical of the story at first, because the medical certificate submitted stated the boy had suffered an accident during his physical education class. This did not align with the boy's claim that he had been purposefully harmed and pushed off the high bar. Only later, during the hearing, the son was able to clarify in detail what had happened and most importantly, explain convincingly how and why during the medical visit he had lied to the doctor and hidden the fact that he had been pushed off rather than fallen off by accident. As a result of this explanation, the willingness and ability of the judge to empathise with the claimant visibly changed. It became apparent that because of the clear and coherent explanation the boy gave, the judge could begin to understand and 'feel' the logic of the story and the case.

[596] 180629_09.

3. Common Sense: A double edged sword

3.1. Common Sense or 'What would be plausible for a person in a certain situation to do?'

Moving beyond simply identifying contradictions inherent in the claimant's story, judges describe using their 'common sense' guided by the question of 'what would be plausible for a person in a certain situation to do?' to test the logic of a claim. The coherence of a story is therefore closely linked to what is *perceived* as plausible, an ideal-type plausibility. This reflects the wider decision-making literature where the use of common sense has been described as a "silent lens, through which judges interpret the meaning of matters, such as reasonableness and normality of human behaviour".[597] More specifically, it has been argued that in the absence of evidence, judges recur to assumptions based on common sense in difficult cases.[598]

In practice, this means, that in order to assess what would be plausible for a person in a certain situation to do, judges - in a first step - frequently go back to the origins of the story to understand why the applicant acted the way she or he did. This is often related to the question of motive. In the literature on the decision-making practices of jurors in criminal trials, researchers identify similar patterns to that used by judges in asylum cases, consisting in establishing "inferred actions, mental states and goals that serve as narrative bridges between the facts drawn from evidence"[599]. The way in which judges build these narrative bridges to construct a coherent story by better understanding the mental state of the applicant, can be seen in the case of an Ethiopian asylum seeker who told the judge that he was singled out by security services because of an opposition flag visible on his

[597] Burns, 'Judges, 'Common Sense'and Judicial Cognition' (n 32) 319.
[598] Applegarth (n 31); Lady Hale, 'Should Judges Be Socio-Legal Scholars?' <https://www.supremecourt.uk/docs/speech-130326.pdf>.
[599] Nancy Pennington and Reid Hastie, 'Evidence Evaluation in Complex Decision Making.' (1986) 51 Journal of personality and social psychology 242, 249; Cunliffe (n 31) 143.

computer screen. According to his testimony, he forgot to close his computer desktop before leaving his desk to grab a cup of tea. The judge trying to understand, why the applicant had been so careless as to leave this potentially dangerous information about his political views visible on his desk, questioned the claimant about his motives in order to assess whether he could build a narrative bridge and establish that the appellant's actions were plausible for a person in his situation to do. In this case, however, the appellant was not able to convincingly convey his mental state and the reasons for his behaviour, and the judge decided it was implausible that a person would normally act as carelessly in such an environment. As a result, he rejected the case.

In order to establish the plausibility and test the coherence of a story, a judge might also make inferences about the claimant's mindset from events or actions unrelated to the reasons for his or her flight. Naturally, this is often a hindsight view on the course of events. In one case, for instance the judge interpreted the claimant's previously rejected visa application for Germany as a sign of a planned emigration, which went foul. In the words of the judge:

> *"I don't really believe his story. I don't believe there is a causal relationship between the problems in his job and his flight. The story about the visa application kind of supports this. He wanted to emigrate and that didn't work. And then he…I mean if he was really persecuted, then he would not have waited for a visa, especially not at home. All this kind of tells a different story. But that's my preliminary assessment."*[600]

The Judge's own Life Experience

In most cases, judges rely on a sense of general life experience to assess what makes sense. Again, elements of this approach to fact finding are reflected in the wider decision-making literature. Graycar concludes in her chapter about the difference of women's judgements

[600] 180620_03.

that judges use personal experience to construct common sense based on the question 'what would I, or people I know do in this situation'.[601] Similarly, in criminal law or jury studies the authors identified how a defendant's actions are measured against a 'hypothetical normal'.[602] While the literature reflects on the necessity of the use of 'common sense' as an inevitable part of judicial decision-making in some situations, common sense is also deemed a "deeply contested concept"[603]. Not only are judges factual assumptions influenced by their own cultural worldview, background or expectations of the community, but they also constitute a "vehicle through which error and discrimination enter the law"[604]. In the refugee studies literature the debate about fact-finding in asylum cases has been focused on precisely this element of subjectivity inherent in the type of credibility assessment required in asylum cases, in contrast to other legal areas.[605] However, because the refugee studies literature primarily draws on the decisions made by administrative officials, studies rarely dissect the different stages to a claim conflating fact-finding and the construction of a coherent story with judicial approaches to solving a case and its representation in a written judgement. As such, Kagen asserts that the solution to the problem of subjectivity in asylum cases as a result of a 'common sense'-based credibility assessment would be "the practice of careful recording of the detail of each decision"[606]. He argues that a detailed justification - where there is "a written determination detailing the number and nature of the inconsistencies" - would make the basis on which a credibility assessment was made clearer.[607] While I found judges using 'common sense' or the hypothetical question of 'what would I or people I know do in a

[601] Regina Graycar, 'The Gender of Judgements: An Introduction' in Margaret Thornton (ed), *Public and private: Feminist legal debates* (Oxford University Press 1995).
[602] Smith and Skinner (n 46) 455.
[603] Burns, 'Judges, 'Common Sense'and Judicial Cognition' (n 32).
[604] ibid 320; Kylie Burns, 'It's Not Just Policy: The Role of Social Facts in Judicial Reasoning in Negligence Cases' (2013) 21 Torts Law Journal 73.
[605] On the role of gender and sexual orientation on the display of emotions, see for example, Spijkerboer (n 51); Spijkerboer (n 121); Rousseau and Foxen (n 98).
[606] Kagan (n 107).
[607] ibid.

similar situation', thereby opening up their decisions to bias and stereotypes, I also found the use of 'common sense' during the fact-finding phase of a claim constraint by the procedural and professional requirements for detailed written determinations. These include the preparation of a hearing protocol and written verdict, requiring explicit reference and justification for contradictions and observations.

Familiar Circumstances

One stark example for how judges' common sense is infused with their life experience is this judge's awkward description of the Taliban and their intimidation tactics.

> "*I am not sure the Taliban really write these threat letters. They must be writing so many of those, they must have a typing pool* [Schreibbüro] *just for writing and a call centre (*laughing*), because they seem to call permanently. I think it always sounds funny, that the Taliban call on a weekly basis to threaten someone. They could just go there and then shoot the person. That would be really easy*."[608]

Here the judge uses concepts familiar to her, such as an organised, bureaucratic process - a typing pool and call centre - and applies it to a foreign context in order to assess the behaviour and actions of people in it. Unmistakeably, this method threads the personal experiences of an individual in a particular society, culture, milieu, environment or class into a seemingly universal standard of behaviour. This is especially salient with regards to the vastly different circumstances in which the judge's and the applicant's lives are situated. As such, this type of plausibility assessment reflects the cultural, ethnic, religious or gendered assumptions connected to what is seen as 'normal' behaviour of an individual. This is reflected in the refugee studies literature and several studies identify correlations between 'variables' such as religion, gender, sexuality or ethnicity and the outcome of an asylum claim. Factored into decision-making as 'stereotypes' or 'extra-legal considerations' the literature focuses predominantly on the outcome of a claim and

[608] 171114_003.

its legitimacy.[609] The way in which I found judges to use common sense adds to this discussion while at the same time highlighting where its limits lie: By distinguishing between the fact finding phase of decision-making, in which judges construct and make sense of a story, and a phase of problem solving, benchmarking as well as an understanding of role and professional identity that enshrines procedural standards, I disentangle process from outcome. In that sense, I show how using 'common sense' as a plausibility assessment forms part of a wider pool of strategies and methods judges have at their fingertips. Instead of limiting understanding of asylum decision-making to a one-directional, out-come driven picture, based on a binary between legal and extra-legal elements, I draw out how 'common sense' fits into a holistic understanding of decision-making.

Expressions and Impressions

Cultural expectations can be re-enforced by the immediate behaviour of the claimant during the oral hearing, meaning the way in which the claimant tells or presents his or her story rather than merely the specific factual elements of the claim at hand. Again, one way of establishing whether the appellant's behaviour is 'normal' and hence plausible or coherent is for the judge to compare the behaviour to his or her own. There are particularly strong expectations of what individuals 'normally' behave like in relation to the emotions displayed by a claimant. When one claimant for instance described his reaction to his brother's violent death, remaining calm and composed, the judge in hindsight expressly compared his reaction to her own. Albeit a merely hypothetical comparison, the judge figured that she would have cried in a similar situation, deeming this element of the story to be implausible. Judges use similar methods of comparison in

[609] Jubany (n 432); Spijkerboer (n 51); Spijkerboer (n 121); Kalin (n 88); Noll, 'Asylum Claims and the Translation of Culture into Politics' (n 7); Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (n 7).

relation to the extent to which certain events are held to be memorable or 'normally' assumed to be remembered. As one judge explains with regards the claimant's memory of his incarceration: "*But in my view, he also massively exaggerated, because if someone says, 'I spent five or seven days at the police', then I would say, I would know very well, if I spent five or seven days at the police*."[610]

The juror and wider decision-making literature is helpful in highlighting the importance of the impressions of people and non-verbal signs when assessing a narrative.[611] The juror literature finds that when assessing a story juror's "credibility judgements were strongly influenced by the emotions displayed, but not by the content of the story"[612]. The importance of the judges' impression of the claimant's behaviour in assessing the plausibility of a story, means in essence that judges also use sensory tools to evaluate the behaviour of the claimant. Indeed, in many of my interviews, it seems as if judges implicitly claim to possess some sort of a 'sixth sense' about whether someone is telling the truth or not. This reflects similar observations about non-rational elements in fact finding in the literature, which Gerwitz coined 'I know it when I see it', quoting a seminal Supreme Court judgement.[613] At the same time, as with other strong claims judges make about their work, this is not without inherent contradictions, given judges seem to boast a pragmatic mindset and a scepticism towards their ability to find the truth (see *Chapter V*). One judge describes her 'sixths sense' about the plausibility of the facts of a case: "*You can sense it, it makes a big difference, if someone just repeats something, that's made up or talks about something he really experienced himself. That is a big difference*." Talking about a recent case of hers, she describes the behaviour of the claimant, whom she believed to be telling the truth, as:

[610] 180620_2C.
[611] Geir Kaufmann and others, 'The Importance of Being Earnest: Displayed Emotions and Witness Credibility' (2003) 17 Applied Cognitive Psychology 21.
[612] ibid.
[613] P Gerwitz, 'On "I Know It When I See It"'(1996)' 105 Yale Law Journal 1023.

"*When I saw, how he shook his head in disbelieve about what happened to him, while telling his story. And then he touched his forehead, where his scar was*…"[614] At a later stage in the interview, this same judge adds, "*Of course, you are never entirely free from the danger of forming a false conviction, criminal judges know that as well. But I do think, you really get a feeling for it.*"[615]

Another judge, talking about a homosexual claimant from Pakistan, described his - very frank - impression of the applicant as follows:

> "*I once had a homosexual claimant, who came in and I thought: 'Ok, if he is not gay, then I really don't know.' But he lied so much. He told a story, that was completely different from what he had told at the first instance, a completely different story. And then I thought to myself: 'Ok, I can't do anything about this now, you are just not credible anymore, I can't believe anything you are telling me*'."[616]

This judge's statement illustrates firstly, how there is often a strong preconception of an expected, normal or credible behaviour. Beyond that, it secondly shows, how the different methods for making sense of the claimant's story - finding contradictions inherent in the story, using common sense to test the plausibility - operate in unison to form an overall picture of credibility.

Translators as Intermediaries

Unlike in other areas of law or in the juror context, the appellant's statement and immediate expressions are channelled through a third party, the translator. Referring to the role of the translator during the trial, many judges admit that it impedes to some extend the direct interaction with the claimant on which their fact-finding and plausibility assessment is based. Observing the triangular interactions between judge, translator and appellant during the oral hearing, most translators seem to interpret their role restrictively

[614] 180620_2B.
[615] 180620_2B.
[616] 171114_03.

effectively channelling the appellant's words. Sometimes, however, interpreters seem unintentionally driven into a more active role, when judges indirectly encourage them to confirm traditions, phrases, institutions or other relevant occurrences in a case. This leads translators to almost explain the claimant to the judge, bridging the 'culture' gap. In one case in Metropolis, for instance, the translator took on relevance during different interactions, mainly clarifying the choice of certain words used by the claimant. The claimant's father had allegedly been killed in the presence of an uncle, who later reported what happened to the claimant by phone. To confirm this, the judge asks, "*You said in your first instance interview, that your father was murdered on 10 September 2016*". Claimant: "*Yes, 10 September.*" Adding something in Pashtu, the interpreter says, "*The claimant wasn't told initially that his father was murdered.*" Turning to the judge, the translator adds, "*Maybe he wants to say, he wasn't told directly*?". The claimant, who understands some German answers the translator's question himself, adding, "*I was told two days later*". After which the interpreter explains to the judge, that the claimant "*seems to confuse killing with dying*".[617]

I frequently observed this kind of back-and-forth interaction with the interpreter in other hearings. As such, interpreters not only translate consecutively but are also forced to adapt, rephrase or re-word depending on the educational level of the applicant, their level of understanding or emotional composition. Judges rely on this additional input from translators while wary of losing control over the hearing. As a result, judges might interrupt a conversation when they believe an interpreter is overstepping their role, asking too many clarifying or follow-up questions. This judge voices her suspicions at overly lengthy interactions between the claimant and the interpreter: "*You must also be aware that the interpreter will probably render some things in a considerably more simplified form. Because sometimes you get the impression: The applicant talks, talks, talks and then you don't really get much back in the*

[617] VG 16K 351.17A.

translation. On the other hand, you just don't know, how shall I put it, how flowery the language is. I wonder if there aren't a few more words to reflect what is said in German. What is decisive, is what is said in German.".[618] Aware of the potential pitfalls arising from the challenges of translating "*not only the language but also the level differences in education*"[619], judges revert back to the procedural norm, which is that the official court language is German. An interaction at the end one hearing further illustrates the role of the translator as seen by judges: The translator asked - on the part of the claimant - whether the claimant could receive the protocol of the oral hearing in Pashtu. The judge, smiling, replied, *"Unfortunately, that is not possible. But the translator is here, so you have a voice*".[620]

3.2. Common Sense or 'What would be plausible for a person in a certain country to do?'

As I illustrated above, when judges assess whether the claimant's story is plausible, the specific context of the story becomes relevant as well. Hence, when assessing what is plausible for a person in a certain situation to do, judges ask the question 'what is plausible for a person in a certain country to do'. This often means finding possible contradictions between the story and general knowledge derived from the country of origin information and expert reports available, which requires abstracting and extracting the relevant information and applying it to the facts in question. In most cases, there might not be concrete evidence for specific actions of state or non-state actors in a country. However, there will be a more general description of the context in the expert reports on the country of origin. Based on this information, decision-makers can paint a picture of whether a story or certain elements of it could be deemed plausible. They make predictions or assumptions - not always directly derived from the evidence - but based on a generalised

[618] 171127_007.
[619] 171114_03.
[620] VG 16K 351.17A.

understanding of the country in question.

For instance, in one case from Afghanistan the appellant claimed to have fled Afghanistan, because of the threat posed by the presence of Taliban forces in his hometown. The Taliban had come to his school threatening to forcefully recruit him and other students. During the hearing the judge then sought to clarify whether the appellant was threatened directly by the Taliban, in order to establish the link required between the threat of persecution and the person of the claimant.[621] While in the administrative hearing it seemed as if the applicant had been directly confronted by the Taliban, it later became clear that the applicant had merely observed the Taliban arrive and had heard from the headmaster about their visit and intent to forcefully recruit the oldest pupils. As a result of the uncertainty surrounding this decisive question, the judge then questioned the applicant further on whether and how he came into contact with the Taliban. He asked, "*How do you know what the Taliban wanted? Did you speak to them directly*?" The applicant replied, "*No, on this day, they only spoke to the teacher and the headmaster. The headmaster prevented it, because he said the children were in school now and not with their parents. He then spoke to us. But I saw four vehicles with rocket launchers and pick-ups with heavy weapons. Big cars*." The judge went on to ask, referring to the interview protocol from the first instance: "*You have been asked about this at the first instance hearing as well. Do you have an explanation for why the Taliban were turned down that easily, if they came with heavy weapons?*". With this question the judge seemed to test the plausibility of the story by drawing on common sense or what he assumed would be plausible for insurgents, in this case the Taliban, in a certain country to do. As the written judgement would later show, the common assumption by both the judge as well as the administration seemed to be that heavily armoured forces like the Taliban would not be as easily turned away as by a headmaster asking them to leave. In the written verdict, this

[621] VG 16K. 351.17A.

assumption forms an essential building block for the argument rejecting the claimant's appeal, stating, "*The conspicuousness of the fact - already found at the administrative stage - that the Taliban did not immediately abduct pupils, despite heaviest weaponry, could not be cleared up. Instead, the Taliban allegedly set a timeframe of three days within which the pupils were to speak to their parents to then reunite with the Taliban. The claimant's explanation, the Taliban are always heavily armed and simply wanted to warn the pupils, is not convincing."* This statement reveals a strong assumption about armed insurgents, like the Taliban and their manner of operating in countries like Afghanistan. What is surprising is that this assumption does not seem to be based on any specific knowledge or explicit reference to evidentiary material, but rather a common-sense notion about the 'normal' and hence plausible behaviour of armed insurgents derived from an abstract knowledge of the available country of origin information. As a critical spectator, you are inclined to ask the judge, 'how do you know this?' and you would expect him or her to share a hint of doubt about this confidently made statement. However, going back to the way in which judges view their role (*Chapter V*), much of how judges perceive their responsibility revolves around probing and questioning the appellant and granting the asylum seeker a space to share her story. By abiding by procedure and performing an independent hearing judges therefore establish their confidence and authority to make a decision, albeit controversial or uncertain.

3.2.1. Predictions: A Special Case of Making Assumptions

The challenges with using a method for making sense of the facts of a case that is based on assumptions of general knowledge or perceived common sense, are exposed more clearly where asylum cases are concerned with predictions. In most asylum cases, making sense of a story is not only directed at past occurrences but also at the possibility of future harm. This is often the case where the claimant did not experience a direct threat against his person while in her home country (*Vorverfolgung*). In this case the claimant's story and

the evidence brought forward by him mainly serve to determine the likelihood of future persecution. Judges need to find ways to use the expert evidence available on the country of origin to form an understanding of what could or is likely to occur upon the claimant's return. As one higher court case of a Syrian claimant illustrates, this can at times resemble an exercise in foreign policy analysis with as many vague or hypothetical assumptions involved.

This case concerned a Syrian asylum seeker, who had not previously been persecuted by the Syrian state for reasons of politics, race, religion or rejection of military service and who claimed to fear persecution by Assad's forces upon return, because she had sought asylum in Germany. In this particular case, the claimant, a widowed 50-year-old woman, had left Syria with her sons to flee the threat on their lives from bombardments in Aleppo. The first instance (*BAMF*) had already granted her subsidiary protection status and upon appeal the administrative court approved her so-called 'top-up appeal' (*Aufstockerklagen*), granting her refugee protection.[622] However, the administration (*BAMF*) appealed the decision and the case proceeded to the Highest Administrative Court (*OVG*), where a hearing was held, in order to, in the words of the presiding judge, "*answer some fundamental questions about these types of cases*."[623] The main question to be answered was: would the appellant would face persecution, in the form of abduction and or torture by the Assad Regime in case of her (hypothetical) return to the country. The crucial and contested

[622] These types of top-up appeals are common in Syrian cases, because the legal position on some groups of claimants (army recruits, civil war) has shifted between 2014 and 2018, moving away from uniformly granting Syrian applicants refugee status. Instead, the administration today awards mostly subsidiary protection to Syrian claimants. However, as refugee status is the preferred protection status category, with a three-year residentiary guarantee, a so-called 'blue' refugee passport and perceived higher long-term status certainty, many subsidiary status holders attempt to 'top-up' their status by appealing the decision in the administrative courts.

[623] OVG 3B 12.17. While the Higher Administrative Courts in Germany do not hold the power to take on or decide 'guideline cases' as in other jurisdictions, the courts have looked to answer the most controversial questions by hearing those cases that might generate some form of illustrative, guiding case decision on a particular issue.

point was, whether as a result of the claimant's asylum claim in a western country, like Germany, she would face a real risk of persecution by the Assad regime. In order to debate and answer this question, both the judge and the two parties to the claim (the *BAMF* and the appellant and her lawyer) relied heavily on all available sources of expert evidence on Syria to draw conclusions on what would in their minds be plausible to occur in this hypothetical scenario. The appellant's attorney, for instance, went so far as to draw on Chancellor Merkel's statement at a G7 meeting rejecting a political solution to the conflict in Syria, to argue that, *"it's clear that anyone who is in the West, the enemy, has moved closer to the West*". Another argument focused on the criminal investigation launched by a Berlin-based human rights NGO (EHCCR) against members of the Syrian security forces, which again was argued to pose a risk for Syrian returnees and the political ideology ascribed to them.

In its written judgement the court then makes three different assumptions about Syria based on its interpretation of the evidence, ultimately rejecting the appeal[624]: Firstly, the court assumes that Syrian authorities would be aware that a formal asylum application is a necessary prerequisite in Germany to receive social benefits, which is why they would not directly infer a pro-western ideology from an asylum application. Secondly, the court did not find the argument convincing that Chancellor Merkel's position towards Bashar al-Assad would be attributed to a Syrian upon her return. Thirdly, the court claimed that even if the Syrian security forces were aware of the criminal investigation launched by the Berlin-based NGO, taking this to affect their treatment of returnees would overstate the importance and power of this NGO's investigation.

This case serves as a stark example for the way in which judges use and apply the general

[624] Urteil, OVG, RN36.

knowledge and information available to them to develop far-reaching, sometimes almost politically salient assumptions about a country of origin. Applying 'common sense' the judges in this case went as far as musing about the thoughts and perceptions of Bashar Al-Assad and the Syrian security personnel to establish 'what might be plausible for a person in a certain country to do'.

3.2.2. Cultural Preconceptions in Testing Plausibility

As I have alluded to above, judges seem to develop a strong, often implicit sense of cultural and gendered preconceptions, as a result of their efforts to make sense of a story by abstracting from general knowledge or the breadth of information available in the country of origin reports. Judges seem to develop this kind of preconception by transforming the knowledge derived from evidence, like the expert reports, into more immediate, more relatable scenarios to allow for the application of the broad and abundant sources of information to a particular case. For example, in relation to blood feuds, frequently referred to in cases originating in the Balkan region, one judge explained in her own terms, what according to her could be considered a plausible case of blood feud and what could not:

> *"Maybe the term 'blood feud' is more of a dictum. My impression is often that it is not a blood feud in the traditional sense. Maybe there are two families, who absolutely can't stand each other, because of whatever reason, but they don't directly go hunting for each other's lives or shoot somebody from that family. Because, if someone from that family is still alive 5 years after the incident and has not yet been shot, well then…(laughs). Then, I guess the situation is more like, 'I can't stand family XYZ and at the next occasion I'll punch one of them in the face'. But not really this kind of targeted killing a blood feud is supposed to be."*[625]

It becomes clear how the judge tries to fill in the narrative gaps by producing her own coherent account of the situation using concepts and ideas familiar to her. While doing

[625] 180629_009.

so, she superimposes her own understanding of 'a real blood feud' over that of the claimant's.

A similar example of cultural imposition occurred in a case of an Egyptian claimant in Metropolis. The appellant - a young Christian man - claimed to have had a relationship with a Muslim girl in his neighbourhood. He fled the country after they were discovered. Asked about what he would fear upon his return, he claimed that he would be killed by the girl's family. The judge then forcefully interjects to argue that "*in Muslim societies it is normal to have a middle-man or mediator in these types of situations. It should have been the parents' duty to organise a mediator, did they do that?*".[626] The claimant replied that because "*it was a question of honour, the family held back*". The judge went on to ask, whether the families were still neighbours and whether the girl still lived there, which the claimant confirmed. To the question whether there had been any problems with the girl's family so far, he replied that the family had asked for him once, reiterating that it was a question of honour. To which the judge replied, "*Yes, especially <u>because</u> it is a question of honour, there would have been a mediation*." The judge's conclusion seemed to be that the claimant's story was incoherent given the claimant's allegations differed from her idea about similar situations in Muslim societies and the way in which people would 'normally' behave in them.

A similar logic is exposed by a different judge at the same court, who recounts the case of an Ethiopian claimant, who had allegedly been taken, abused and violated by police officers. According to her, a friend who had been taken with her, filmed the scene. Discussing the case afterwards, the judge, said,

> "*In terms of the plausibility of her story, I cannot make sense of it. The policeman saw that her friend made that video. But, I mean, which police officer in Ethiopia, who can take drastic measures, let's himself be filmed when he is doing something forbidden and then - despite that - goes on to*

[626] B4 K 17.31883.

> *abuse the claimant and her girlfriend for three more days. And then she even goes to the police afterwards and shows them the video. I don't believe that.*"[627]

This judge's statement shows how an assessment of plausibility is derived from 'common sense' mixed together with general knowledge and simplified assumptions about a specific country and the behaviour of people in that country. In this case, the judge unconsciously makes three assumptions fundamental to the plausibility of the story: Firstly, Ethiopian police are rough and "*can take drastic measures*". Secondly, the police officer perceived the abuse of the victim as forbidden, which is why he would have been concerned about being filmed. Thirdly, police in Ethiopia are not trustworthy, which is why the claimant would never voluntarily go to the police to seek help. Whether or not these assumptions reflect the reality of life and policing in Ethiopia, the judge seems unaware of the preconceptions behind his seemingly 'logical' assessment of the fact.

Naturally, this kind of simplification and essentialisation of culture on which judges base their assumptions about plausibility is problematic and prone to error. Even more so, most judges seem only partially aware of the assumptions they make and the dangers inherent in this kind of assessment. When asked about the role cultural preconceptions and bias might play in testing the plausibility of a story, judges mostly understood culture narrowly, meaning specific and observable differences, relating to how things are done or defined. For instance, talking about culture, judges frequently referred to the existence of different calendars and their efforts to grant applicants the freedom to use 'their' calendar, when referring to dates or times. However, there was no open acknowledgement that beyond the simple classification of time, time itself and the measurement of time or a temporal memory might take a different from in different cultures or for different people. Similarly, referring to the role of culture in asylum proceedings, judges described an awareness of

[627] 180622_7B.

the different terms used to describe family relations, such as an 'uncle' including non-blood related relationships in certain countries, ultimately changing the meaning of the concept of 'family'. Equally, when asked about the difficulty dealing with less educated or even analphabetic applicants, one judge explained how he uses drawings to help the claimant illustrate his or her story. However, there was no explicit acceptance or reflection on the part of the judge on how this might affect the ability of a claimant to reproduce a coherent story as such.

When judges talk about the role that culture plays in making sense of the facts of a case, they highlight the overarching challenges of fact finding in asylum claims. As one judge, for instance, describes the difficulties he faces in Afghan cases: "*They are difficult because claimants are difficult to question, partly because they aren't well educated, partially because they don't have a particularly high intellectual level and partly, because they come from simply very different circumstance*."[628] Judges hence seem to be both aware of the 'different circumstances' (as this judge euphemistically calls it) and at the same time unaware of the impact these might have on their assessment of plausibility of a claimant's story. As a result, judges seem to go a third way and unflinchingly pursue their efforts to make sense of a case using the professional techniques expected from them and familiar to them, such as comparing and contrasting different statements, questioning on the basis of available evidence and reports and assessing the claimant's statements on the basis of 'common sense' shaped both by their personal experience and the knowledge gained through expert evidence. In order to find the facts, respect the process, and do so in a timely and efficient manner, judges seem to choose leaving the fundamental question about the dangers of an essentialisation of culture, 'orientalism' or bias afore. In that, the dangers of judges' drive to make sense of a story using a seemingly rational and evidence-based approach, become

[628] 180629_09.

particularly apparent.

Similar concerns associated with a fact-finding approach based on seemingly rational expectations of 'normalcy' have been revealed in detail in relation to so-called 'rape myths' in rape trials.[629] Comparable, to the 'ideal' refugee story, gendered assumptions about 'normal' behaviour have been shown to shape the assessment of plausibility in rape cases.[630] In the literature on 'rape myths', the prioritisation of seemingly rational inconsistencies as part of a truthful/not truthful binary, is argued to be one reason for the continued power of stereotypes in decision-making, bringing bias to the fore.[631] At the same time, judges are unlikely to recognise, that common sense in fact might reflect individual experience or worldviews.[632] This reflects the way judges responded to my questions about possible cultural preconceptions (*see above*). More broadly, 'common-sense' seems to be used as a decision-making short-cut, offering a tool for more efficient decision-making, in particular when caseloads are high.[633] In other non-judicial contexts, scholars have highlighted the role that 'common-sense' or a certain nonchalance might play in immigration decision-making.[634] However, in the context of courts and asylum cases, the focus has largely been on the subjectivity, discretion and arbitrariness as a result of the importance of the credibility assessment in asylum cases. Instead, this chapter acknowledges that there are undoubtedly uncomfortable elements that reveal judges'

[629] Taslitz (n 46); Smith and Skinner (n 46); Nicolson (n 46); Brown and others (n 31); Miranda Horvath and Jennifer Brown, *Rape: Challenging Contemporary Thinking* (Routledge 2013); Taslitz (n 46); Jennifer Temkin, '"And Always Keep a-Hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13 New Criminal Law Review: In International and Interdisciplinary Journal 710.
[630] Estrich (n 46); Carol Bohmer and Audrey Blumberg, 'Twice Traumatized: The Rape Victim and the Court' (1975) 58 Judicature 391; Dan M Kahan, 'Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases' (2009) 158 U. Pa. L. Rev. 729.
[631] Kahan (n 628).
[632] Burns, 'Judges, 'Common Sense'and Judicial Cognition' (n 32) 338; Dan M Kahan, David A Hoffman and Donald Braman, 'Whose Eyes Are You Going to Believe-Scott v. Harris and the Perils of Cognitive Illiberalism' (2008) 122 Harv. L. Rev. 837.
[633] Guthrie, Rachlinski and Wistrich (n 27); Burns, 'Judges, 'Common Sense'and Judicial Cognition' (n 32).
[634] Jean-Philippe Dequen, 'Constructing the Refugee Figure in France: Ethnomethodology of a Decisional Process' (2013) 25 International Journal of Refugee Law 449; Tobias G Eule, 'The (Surprising?) Nonchalance of Migration Control Agents' (2017) 0 Journal of Ethnic and Migration Studies 1.

essentialisation of culture and stereotypisation on the basis of gender, religion or culture. However, it equally shows that beyond what the asylum literature proposes, this cannot be treated as a single decisive factor in decision-making, but as one part of decision-making that integrates into a wider process. By showing the routines, mindset and ambitions of judges when constructing a story and making sense of it, it shows how judges grapple and deal with the inadequacy of the available evidence on which they are meant to rely by developing a toolbox of strategies and methods to weigh and assess its value.

Conclusion

This chapter explored and systematised the way in which judges bring together the available, albeit limited, evidence and the unique story of the claimant to make sense of it. It analysed the main formal and informal sources of evidence and the differing weight judges attribute to them. It then showed how judges attempt to align both the available evidence and the specific facts of the case by purposefully questioning the claimant during the oral hearing, seeking out explanations, details or corroboration in order to form a coherent mental image of what happened. The main finding from the analysis in this chapter is that judges use investigatory techniques to compare and contrast, testing the logic of the story, by either establishing its inherent plausibility comparing it to what was said at the first instance or by questioning whether the story makes sense in light of what a normal person would do or what a person in a certain country would do.

Originating from the lack of documentary evidence in asylum cases, requiring fact-determination on the basis of the claimant's testimony, this chapter also discusses the potential bias associated with an approach that bases plausibility on 'normal' behaviour, including impressions during the oral hearing. Ultimately depending on what German judges presume to be common sensical, it refers to the 'silent lens'[635] that 'common sense' provides and through which judges collect and assess the facts of the case to form an assumption about the coherence and plausibility of a story. This lens, however, is a powerful 'cultural system'[636] in itself, which provides a vehicle for judges' own world views to enter this seemingly factual assessment. As this chapter has shown this is particularly

[635] Burns, 'Judges, 'Common Sense'and Judicial Cognition' (n 32).
[636] Clifford Geertz, 'Common Sense as a Cultural System', Local knowledge: Further essays in interpretive anthropology (3rd edn, Basic books 2000) 73.

impactful in relation to 'reasonable' or 'normal' behaviour.[637] Albeit efficient, using 'common sense' to establish the coherence of a story can therefore lead to stereotyping and discrimination, cloaked as the dominant view of human agency.[638] This arguably gains particular saliency in asylum cases, because of the unique vulnerability of claimants in a foreign legal system in which their voice is only heard *via* an interpreter.

In the literature, the use of common sense in fact-finding forms part of the wider discussions on the unconscious in judicial decision-making[639], including intuition in decision-making, which is posited in contrast to reasoned deliberation.[640] The next chapter will put this into question, exploring the role of intuition as part of judges' experience in deciding on the case as a whole. It will analyse how judges attach weight to the different types of contradictions and implausibilities found in the claimant's story, asking whether this story is enough to award protection status, forming a final decision and solving the case. The next chapter will hence describe this process of weighing and assessing the case as a single narrative and against a benchmark, based in law and experience. Thereby, it will explore the role of intuition further, not just in relation to 'common sense', but more importantly in relation a judge's personal and professional experience as part of a court, a chamber, as well as judges' intuitive techniques of decision-making, like writing.

[637] The role of common sense in interpreting the 'reasonableness' of behaviours has been particularly prominent in UK tort law, see for example Burns, 'Judges, 'Common Sense'and Judicial Cognition' (n 32).
[638] Thompson (n 32) 119; Burns, 'It's Not Just Policy: The Role of Social Facts in Judicial Reasoning in Negligence Cases' (n 602) 83–85.
[639] Guthrie, Rachlinski and Wistrich (n 27); Burns, 'Judges, 'Common Sense'and Judicial Cognition' (n 32).
[640] Applegarth (n 31); Kylie Burns, '"In This Day and Age": Social Facts, Common Sense and Cognition in Tort Law Judging in the United Kingdom' (2018) 45 Journal of Law and Society 226.

CHAPTER VII - LAW AND EXPERIENCE: SOLVING A CASE

"In order to grant protection status, you have to be convinced that this is what happened to the claimant with considerable likelihood or that this is what will happen to him with considerable likelihood. And that is often the problem, even if a story may be plausible, that might not be enough. And if I have doubts, then it might also not be enough. So, you always have to remind yourself, how probable is it and what is the benchmark that I am aiming for here?"[641]

After making sense of a claimant's story, when the different factual elements of the case are collected and assessed, judges turn to ask a new question: 'What does this mean for the outcome of the case?'. Given judges rarely encounter one particular contradiction or implausibility that makes the entire case fall apart, they now need to solve the case as a whole by bringing the facts and evidence of the case in line with the law and their experience. This process is not unlike the assessment of evidence in criminal law (*Beweiswürdigung)*, which can be best described by the metaphor of a glass filling up with credibility pluses and minuses. Similarly, Tata refers to the 'whole-case narrative', which he posits in contrast to the idea of irreducible, discrete factors, that determine a decision.[642]

That is to say, the underlying question for judges during this second phase of the decision-making process is, 'is this enough?'. Judges pose this question to themselves, asking, 'is this enough for me?' (*Reicht mir das?*), which shows again the importance of the judge as an individual, who needs to be convinced (see *Chapter V*). The question is hence not only, 'is it enough for the law', but also 'is it enough for me?'. As a result, in this stage of decision-making, the legal and the personal benchmark converge, merging law and experience. While in the previous stage, the focus was on establishing the facts of a case by using the existing evidence to make sense of the claimant's story, testing its plausibility, at this stage,

[641] 181004_14.
[642] Tata (n 14); Cyrus Tata, 'Conceptions and Representations of the Sentencing Decision Process' (1997) 24 Journal of Law and Society 395.

it is about evaluating what these facts mean for the outcome of the case. In that sense, even though a judge's personal experience also pervades the fact-seeking process, for instance when referring to common sense to assess the plausibility of evidence, during this part of the process, the judge's professional experience becomes truly paramount and thereby equal to law.

The Benchmark

So, how do judges determine what is enough? This is where the conditions of the legal norm, the assessment of the facts, the claimant's story and the professional experience of the judge come together, all under the auspices of the performance of judicial independence. Judges in administrative courts frequently use the term *Überzeugungsmaßstab* to describe this synthesis, meaning the 'benchmark which needs to be reached in order to form conviction'. This benchmark reflects what is asked by the law, including all that has been determined in other cases, and forms part of the experience of the judge. The question is hence whether the facts and contradictions unearthed by the judge as part of the story satisfy this benchmark. Ultimately, the judge will come back to the question with which the decision-making process began, and ask, 'am I convinced?'. Establishing a benchmark for doing so not only 'solves' the case at hand, but also allows judges to reach consistency[643] and certainty across cases by drawing from their professional experience, trying to apply this benchmark uniformly.

In order to develop their benchmark, justify it and make it come to life judges explicitly and implicitly recur to two sources: law and professional experience. In a first part, this chapter will therefore explore the legal components of the benchmark, the legal norm and rule-like legal knowledge judges rely on. In a second part, it will show how this legal

[643] Tata (n 14).

knowledge intertwines with judges' experience, in the form of other cases, both his or her own and others' as well as the more subjective and difficult to verbalise qualities of experience, such as intuition, exchange, or personal techniques like writing or simply letting time pass.

Naturally, the two stages 'making sense of the case' (*Chapter VI*) and 'solving the case' (this Chapter), do not exist in isolation nor are they always clearly distinguishable, neither chronologically nor procedurally. Hence, a cross-fertilisation between the two stages of assessment occurs in practice. One judge's statement in particular illustrates this transition between the first stage of finding contradictions and implausibility in the story to the second stage of evaluating and benchmarking them:

> *"Today, I had a claimant, who had said at the first instance that he attended school for seven years. Here, he told me he attended school for five years. What do you do with this kind of contradiction? That's oftentimes the question. Sometimes it all adds up, so that his credibility as a whole is put into doubt, then I will just stop believing anything he says at some point. Or…like today, I chose to just overlook it.*"[644]

I. Law

The core tenet of the benchmark is the legal norm on which the claimant's case is based and against which the judge will assess it. The legal text of the norm can be sub-divided into its different conditions (*Tatbestände*), which all have to be met in order for the claim to succeed. Finding and making sense of the facts of the case was a first step. In order to then test whether the claim in question meets these legal conditions, in a second step, the facts of the case need to satisfy the requirements set out in the legal norm. The central condition in the legal norms for protection status determination (both refugee and subsidiary protection) is the likelihood of persecution in case of return. German legal doctrine calls this the prognosis, or probability benchmark (*Prognose- oder Wahrscheinlichkeitsmaßstab)*,

[644] 171114_003.

which requires a 'real risk' of persecution (*eine beachtliche Wahrscheinlichkeit*). This interpretation is based on the European Qualification Directive and jurisprudence by the highest federal administrative court, the *Bundesverwaltungsgericht*[645], which sets out, that weighing and considering the facts of the case, taken together, those circumstances that make a persecution likely must outnumber the opposing elements.[646]

There is an easing of this burden of proof, in cases with clear evidence of previous persecution (Art.4 Abs 4 Directive 2011/95/EU). In some cases, this leads to an almost paradoxical situation, in which it might have been preferable, if the claimant had engaged in risky activities in order to be able to show for acts of previous persecution, instead of protecting him- or herself from acts of violence. For instance, in a case concerning a family from the Hindu minority in Afghanistan, the judge remarked in her judgement, that the mainly verbal threats the family experienced did not show for persecution. However, according to the claimant, out of physical fear for acts of violence against them, the wife and children barely left the house, hence effectively preventing that the threats against them materialised. Ultimately, the family was not awarded refugee or subsidiary protection status. The question remains, what an element of a benchmark, like 'real risk', means in practice and how it is operationalised?

1. Calibrating the Benchmark

When calibrating a benchmark, like 'real risk', judges seem to use different case scenarios testing and exploring where the threshold for that condition of the norm lies. With regards to 'real risk', a key aspect seems to be the imminence of the threat against the claimant, which of course, is closely connected to a claimant's story, and whether this was found to

[645] BVerwG Urteile vom 1.Juni 2011, 10.C.25.10 Rn 22 and 20.Februar 2013, 10.C.23.12, Rn 23
[646] BVerwG, Urteil vom 20. Februar 2013 – 10 C 23/12 – Juris Rn. 32) (Urteil, OVG Berlin, OVG 3B 12.17, 22.11.2017, Rn 18.

make sense. The following quote by a judge at Oasis illustrates, how he explores various fictitious scenarios in relation to the imminence of threat and whether these would satisfy the benchmark or not. By slightly changing the facts in each scenario and turning the screws so as to highlight the key elements, the judge approaches the threshold from the extremes.

> "*If I know, for example, that someone stood there raising his sword, but the victim was able to duck away, run and flee to Germany, if I believe that, then I also believe, that if this person returns, the guy with the sword will still stand there and wait for him. If I don't believe the story with the sword, then I won't assume a real risk. Or if the case is different, if the guy with the sword was really old and had died, then there is no longer a real risk. Those case scenarios are really construed, but that is how my conviction about what someone told me goes hand in hand with the question of 'real risk'. Of course, there could also be a scenario in which a small child throws a stone at the claimant, calling him a 'Jewish Pig'* [Judensau]. *Then I would say, the small child threw the stone. But, if the child was an orphan, a lone individual, then I would probably not say the claimant faces a 'real risk' of being persecuted for his religion at home. However, even if it was a lone child throwing the stone, but the whole village or the whole community stood behind that child, then I would probably conclude that the claimant does indeed face a 'real risk' of persecution."*[647]

By simplifying otherwise complex factual scenarios, this judge explores the bounds of the legal norm and benchmark to be able to apply it to real-life cases. He creates his own guidelines, operationalizing the abstract notion of 'real risk' the law provides by highlighting the key considerations for him: the imminence of threat, the systematic or institutional nature of the discrimination or persecution.

1.1. The Point of Least Resistance: Thinking Ahead

This quote also alludes to the fact, that weighing a case against the conditions of the norm is not a uniform process in that each element required for the norm to be satisfied will be tested in a linear, chronological and structured manor. Instead, there seems to exist a process in which judges construct hypothetical scenarios in order to identify the weakest link in the case. One judge phrased this as "*an der dünnsten Stelle bohren*", which literally translates as "drilling at the weakest spot", meaning seeking the point of least resistance.

[647] 180103_10.

When trying to find the point of least resistance within a case, judges construct these hypothetical scenarios similar to how the judge above imagined the different threat scenarios an appellant might face. In a concrete case judges might also hypothesise about the legal consequences of the applicant's story imagining everything the applicant has said to be true. Frequently, judges then realise, that even if all the facts of the case were taken to be true, the story would not satisfy their benchmark. With this in mind, the judge will still complete the hearing and the case, as per his job description, but the aim of why he is doing so might change. This ranges from going as far as making sure all the relevant information is collected to offering the applicant extra time just to make him feel heard and listened to.

This arguably pragmatic decision-making strategy impacts the way in which a case is approached, and which conditions or elements of the norm are tackled. As a result, depending on the facts of the case, different elements of the legal norm become decisive. Bearing in mind that all conditions of the norm need to be fulfilled in order for the claim to succeed, this type of pragmatism leads to an efficient assessment of the likelihood of each condition to be fulfilled. Meaning that through routines and experience judges attempt to pick out the weakest link in the chain of conditions in order to be able to focus on that strand of argument. If the failing link is found, the remaining uncertainties, complexities or implausibilities in the story may lose importance, making the case a lot easier to solve.

One judge dealing with Pakistani cases, put it as "limiting oneself to the essential"[648] (*sich auf das Wesentliche beschränken*). It almost seems as if in the name of efficiency, the judge is driven towards curbing her intrinsic motivation to make sense of a case or a story. As one

[648] 171127_07.

judge puts it: "*Ultimately the oral hearing is protracted by this (trying to understand what happened). We are encouraged to work economically, resource efficient, meaning as fast as possible, as much time as necessary, but not necessarily more.*"[649]

Judges would argue that this approach is not used to tweak or cheat the system or the applicant, but that it is part of their strategies for solving the case or "doing the job" in an efficient manner. This is not an unusual or new approach in administrative cases. Using the example of visa cases, one judge explains how judges regularly need to decide on complex issues around how to credibly verify relationships. At the same time, in many such cases, the requirement for visa applicants to possess "sufficient financial funds" is not fulfilled and the case falls apart on these grounds. Therefore, what seems like a diligent and linear process of applying the law to the facts, is facilitated by judges' professional experience and strategies to quickly identify the key considerations of a case.

1.2. Hypothetical Case Scenarios: A Pragmatic Approach

I previously discussed the role of pragmatism as a judicial attitude or approach that is defined by a scepticism towards being able to find the truth and that shapes judges' role perception in asylum cases (*Chapter V*). When solving a case, judges employ this pragmatic approach in order to disentangle the facts of a case and identify the key elements required for the story to satisfy the benchmark. In other words, pragmatism works as the glue between the principles that constitute the judges' role and responsibilities, the strategies that allow judges to construct the story and the benchmark that then leads to solving the case. In slightly wordier fashion Hassemer states that "judicial pragmatics is the electrifying keyword for the development of legal methodology. It calls for the idea that judges follow rules which - like legal methodology and in contrast to dogmas - are situated

[649] 171108_06.

on a middle level between the law and a case decision. These - like methodology and dogmas - mediate between the law and a case decision, which are not formalised but sanctioned, which make the process of finding justice transparent and strengthen the judge's commitment to the law."[650]

This is in line with pragmatist philosophy, which concedes that an absolute or metaphysical truth is irrelevant. Instead, the question is whether something is functionally useful or not.[651] As *Chapter V* shows, most of the judges acknowledge that it is nearly impossible for them to know the truth, i.e. whether the applicant's claim is true or false, or even whether the evidence is real or false. This aligns with most literature on asylum decision-making, which argues that it is impossible for a decision-maker to figure out the "true motives and considerations of an applicant", differentiating (like many others) between a real and a false (thereby economic) refugee.[652] In order to circumvent the fallacy of the unknown or unknowable and still feel persuaded about a case with a degree of certainty, judges in their pragmatic attitude seem to focus on the necessity of knowing the truth, constructing a hypothetical case, thinking about the legal consequences that believing or not-believing the facts of this particular case would have. The revelation of this strategy of decision-making that results from judges' sceptical position on truth and their pragmatic approach is also where my findings go beyond the asylum literature. While the asylum literature equates the impossibility of identifying the "true motives" of the applicant and the resulting scepticism with a "culture of disbelief"[653] and the stereotypisation of decisions, this chapter shows that judges in fact built a strategy around

[650] Hassemer (n 534) 13.
[651] Thomas (n 435) 309.
[652] Günter Bierbrauer, 'Rechtskulturelle Verständigungsprobleme. Ein Rechtspsychologisches Forschungsprojekt Zum Thema Asyl' (1999) 11 Zeitschrift für Rechtssoziologie 197, 197; Helmut Rittstieg, 'Flüchtlingaufnahme in Rechtspolitischer Sicht' (1987) 2 [70] Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV) 247; Fassin (n 7).
[653] Jubany (n 12).

it that relies on hypothetical case scenarios.

This means, in other words, that since judges are focused on finding the weakest link in the case, the decision-making process is driven by the aim of solving it. In the one successful case about Ethiopia in Oasis, this becomes visible at the end of the hearing, when the applicant's lawyer wants to talk about the persecution the claimant experienced in the country of origin. However, the judge, already convinced, that he will grant refugee status based on the claimant's political activities in Germany, quiets the lawyer, assuring her, that "he has got enough"[654]. Finding the weakest link of a case therefore goes both ways, when establishing that the benchmark for protection status is met or not. By thinking ahead to the consequences of a story for the award of a protection status, judges can also increase the efficiency of their decision-making. In this case, the judge kept both the hearing and the written judgement short, raising the question whether solving a case can also mean fully comprehending it so as to offer a thorough evaluation of it? Where comprehending and solving a case do not align, this might ultimately mean for the asylum system, that certain questions will not be answered or the credibility of certain facts not evaluated, because they are simply not relevant for the solution to a case.

2. Rule-like Knowledge

While the construction of hypothetical case scenarios to find the weakest link in the case is very much directed at solving the individual case, judges also use the informal rules and legal principles set by other cases to make it easier and more efficient to make sense of a case despite the power that the concept of 'individual justice' holds. In fact, as Cardozo suggests, individual justice and deference to the cases decided by others are not mutually exclusive: "The labour of judges would be increased almost to the breaking point if every

[654] B7K 16.30724.

past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[655] As a result, judges also refer to various sources of jurisprudence drawing out what I call 'rule-like knowledge' in order to set the legal requirements for the threshold of protection status and assess whether the facts of a case are enough to satisfy this benchmark.

In more practical terms, judges use 'rule-like knowledge' derived from (higher court) jurisprudence in order to interpret and apply the law, weighing the different elements of the claim and ultimately allowing the judge to confidently form, justify and communicate his or her conviction. Because of indefinite and abstract legal requirements, like 'real risk', wherever possible judges look to shared rules to establish indisputable benchmarks that serve to weigh, assess and ultimately justify a decision. I call these 'rule-like' because they are not directly codified as written, binding rules in the way that the legal norm itself is. Therefore, they serve more to strengthen an argument and form an overall conviction about the outcome of the case. In the words of Raz, "rules are applicable in 'all-or-nothing fashion', prescribing relatively specific acts"[656]. In that sense, the use of rules seems to simplify the application of the law in an individual case, yielding a sense of certainty. Nonetheless, as a result of the independence of judges, these rules might be used and interpreted differently by each judge or bear different weight for chambers or courts.

2.1. Highest Court Jurisprudence and the 1:800 Ratio

Rule-like knowledge can emerge from various sources of jurisprudence, the most important of which is Highest Court jurisprudence. One of the most important 'rules' on the application of the norm on subsidiary protection for example was developed by the Federal Administrative Court (*BVerwG*) and later gained significance for different

[655] Benjamin N Cardozo, 'The Nature of the Judicial Process (1921)' [1976] New Haven: Yale 149.
[656] Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 The Yale Law Journal 823, 383.

countries of origin. In 2011, interpreting the legal norm on serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (§4 Abs. 1 S. 2 Nr. 3 AsylG and Art 15 2011/95/EU Qualification Directive), the Highest Administrative Court, formulated the rule, that the number of civilians living in a region need to be put in relation to the number of acts of indiscriminate violence and resulting casualties. The court established that were the ratio to lie below the threshold of one act of atrocity per 800 (1:800) habitants, a serious and individual threat to a civilian's life exists.[657] Thereby, the highest court developed a numerical guideline for quantifying the risk of bodily harm in a weaponised conflict.

This threshold is referred to frequently by judges when testing a claim based on situations of international or internal armed conflict, like in cases from Afghanistan, Somalia or Syria. The result is a straightforward mathematical test, which reduces questions of credibility, evidence or conviction to a minimum. In the words of one judge,

> *"In subsidiary protection cases on internal conflicts, like Afghanistan or Somalia, I can't solely refer to the credibility of the claimant when rejecting the claim. I need to also test whether the threat is actually that high. So, I test, whether the claimant is really from that region and whether the conflict really exists, because there needs to be a 1:800 risk of death, that's what the Federal Administrative Court has established."*[658]

As described by this judge, using a rule like the 1:800 rule as a way to determine the threshold for success, allows judges to operationalise the benchmark, by simply ticking boxes, i.e. where is someone from and what does the country of origin information say about the frequency of incidents. It creates an almost mechanical way to solve a case, fitting the binary logic of approval or rejection enshrined in asylum law. In a sense,

[657] BVerwG, U. v. 17.11.2011 - 10 C 13.10 - NVwZ 2012, 454 [ECLI:DE:BVerwG:2011:171111U10C13.10.0]
[658] 180621_05.

numbers create certainty and portray objectivity.

2.2. Higher Court Jurisprudence and the Capacity to Survive

Since the central question surrounding the award of protection status is whether there is a 'real risk' of persecution for the claimant in his or her home country, there are several rules developed in jurisprudence surrounding the capacity to survive in the home country. The notion of capacity to survive is often taken as a strong indicator for the lack of immediate persecution. The capacity to survive does not only relate to the applicant him- or herself but is frequently inferred from the general family situation. On the basis of higher court jurisprudence, the 'capacity to survive' can be further broken down into more specific rules: the 'internal flight alternative' (*innere Fluchtalternative*) and in the case of Afghanistan, whether the appellant falls into the category of 'young, single, healthy and capable male adults' (*junge, leistungsfähige Männer*).

The latter refers to a category of individuals, which the courts established are generally capable to survive in Afghanistan alone. This rule originally derives from UNHCR Guidelines and was fortified through higher court jurisprudence in Germany.[659] It seems to almost serve as a mantra for justifying a decision both positive and negative, since it provides a convincing and objective baseline on which an argument about the applicant's own position within this group can be made. Unlike the quantitative or mathematical assessment of the general threat level under the 1:800 rule, applying this notion is not an automated process, but rather requires interpretation and balancing, deciding whether the claimant can indeed be called 'fit' or 'capable'. Nonetheless it seems to give judges something to hold onto when navigating the uncertainties of a decision, establishing conviction and making a decision. At the same time, it can also directly affect some groups

[659] BayVGH, B.v. 25.1.2017 - 13a ZB 16.30374 – juris.

of claimants, like women and children who are excluded from this rule from the outset (a fortiori). As one judge noted with relief,

> "*I have to say, I am quite happy, that the Highest State Court decided, with the authority of its office, that single women and minors are not safe going back [to Afghanistan]. Like this, I can at least give out some positive decisions. I can't say it otherwise. At least, then I have some certainty. In these cases, I normally write a letter to the Home Office, saying, 'no, this is a family with minor children' and I can tell them, 'look, this is the jurisprudence'. Often, I ask them, 'don't you want to at least give them protection from deportation?'. And then, that's it, the case is solved.*"[660]

This statement and the way in which judges refer to rule-like knowledge, such as the internal flight alternative and more generally the capacity to survive, further illustrates that for judges these rules serve more than just a legal purpose. Instead, they also play a psychological role. In certain cases, reference to these uncompromising rules serves as an emotional pacifier for judges, as they create certainty in complex or personally tragical cases. Referencing a hard-established rule generates distance to a potentially doubtful, ambiguous or difficult case scenario creating the peace of mind and certainty about an often-unfavourable outcome. This effect is visible in a case from Oasis, where the daughter of an Azerbaijani couple repeatedly expressed how much she suffered from discrimination as a darker-skinned Azerbaijani girl in Belarus. The judge, taken by the young girl's story, explained, that she believes the girl's account and even suggested, that "*this is definitely not easy*". However, because of the overall weakness of the case in light of the high benchmark for refugee protection and the binary logic of approval or rejection, the rule-like argument that the family could live and survive in some part of the country outweighed other elements of the story for the judge:

> *"Well, Belarus is not a small country, and that it is really impossible for them to find a place somewhere in that country…I mean she is also getting older and somehow stronger and more able-bodied and everything. I mean, that this affects her, you could really see that she did not put on a*

[660] 180621_06.

performance or anything, but…what can you do."[661]

In a similar situation, evaluating the risk and circumstances of a hypothetical return to Pakistan, a different judge also clings to the principle of internal alternative for flight in order to both justify a seemingly harsh decision as well as to cope with the uncertainty surrounding the current situation in Pakistan. Discussing the case with me, she first describes how most claimants allege that they will be found anywhere in the country. However, she then goes on to pose several follow-up questions that illustrate how judges navigate uncertainties:

> *"Yes, if this political party really exists everywhere, how do you determine whether he can be found or not? (…) But ultimately, the fact remains, that in these mega cities with millions of inhabitants, without any official registration system, how can he be found there? I mean, if you are really afraid to be found...well, then you have to think about how you communicate, that you are back. It might sound really harsh, but that's just the rule: Internal protection comes before international protection."*[662]

In reflecting on her uncertainties about whether somebody will be safe or not, she uses both factual evidence from the country of origin information as well as reference to the 'rule' that an internal alternative to flight outweighs international protection, which ultimately helps her create a decision-making benchmark in an otherwise unsatisfyingly unclear situation. Hence, the use of such rule-like legal knowledge, not only serves to set the benchmark for evaluating a claim, but also to create legal certainty in a complex, fast-changing often politically charged environment.

In a nutshell, the first part of this chapter explored how judges interpret and apply the law to calibrate a benchmark used to assess the merits of the case as a whole. It showed, how judges use different methods of simplification to give life to the legal requirement for a 'real risk' of persecution upon return. Judges take a pragmatic approach establishing

[661] 189620_2B.
[662] 171127_007.

the weakest link in the case using (hypothetical) case scenarios and rule-like knowledge derived from high(est) court jurisprudence, which can be clearly, methodically and in some cases even mathematically applied, thereby instilling confidence in the outcome of a decision.

More generally, the way in which judges use legal norms, jurisprudence and rules to form a benchmark, illustrates the difficult alliance judges navigate between the perceived certainty of the law and the fluidity and intuitiveness of experience used to actually apply it. When describing the process of forming a conviction in the face of uncertainty, judges tend to primarily refer to the importance of law and jurisprudence for developing their benchmark.[663] However, seemingly unaware of the apparent contradiction, the same judge might also acknowledge the importance of his or her individual perception and personal experience when using this benchmark and solving a case.[664] In that light, the second part of this chapter will explore the role of judges' experience in solving a case, its make-up, use and - most importantly - its synthesis with law.

II. Experience

1. The Fluidity between Law and Experience

In my interviews, law and experience are both strongly present: On the one hand judges frequently reference legal doctrine as narrow, or legal methodology as rule based, objective and neutral, with judges describing their decision-making process as based on the execution of a simple plus and minus list. On the other hand, judges simultaneously express a strong awareness of their own fallibility and humanity, including the personal, emotional and intuitive component of their decision-making process, reflected in

[663] 180622_7B.
[664] 180622_7B.

sentences, like "*I am no better than you in making this decision*…"[665]. Albeit not explicitly expressed, as judges seem to find these instinctive aspects difficult to verbalise, judges seem to inherently accept all that pertains to human decision-making, including intuition.[666] Judges therefore employ rules and intuition as one single methodical element in the decision-making process. Hence, judges put their experience to rational use. The use of intuition, it follows, is not contradictory or dichotomous to rules. Instead, it is an integral part of the reasoning process. Even though it is worth clarifying that the use of experience and intuition takes place more privately, because it remains unarticulated and thus largely invisible to the external observer. After all, it happens for the most part outside the performative space of the oral hearing or the written verdict.[667]

This focus on the role of the unconscious in decision-making is in fact not entirely novel. The way in which rational, objectifiable facts, reasoning and rules are intertwined with experience, subjectivity and emotion aligns with how Tata and Kritzer describe the synergies in their conception of judging as 'craftwork'.[668] Much of the decision-making literature - rationalist or realist - posits emotion and reason along a binary[669], which is also reflected in the 'rules vs. discretion' dichotomy dominating much of the same literature.[670] However, as it becomes visible in the way in which judges routinely approach cases in the everyday, decisions "may in fact be made on the basis of a more subtle synthesis of the

[665] 171106_G.
[666] This acceptance of judges' own humanity and hence the acceptance of all that pertains to human decision-making, including intuition, shortcuts, stereotypes and the use of common sense is reflected in the decision-making literature, see for instance Guthrie, Rachlinski and Wistrich (n 27) 420; Frank (n 45); Stephen Gageler, 'Why Write Judgements' (2014) 36 Sydney L. Rev. 189.
[667] The effect this blurring of the boundaries between reason and emotions has for the way in which judges interpret and view their own role and responsibilities was explored in *Chapter V*.
[668] Tata (n 14); Kritzer (n 30).
[669] Neuborne (n 22); Patterson (n 23); Heise (n 23); Singer (n 23).
[670] This binary between reason and emotion is also fundamental to the two dominant views on judicial decision-making: Rationalist and Legal Realists. See also, Hawkins (n 14); Dworkin, *Taking Rights Seriously* (n 211); Baumgartner (n 14); Gerwitz (n 611).

two".[671] Tata, for instance, alludes to gut feeling, intuition, hunch.[672] Indeed, this second part of the chapter shows and investigates when and how emotions and experience are used and how they are intertwined with the reasoning process. This is all the more important, because, according to Tata, judges have a choice as to when and how they employ reason and emotion.

Driven by seminal developments in cognitive psychology, research on judicial decision-making so far, has explored the "simplifying shortcuts of intuitive thinking"[673], focusing on the hidden biases it reveals.[674] However, the approach and findings this chapter presents go beyond this research for three reasons: Firstly, my findings show that intuition is in fact part of experience as a whole, which includes professional experience, derived for instance from the experience of other cases or cases over time. It is thus highly specific to the particular judge, legal area and court in questions. Therefore, not only hunch and intuition factor into decision-making, but the wider experience of the judge itself. Secondly, my research tries to further illustrate how experience (including intuition) is used by judges in the particular process of assessing or solving a case. It hence not only establishes intuition as a cognitive process, but also shows how it is employed in conjunction with the law and principles of legal reasoning. Instead of remaining within the binary thinking of "heart versus head"[675] and viewing intuition and emotion as opposed to deliberation and hence as requiring checks,[676] my findings broaden this

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671 Tata (n 14) 431.
672 Cyrus Tata, 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process' (2007) 16 Social & Legal Studies 425, 431.
673 Tversky and Kahneman (n 195); Applegarth (n 31).
674 R George Wright, 'The Role of Intuition in Judicial Decisionmaking' (2005) 42 Hous. L. REv. 1381; Guthrie, Rachlinski and Wistrich (n 27).
675 Guthrie, Rachlinski and Wistrich (n 27) 5; Andrew J Wistrich, Jeffrey J Rachlinski and Chris Guthrie, 'Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?' (2015) 93 Texas Law Review; Austin 855.
676 For a critique of Rachlinski et al, see also Terry A Maroney, 'Why Choose? A Response to Rachlinski, Wistrich, & Guthrie's' Heart versus Head: Do Judges Follow the Law or Follow Their Feelings?" (2015) 93 Texas Law Review See Also 15.

understanding, by exposing how experience and law intertwine. This also resonates with the unique principles underlying German administrative adjudication (explored in *Chapter V*), in which both personal conviction (*intime conviction* or *Überzeugungsbildung*) and transparency, i.e. the rational representation of legal reasoning in the verdict, guide judicial decision-making. Thirdly and consequentially, intuition and by extension experience does not constitute a 'hidden factor', potentially exposing the 'true rationale' for a decision, as the 'rules vs. discretion' literature suggests.[677] Instead, my findings show how experience is used purposefully, how for instance thought and expression are intertwined in the intuitive process of writing, thereby (actively) feeding into the legal reasoning process.

Having established the role of experience and its inextricable entanglement with legal reason, the following section is guided by the question: What is judicial experience, where is it derived from and how is it used? It explores three areas that shape judicial experience: other cases, the relational aspects of decision-making in the exchange and discussions with colleagues, and intuition. It argues that the bundle of other cases - ideal cases, the development of cases over time and cases from other courts - are at the core of how judges develop and use their professional experience. Beyond that, the interaction, exchange and formal or informal discussions with colleagues around these cases further forms judges' experience or what they perceive this to be. Finally, the unseen and often unspoken - intuition - is developed and utilised in personal techniques, like writing or simply letting time pass.

[677] Tata (n 14) 440.

2. Professional Experience: A Grading System Out of Other Cases

Certainly, most judges in the administrative courts today, have decided on a large number of asylum claims, mostly from similar countries of origin. Depending on their time of convocation to the courts, judges have seen a continuous increase in caseloads, at least since 2015, but for the most part since the war in Yugoslavia in the 1990s. As a result of this heightened exposure of judges to asylum claims, a constant comparison with other and previous cases pervades decision-making. In particular, the comparison with those cases which were perceived as being highly credible and directly satisfying the judge's benchmark, creates a form of hierarchy.

One judge compared this to an exam grading system, in which once in a while there would be a candidate, who reaches 90% and it is imminently obvious that this is work of a different quality and as a result, the 50%, 60%, and 70% candidates seem accurate in hindsight as well. As a result, the cases which judges remember and talk about most are those sharing a degree of exceptionality, either successful or un-successful. For instance, successful cases, which are extremely rare for some countries of origin (like Pakistan, the Western Balkan, West African states), are considered the odd ones. They are described as the memorable ones, those with a coherent story and some form of evidence, that leads to approval. In a way, this also reflects the binary nature of asylum decision-making: There can only be a full satisfaction of all conditions of the norm, leading to a positive outcome or else the case falls back into the deep sea of rejections, which might in contrast be due to a myriad of coinciding reasons. But this is also a constructed system, which becomes apparent by the role that hindsight plays in legitimising the system itself.

The strongest example of the way in which judges classify cases, was after one hearing in

Metropolis. This was the only case that would ultimately be successful out of the 21 cases, I observed at this court in June 2018. After the oral hearing, one of the first things the judge told me, putting the case into perspective, was: "*This claimant was able to tell his story without contradictions. I haven't seen something like that in the last three years. That is not your ordinary case.*"[678] Later, when his colleague came into the room to ask how the case went, he added excitedly, "*A totally exceptional case! I will give him the 'number three' [*meaning refugee status*]. I am totally convinced. He knew the whole structure* [of the political organisation he worked for], *on a daily basis he posts two or three videos on this platform and was part of organising all these* [demonstrations]. *He invited the Ethiopian government's public enemy number one, Professor* [Berhanu] *Nega* [leader of the opposition group Ginbot 7, who lives in exile in the US] *to Frankfurt to interview him. By the way, he is coming to Frankfurt again, this weekend. As I said, I have never had a case like that, a case that just makes sense from beginning to end.*"[679]

Other cases might not be remembered or classified to delineate the positive or negative outliers, but they create a more general sense of 'experience'. As one judge put it in relation to Iranian conversion cases,

> "*Maybe for you this is difficult to see, but for me, I have many years of experience and for me this case, in comparison to everything I have seen and heard, what others tell me, this claimant is…somewhat of a 'thoughtless follower'* [Mitläufer]. *He knows more or less what Christianity is about, and I also think, he connects Christianity to the western way of life and to freedom. But what is decisive, is always, if he returns to his home country, will he be persecuted there, because of it. And that's where I have big doubts, whether this claimant really has the unconditional will to practice his new faith at home.*"[680]

Arguably, not unlike a grading system, this comparative system is therefore coherent in itself, constructed with regard to the cases that populate and shape(d) the system. Jurisprudentially this is mainly due to the principle of equal treatment

[678] 180627_10.
[679] 180627_10.
[680] 180621_04.

(*Gleichbehandlungsgrundsatz*) or as part of a more fundamental principle shaping judicial decision-making, simply termed 'consistency'.[681] Despite considering themselves fully independent as decision-makers, the notion of equal treatment prompts judges to compare their own stance with that of other courts or judges. In the words of one judge,

> "*If you operate within the framework of the existing jurisprudence and don't completely disregard it, that is also a matter of the principle of equal treatment. If you decide differently and disregard the highest court jurisprudence, that is initially difficult with regard to equal treatment. Even though, you can, of course, always do it and deal with* [jurisprudence] *critically*."[682]

Hence, a benchmark based on the experience of other cases is closely connected to the idea of fairness and fair procedure. It is not developed, nor does it exist in isolation from other cases, it rather needs to be applicable across a bulk of cases. As a result, the experience of other cases becomes part of judicial reasoning, as it is prescribed by the principle of equal treatment and hence part of the 'rational' legal process.[683] However, whether the classifying scale, which the system developed is gauged and calibrated correctly or even fairly, is a different, normative question.

2.1. The Ideal Case

In the same vein, a judge's professional experience and hence the benchmark for assessing whether a story is 'enough', also seems heavily influenced by an overarching ideal of the 'real' refugee story which often coincides with 'the classic case of political persecution'. Independently of each other, different judges at my two fieldwork sites referred to the Holocaust, the persecution of Jews by the Nazis, as an example of what they understand

[681] Tata (n 14).
[682] 171023_01.
[683] Civil law is here in fact closely aligned to the principles of common law, following similar steps by its own logic and judges developing their own techniques to reach uniformity across cases. As defined by Lord Neuberger, "Common law involves the judges developing the law on a case by case basis, and fashioning legal rules, not so much by reference to an overarching principle or set of principles, but by reference to the experience and the requirements of justice as assessed in the context of the facts of a particular case, albeit viewed by reference to the law built up by judges in previous cases." Lord Neuberger of Abbotsbury MR, 'Judges and Professors–Ships Passing in the Night?' [2013] Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law 233, 19.

'real' persecution to mean. Judges visualise persecution using this particular historical example familiar to them and coincidentally pertinent to the understanding of refugeehood and persecution as such, as it relates directly to the origin story of the 1951 Refugee Convention. By applying it to the case at hand, judges also apply the concept of a perpetrator state, in that case a highly bureaucratic state, where acts of persecution where meticulously documented and committed towards a clearly defined religious group. As one of the judges then goes on to acknowledge himself, in the case of current countries of origin, that come before the administrative courts, these concepts do no longer apply. In most cases, there is no clear perpetrator state, nor does any form of documentation exist, nor are atrocities committed towards a clearly or singularly defined or singled out group of people. As one judge explains, referencing the iconic group of hereditary military leaders of the Japanese middle ages, the Shogun:

> *"The core idea remains the same, someone is persecuting someone else. Only that the person who is persecuting the other is no longer the state, but the persecutors are others, and it is all more inconspicuous. Just as wars are no longer fought like the Shogun in Japan, where some have red flags and others blue flags, and you could clearly distinguish who is who. But now some kid blows himself up or something like that. But the core principle remains the same. The one against the other and that makes it more difficult to feel convinced. I must now look more closely that the individual case."*[684]

Of course, in general and most visibly at the first instance, the *BAMF*, these types of cases exist and receive immediate positive results. Hence most of them do not reach the appeal stage, the administrative courts. Therefore, the 'classic' case of persecution is a hollow ideal, a mirage which several judges at both courts voiced as their reference point, but that they had never actually witnessed. As a result, cases are assessed against a benchmark that no one has ever seen. Because, and this is also something judges argue frequently, the courts only get the rejections, all the successful cases are sorted out before. As one judge put it, "*Let me say this, I have never had this classic case of a political persecution, in all these years, in*

[684] 180103_008.

which I have been doing this job…You don't get to see those. They have all already received refugee protection at the administrative stage."[685] This creates a benchmark which is delimited not only by the ideal case, but also by the vast number of not ideal ones. It is delimited not only by experience of other cases but also by the lack of it.

2.2. Cases Over Time

Not only the cases in front of the judge today but also the development of cases over time can shape a judge's experience. This occurs in different ways: more generally, when numbers grow and more and more similar cases reach the court, shaping the 'grading' system. It occurs more situationally, when the life of the case after it left the court leaves an imprint - emotional or legal - on the judge.

2.2.1. Changing Numbers of Cases

If judges witness a changed frequency of cases with a very similar storyline, this can nurture and create an 'experience', which influences how a judge assess the weight of the persecution with regards to the requirement of the law. At the time of my fieldwork, the impact of increasing case numbers became particularly visible in the cases of Iranian applicants claiming to have converted to Christianity. Many of the judges who had been working at the court for more than five years, explained how such claims were rare only a few years ago and how over time the number of Iranians basing their claim for protection on a newly acquired Christian faith had grown. One judge estimated an increase from 5% of all claims in 2008 to 95% in 2018.[686] The shared observation of rising numbers of certain types of claims and the ensuing suspicion that these are tactically motivated asylum claims, is often also sustained by judgements at other or higher

[685] 180620_03.
[686] 180116_10.

courts. In the case of Iran, for instance, judges told me about similar cases in other German federal states, which had been continuously rejected, together with the Highest Administrative Court, which equally referred to the risk of 'asylum tactical' conversion claims in its judgements. So today, with nearly all Iranian claimants basing their claim on their conversion to Christianity and producing a very similar story, including frequently submitting similar evidence from the same Iranian congregation or even the same priest or institution, judges' professional experience seems to prohibit believing these stories and viewing them as satisfying the benchmark for what it means to be a 'true' Christian. The rising quantity of similar cases over time has hence shaped judicial experience and somehow shifted the benchmark of what suffices as an authentic story of conversion.

Despite the anecdotal basis for these experiences, there are standardising and unifying elements like a common formula to provide reasoning for these observations in the written judgement, which summarises as, "*stereotypical submission, which is known to the Court from a number of similar cases and which does not present to be an individual fate, but is clearly a submission fitted to the requirements of an asylum claim.*"[687] The experience of similar cases, and the ensuing suspicion of claims being explicitly targeted towards obtaining asylum, not only pervades judgements, but also oral hearings. One explicit example of this occurred during a case with an Egyptian claimant[688], where the judge asked the applicant provocatively about a tattoo of a Christian cross on his arm:

Judge[689]: *So, you already had problems in 2013 [because of your Christian faith] and you got a tattoo anyway?*

Claimant: *Because I like it.*

[687] 171106_G.
[688] B4K17_31883.
[689] In order to facilitate understanding, the personal pronouns were changed to the first person, instead of the third person replies, which were given by the translator as intermediary.

Judge: *So, you did it, so that you could rely on it here* [in your asylum case] *now*?

Claimant: *No, I didn't think about that then*.

Judge: *But a tattoo like this is quite a provocation in a Muslim environment.*

Claimant: *But my tattoo is none of their business, it is my faith*.

This interaction shows the suspicion some judges currently harbour against a certain type of case scenario related to 'Christian conversion claims'. By basing this suspicion on a professional experience, fed by frequent and similar cases over time and reinforced through streamlined chamber decision, judges foster a strong stance towards these cases.

2.2.2. The Life of a Case after Court: Review by a Higher Court

The life of a case after it left the court may also shape or harden a judge's own stance towards similar cases. This is particularly true, when a judge's case is later reviewed by the Higher Administrative Court (*OVG*) to be either overhauled or confirmed. In one such case, for example, the claimant, a young man from Egypt, who claimed to have fled because of his fear of persecution for being a Copt, was so similar to another case the judge had previously decided, that she bluntly asked whether the two claimants happened to know each other. In her recollection of the previous case, the claimant had been born in the same month as this current one and came from the same village. The judge had rejected that previous case. And what was more important, the claimant had appealed the decision, and the Bavarian Higher Administrative Court (*VGH*) had sided with the judge on her decision. As the judge pointed out later, the court had lauded her for, "*dealing extensively with the question whether Copts are persecuted as a group in Egypt*"[690] and rejected the need to further investigate this question. The confirmation of her 'correct' interpretation of the evidence on the persecution of Copts in Egypt and the higher level-approval she

[690] 180625_2D.

received from the *VGH* that she satisfied her duty to investigate in a seemingly identical case, instilled confidence in her about the certainty of her benchmark.

2.2.3. The Life of a Case After Court: Revelations after the Fact

Similarly, the life of a case after it left the court may shape a judge's experience, when it offers a revelation of some sort. As previously shown, other cases might be decisive for forming a general sense of professional experience through which judges develop a 'grading' system and ultimately establish a benchmark by direct and indirect comparisons with similar cases. But the familiarity with other cases might also shape the emotional experience of judges. When talking about their emotional state, judges most frequently express an experience of being lied to or the feeling of continuously being lied to. The cases in which the lie clearly materialises after the case left the court seem to have the starkest impact. The lie or deception does not necessarily need to be directly connected to the asylum claim. Instead, it might for instance be connected to the identity of the applicant. Several judges told me about cases where the individual had lied about their name or lack of passport, when at a later stage the judge received a notice from the immigration office that either the person had been deported 'now using another name', or a passport had appeared stating a different name or even a different country of origin. In other cases, the deception might materialise as part of an official inquiry into the evidence submitted:

> *"I remember frequently thinking: 'well, this story might be true'. Just to make sure, I would then ask the Foreign Office and the diplomatic representation in that country and I have…I think I have never had a single case, where I got the feedback that the story they had told, me was correct. This is quite…well, it might be just country specific. In this case it was Azerbaijan.*"[691]

Taken together, these anecdotes seem to foster doubt and a feeling of deception in judges.

[691] 180629_09.

Interestingly, however, judges frequently and quite openly reflect on the way in which their experiences might further doubt and scepticism and the risks involved in being regularly confronted with similar negative or deceptive experiences. One judge put it this way, "*I think you have to be careful, if you do this job for too long and you have negative experiences and get negative feedback in ways…like the feeling of being used. You have to be careful, not to become defensive from the outset.*"[692] This is especially true for those countries of origin that see more rejections than others at the court stage. The impact on judges' experience stands true, even if it is precisely these negative experiences or adverse anecdotes that - perhaps paradoxically - solidify the judges' confidence and certainty when making a decision.

2.3. Cases from other Courts and Chambers

Other cases might not only be the cases a judge personally handled, witnessed or experienced taking place at his or her court or chamber. Other cases might also be those referred to in previous judgements, cases from higher courts or other courts in similar matters. Knowledge of these cases might not only relate to legal questions, as described above, but also establish a broader or relational understanding of what the benchmark in different types of claims is for others. For judges these cases seem to indicate how far off the own or the chamber's opinions are in similar type of cases. For instance, in cases with Ethiopian claimants, several judges referred to a different approach taken by one of the courts in this particular federal state. In Oasis, the judges described their benchmark for claims based on political activities in exile (*exilpolitische Tätigkeiten)* as high, meaning political activities had to be clearly demonstrated and individualised. For appellants who were merely nominal members or followers (*Mitläufertum*) in a diaspora organisation it would be difficult to reach the necessary threshold. In contrast, other courts placed their benchmark in similar types of cases lower, granting protection to anyone who could show

[692] 180629_009.

proof of membership in one of the existing Ethiopian diaspora organisations. Whenever a similar case occurred, knowledge of the existence of this differing benchmark led judges to compare and contrast their own approach with that of the other court. However, what seemed even more important for the judges to bring across, was the isolated nature of the other court's approach, thereby emphasising that their own benchmark was shared by most other courts in Germany. Therefore, the impact cases from other courts have depends on how established a jurisprudence is across the country and how the judges' own chamber or court position relates to this. Talking about the persecution of religious groups, when deciding whether Copt Christians were persecuted as a group in Egypt, one judge said, for example, "*I only know of one accepted persecution of a religious group, namely that of the Ahmadyya in Pakistan. A jurisprudence like that is solidified over years, that's not something you just go ahead and do*."[693] In that sense, cases from other courts have an impact in establishing, setting, moving or justifying a benchmark, because they provide a rapport to other positions and a view of the popularity of certain approaches across courts.

2.4. Cases from the Judge's Own Chamber

Even more intimately than cases from other courts, cases decided within a judge's own chamber can equally shape the professional experience and later the benchmark judges use to solve a case. Generally, the role of a chamber is perceived by many judges as serving to unify decision-making, forming a shared understanding of the sources of evidence, the situation in the country of origin, as well as offering solutions to complex case constellations. In the words of one judge, this serves to "*form something like a basis on which the individual judge in that chamber can then decide in other cases.*"[694] The written judgement of the chamber decision therefore provides a template, a tool for more efficient decision-

[693] 180625_2D.
[694] 180629_09.

making, a document for copy paste, a research paper, from which individual judges can draw their arguments, both legal and factual. In the words of another judge: "*Chamber decisions are means of effectiveness, because then I can base all other decisions on them. But the first approach is of course hard*. [Interviewer: "How do you mean hard?"] *Our decision on conscripts in Syria is 80 pages long*.[695]

The reliance on previously concluded chamber decisions, as well as the informal exchange between judges within those chambers (see next section), not only facilitates decision-making, but also creates consistency in light of equal treatment and thereby gives off an image of unification and coherence to the outside.

> „*Everyone knows what the other in the chamber is doing and what he or she is working on. Concerning the questions surrounding the country of origins it is very clear, you discuss within the chamber, because otherwise, that would leave a bad impression to the outside, when one judge decides, 'this is a persecution for me' and the other one says, 'no, not for me'. Of course, you cannot prescribe a judge what to do, you know that, but a shared understanding within the chamber, that definitely exists*."[696]

As a result, judges not only draw on their own or their chamber's judgements as a reference point for assessing and solving a case, but by writing and potentially publicising a judgment, they also actively take part in shaping the benchmark itself. Several different judges for example explained how they would publish those cases on Juris - a publicly available German equivalent of Westlaw or LexisNexis - for which other courts might be 'thankful'. This means, for instance, phrasing arguments more clearly in cases where other courts are presumed to have similar questions, or a particular judge or chamber is known to have invested time into research and developing a well-reasoned argument.[697]

The importance and process around seeking guidance and inspiration in chamber

[695] 180629_09.
[696] 180629_09.
[697] 180116_10.

decisions is furthered by the way in which judges typically organise their caseloads. Given that most asylum cases are attributed to single judges rather than chambers, each individual judge is responsible for organising and scheduling their own case load. As a result, when judges describe the way in which they plan and schedule their cases after having received all the files, skimming through them, they seem to prioritise, the easy, routine cases or those where a chamber decision has been made before. The difficult or controversial ones are therefore sometimes left aside for some time to come, leading to a form of managerialisation or routinisation of the legal process.[698]

> *"On the first of September we made a chamber decision [on Eritrea]. Following this, the Eritrean cases without any major particularities were transferred to single judges and those Eritrea cases that I have as a single judge I have now scheduled until December. Simply for efficiency reasons. Some specifics are still open now, e.g., it is relatively rare that Eritrean citizenship is questioned, but there are cases in which people claiming to be Eritreans are to be sent back to Ethiopia. These cases are not yet decided by single judges, because we have not yet been able to think about Ethiopia, for which we are also responsible. Those decisions are therefore still pending. I also have a case, which I have not yet scheduled, where someone claims to be homosexual, but he claims to have been persecuted in Ethiopia, not in Eritrea. And this is also a bit of a special case, and we probably have to talk about how the situation for homosexuals is in Eritrea in the chamber at least once. There might be a separate reason for granting refugee status in this case, but otherwise the model is relatively clear: there is the leading chamber decision and after that decisions are made as a single judge."*[699]

2.4.1. Social Pressure to Conform in the Chamber

This close-knit chamber structure and its particular guidance function for single judge decisions is described by judges as a special feature of administrative courts and asylum judging. The organisation of the administrative court into different chambers and the resulting benefits, pressures and challenges are perceived as fundamentally different to other courts, like the District Courts ('*Amtsgericht*') or Social Courts, which decide on civil and criminal matters and where judges work more autarkically. As a result, in asylum

[698] Lauren B Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (University of Chicago Press 2016) chs 2, 8.
[699] 171106_05.

cases, the relationship and potential (non-)conformity with the chamber takes on a particularly prominent function, which is not always perceived as only beneficial but also gives rise to social pressure. The following excerpt best illustrates the nuances of the social pressures to conform with the chamber position and how this particular judge navigates the conflicts that he anticipates arising from a potential non-conformity:

> *"For me, coming from the Amtsgericht* [equivalent to a District Court in the UK], *it was quite a change moving to the administrative court. You do feel a social pressure to conform* [Konformitätsdruck] *here at the administrative court. At the District Court everyone just does whatever they want. Which, I don't find particularly helpful either, with respect to Art. 19 Abs.1.*[700] *Because, if I have a Federal Supreme Court (BGH) decision, which states one thing and a colleague then makes a decision to the contrary, I find that strange. You don't have that here. Here there might be individual decisions, that vary slightly, but in general…I mean the decisions are sent around the chamber, so your colleagues in your chamber will read them. Whether someone actually reads them, that's a different question. I myself often just put my initials and sign them off, because I often just don't have the time for it. But at times, it can be really interesting to see, how colleagues do it, how they structure the verdict. You learn from that. But if, I would consistently approve cases here, like 'of course, the appellant is clearly a Christian', even though the claimant doesn't know what the holy spirit is or what Pentecost is…well then [sighs]...my colleagues would probably start asking at some point, 'What's happening? Why are you only approving cases?' Then I would say, 'Well, they just always fully convince me'. Then they might say, 'Maybe you come and have a look at how I go about questioning them, because somehow that cannot be.' And then I would maybe say, 'but that's an unbearable interference with my judicial independence'. And then at some point, I would probably be branded as a troublemaker, and no one would talk to me anymore. Of course, it won't happen to that extreme, but I have seen that happen in other courts […] But, as I said, it doesn't really come to that here, because there is a higher degree of pre-selection and there exists this social pressure to conform."*[701]

This judge's account highlights the 'social' elements of the pressure that other judges in the chamber exert. He alludes to the implicit ways in which an alienation from the chamber would take place when chamber judges seek to rein in the non-conforming judge, ultimately branding and banishing him or her as a troublemaker. As a result, of the social pressures to conform, according to this judge, non-conformity is actually avoided within administrative court chambers. However, the pressure to conform to the chamber opinion does not necessarily mean judges will not decide contrary to others or follow their

[700] This article of the German Basic Law provides that any law made needs to apply to everyone and not just in an individual case.
[701] 180121_011.

personal conviction. Another judge in a different chamber, albeit agreeing with the general observation of a pressure to conform, recounts how he once decided contrary to his (older) colleagues and what happened:

> "*At the Social Court* [Sozialgericht]*, where I was previously, you are alone and as a consequence you can really do whatever you want. I sometimes even decided contrary to the Federal Social Court* [Bundessozialgerichtshof]*, because many decisions tend to be politically motivated there and are in my opinion incorrect. You could not do that here. I tried doing it here once, but before I made this contrary decision, I discussed it with my colleagues in the chamber. That did not go down so well. Sometimes you end up fighting a little and don't talk for a few days, but that's nothing personal. But all in all, this happens rarely here. The older colleagues simply have a competitive advantage in experience, but I guess sometimes there are just not quite up to date."*[702]

As a result, it seems the role that chambers play in shaping decision-making is viewed both positively and negatively by judges: On the one hand, they allow room for discussion both critical and productive (see below): "*Of course, it is different when we take a case as a chamber, and then we sit there together, the 5 of us in the consultation chamber and then we discuss the case. The whole process is different if there are more people involved, compared to when it is just you, who needs to find a conviction*."[703] On the other hand, chambers may exert a social pressure that restricts and hinders constructive disagreements homogenising and streamlining the approach to different case categories.

Similar findings are reflected in German socio-legal scholarship, which contests that "judicial activities are geared towards being highly predictable and uniform"[704]. The literature references the organisational culture of courts as one of the key features for streamlining decisions with judges finding orientation and signposts in the decision-making practice of their court as well as in key jurisprudential lines that are used as guiding conventions, similar to the rule-like knowledge and individual benchmark

[702] 180121_011.
[703] 180619_01.
[704] Michael Wrase, 'Recht Und Soziale Praxis–Überlegungen Für Eine Soziologische Rechtstheorie', *Wie wirkt Recht?* (Nomos Verlagsgesellschaft mbH & Co KG 2010) 118.

described above.[705] However, these studies attribute this practice mainly to the way in which careers are made in German courts and in particular the career-making power of senior judges. Instead, my findings highlight the social and relational elements of judging that come to the fore in the way in which judges interact in the chambers, reflected in judges' nuanced account of the social pressure to conform on the one hand and the productive space for reflections the chambers offer on the other.

3. Experience: Exchange and Interaction with Colleagues

As the above observations of the social pressure that exists within chambers show, the chamber is not only a place for streamlining decision-making, but the interactions therein are equally important in feeding a judge's experience. Not only is the experience of other cases relevant for developing a judge's experience but also - and more broadly so - does engaging in exchange or discussions with colleagues over cases.[706] Exchange means both formal and casual interactions with colleagues or members of the judge's chamber. Formal interactions might be part of organised training sessions, case preparations for chamber decisions or in the case of early-career judges reviews with their superiors. In that way, even before new judges begin handling and deciding their first case independently, they attend and observe hearings by other judges in their chambers and discuss these with their colleagues. As one early-career judge told me, before scheduling her first hearing, she had discussed her preparations and approach with her chamber's superior, in order not to *"end up with a big fat surprise in the oral hearing and with a case, where I wouldn't really know where and how to go from there*."[707] Meaning, she wanted to make sure to

[705] Stegmaier (n 34) 302; Stefan Machura, *Fairneß Und Legitimität* (Nomos Verlagsgesellschaft 2001) 31.
[706] The effect of groups, such as jurors, during deliberation and decision-making has been previously described in social psychology as arguably amplifying the individual's position, see Cass R Sunstein, 'The Law of Group Polarization' (2002) 10 Journal of political philosophy 175; Daniel J Isenberg, 'Group Polarization: A Critical Review and Meta-Analysis.' (1986) 50 Journal of personality and social psychology 1141.
[707] 171127_007.

decide on a simple, straightforward case in her first decision. This shows how from the very early stages of their careers, judges learn to develop assumptions about different types of cases and their complexity based on a shared experience within their courts or chambers, which is partially developed by how judges interact and communicate with each other.

More frequently, however, interactions between judges seem to be on a casual, informal and daily basis. In Oasis, the smaller court, one judge described how exchanging ideas with others helps him to calibrate and set his benchmark. Albeit highlighting that the ultimate decision and application to the details was for every judge alone, he describes how specific case constellations are frequently discussed between colleagues.

> *"Of course, at the end, the individual judge has to make the decision. In Iranian cases, for example, where the individual judge has to find out whether someone truly identifies as Christian, you wouldn't go as deep and discuss every detail and what to do with your colleagues. But you discuss benchmarks, for example, someone has been baptised, but does not even know his baptismal verse* [Taufspruch]. *Or he knows the verse but does not know where he took it from or does not even know that it is from the Bible. These general questions, you can discuss very well with your colleagues. So, you can determine, if someone doesn't know this, then it is already pretty bad, and he needs to submit many other things* [for this claim to succeed]. *These general and generalisable issues, you discuss with your colleagues. But the finite details, the decisive questions, those are for the individual judge to decide*."[708]

As this quote shows, inter-collegiate exchange here helps the judge to solidify and operationalise the testing of a nearly impossible mental state, namely whether someone is in fact a 'true' Christian. This view on the value of exchange is echoed by several other judges, who stress that in particular in complex and borderline cases talking to colleagues proves beneficial for applying the benchmark and solving the case.

There were, however, observable differences between my two fieldwork sites - the larger and smaller court - and the way in which exchange and interaction between colleagues

[708] 180622_7B.

took place. The main observable difference was between the more formal and institutionalised forms of interaction in the larger court and the more imminent and informal ways of exchange in the smaller court. As such, in Metropolis, the significantly larger court, exchange between colleagues was more selective and either based on individual, private relationships amongst judges or occurring more formally within each chamber. Physically, offices, hearing room and administrative staff are spread out in the large four-story building. With at least two hearing rooms on each floor, an electronic information board is needed to keep track of all, parallel or overlapping hearings. As a result, even between chambers working on the same countries of origin, there was considerably less informal interaction between judges, which I could observe. Instead, judges positively referred to more formalised structures of exchange, like regular trainings or the monthly newsletter sent out by the court's representative for asylum (*Asylbeauftragter*), highlighting relevant jurisprudential developments. Judges hence relied more on institutionalised forums for exchange or altogether private encounters, like lunch- or coffee breaks.

In contrast, in Oasis, the smaller court, interactions were more imminent. Colleagues, even those from different chambers, were aware of the hearings taking place in the court that day and inquired about them later on. Facilitated by the size and layout of the building, comprised of one main staircase, the main hearing room on the first floor and office spaces on the second floor, I frequently observed judges chatting in the staircase, where colleagues would ask about hearings and get a quick update on the more uncommon cases or occurrences during the hearings and sometimes a general gist on the direction of the decision. Driven by what judges believe their colleagues would find interesting, some judges seemed to implicitly confirm expectations about the behaviour of certain ethnic groups or reinforce an impression of abundance of certain types of

claims, claimants or a specific category of cases. The effect of this type of frequent informal exchange at Oasis became visible during my interviews, when even judges who were not personally working on a country of origin would still confidently share the experiences and opinions of their colleagues on issues in this country or example cases. Finally, different types of informal interactions and exchange foster shared assumptions, which in turn creates an experience on the basis of which benchmarks might be set.

4. Experience: The Unseen and Unspoken

Apart from recurring to other cases, both their own and others, and fostering a shared understanding through interaction and exchange, judges also employ intuitive skills and techniques to weigh the presented evidence, develop a benchmark and evaluate the claim against this benchmark. Describing what these methods entail, judges often refer to their experience more generally, and to intuition, writing, and time in particular. Even though these methods seem to fall on the discretionary and emotional side of the 'reason vs emotion' binary, summarising them under the heading of experience, I further highlight the fact, that there is an element of expertise, training and routine in applying intuition as well. As a result, I show how imposing the 'reason vs emotion' binary fails and is even unhelpful in analysing judges' reasoning for it imposes a purely rational lens thus not leaving space for the articulation of intuitions and emotion, which are in fact intertwined with reason.

4.1. Intuition

Intuition is closely connected to what judges sometimes refer to as a sensation, an impression, a gut feeling, hunch, idea or a general 'feel' of the case. This feeling does not exist in the void, but rather derives from a synthesis of the different sources that make up a judge's experience (explored above), like other cases or the shared assumptions

generated through exchange and interaction with colleagues. One judge, for instance, described intuition as the feeling that judges recur to after all other rational steps to assess the claim and solve the case have been taken:

> "*You can work from your experience, you can try and test the plausibility of the claim chronologically, or you can try to get the claimant to really tell what is important to him/her by using questioning techniques…I mean, you can take all these steps and your benchmarks and you can try and be really well informed about the country of origin, but at the end, you simply have to go and ice skate.*"[709]

For this judge, intuition seems to be what remains the most private part of decision-making, inexplicable to the judge herself and difficult to verbalise without using some form of analogy or metaphor like 'ice-skating'. One judge phrased it even more bluntly as a response to my question about his decision-making strategies in particularly complex and uncertain cases: "*Yes, what do you do then? I fumble for it…To be honest, I don't really know myself, how I do it.*"[710] This acknowledgement and acceptance of an element of uncertainty in decision-making is also where the inherent contradiction between what judges are supposed to do and the view of themselves and the law as certain, clashes with the intuitive reality of their decision-making and its inherent uncertainty. As a consequence, judges seem to be able to step out of their performative role and admit uncertainty to themselves, consciously give their feelings space, only in the private sphere, after the oral hearing and before the submission of the written judgement. This is the only moment when judges feel comfortable allowing elements like intuition and gut-feeling to come into play without perceiving it as contradictory to the apparent clarity and determinacy of the law, which they would normally display in the oral hearing or the written judgement, the public sphere. As a result, judges continue to publicly frame a decision in purely rational terms, even though it was partially based on the - oftentimes conscious - use of intuition.

[709] 180620_03.
[710] 180103_008.

Elements like experience and intuition that played an important role in decision-making thus go publicly unacknowledged. They are therefore effectively intertwined with what judges perceive as a legitimate reasoning process. The reasoning and rational explanations provided in the public sphere on the basis of intuition in the private, ultimately legitimise its use and let it become part of the reasoning process itself. As one judge bluntly put this synthesis between intuition and reasoning when talking about interpreting the requirement for a 'real risk' of persecution,

> "*This is really difficult to grasp. We have this 'real risk'* [hinreichende Wahrscheinlichkeit], *but no one really knows what that is. I am just going to be cheeky and say that here. It is pure gut feeling and then at some point, when it overcomes me and I say, 'oh no, I don't dare to send him back there', then I just go ahead and argue, 'yes, there is a real risk'.*"[711]

Furthermore, the principle of judicial independence legitimises the use of intuition, as a judge strives to find conviction. Several judges therefore describe their decision-making process as a comprehensive package (*Gesamtpaket*) or overall picture (*Gesamtbild*), derived from the interplay between experience, knowledge about the country of origin, the unearthing of contradictions during the oral hearing and the requirements of the legal norm. In that sense, judges explain how they use intuition as a professional routine, incorporating it into their review of the written protocol of the oral hearing.[712] As such, they describe it as a feeling which they seem to be able to rely on, substantiating it with other techniques, like reviewing the written protocol of the oral hearing. As one judge describes this process, "*I try to at least have a look at the written summary of the oral hearing, to not just rely on my gut feeling for a decision. But ultimately, the decision - not the legal evaluation - depends on whether I am convinced and that depends on my perception and this in turn depends largely on the oral hearing and I check that with the written protocol.*"[713]

[711] 180103_08.
[712] 180629_09.
[713] 171023_01.

In the literature this type of almost consciously employed intuition is called, 'expert intuition'. Authors distinguish it from other form of intuition describing it as "based on significant, often dedicated, explicit learning"[714]. It therefore goes beyond the 'gut feeling' as it is connected to knowledge and expertise in a certain field: "It allows experts to assess situations quickly and correctly, spotting anomalies and recognising the viable options. It is sometimes mistrusted, since intuitive experts are not easily able to explain their decisions. However, and again similar to other types of intuition, if learning has taken place in representative situations and with adequate feedback, the decisions from expert intuition will be correct as well as efficiently fast."[715] This description aligns with the way in which I found judges' intuition to be moulded by their knowledge, deliberate learning and professional experience, constrained by rules of procedure and principles. However, the key component, that distinguishes this 'expert' intuition from that used by doctors, nurses, pilots or other routine decision-makers, is the lack of an effective feedback loop. Where a doctor might witness a patient react, the judge in an asylum case might never get to hear or see her 'patient' again. Much like the 'grading system' I have described judges instinctively reverting to above, the lack of external feedback creates a closed system that feeds itself. Arguably, this makes the relational aspects of judging that create some form of feedback loop, like the interactions within the chamber even more important for the formation of judges' intuition.

4.2. Writing

Intuition, however, is not simply a feeling or a state of mind. By developing it routinely, almost strategically, its different components become visible. Writing is one such

[714] Gary A Klein, *Intuition at Work: Why Developing Your Gut Instincts Will Make You Better at What You Do* (Currency/Doubleday 2003); Eugene Sadler-Smith and Paul Sparrow, 'Intuition in Organizational Decision Making', *The Oxford handbook of organizational decision making* (2008).
[715] Glöckner and Witteman (n 176) 15.

components and a common technique for weighing and balancing evidence and a central aspect of the intuitive part of the decision-making process. It is closely connected to the principle of transparency and the requirement for logically communicating and rationally describing a case (see *Chapter V* above). At the same time, writing the verdict is also an activity that occurs outside of the public eye, far from the performative aspect of decision-making. It shows how an activity, which is closely related to intuition and difficult to verbalise, is packaged and used as a technique, a trustworthy and routine method for finding a solution or coming to a decision in an uncertain case. Going back to the image of the holistic picture (*Gesamtpaket*), the writing stage also includes elements more closely aligned with legal reasoning, like reviewing the material previously collected, such as the documentation from the oral hearing, using it as one judge says: to fact-check intuition.

As this judge put it,

> „*I also thought about another case from that day a lot. But then I just started to write. And sometimes when you start writing you realise, the solution is actually really easy, what the claimant told me happened is actually not possible at all. It is actually contradictory. And then there are all these aspects, that I don't believe and more and more comes together and you realise: it writes itself well* [it is easy to write]. *Or sometimes it works the other way around, you write a judgement and you realise, this doesn't work at all, it doesn't write itself well at all. Something doesn't sit right. You realise while writing whether something moves in the right or wrong direction."*[716]

This statement also illustrates the way in which weighing the factual elements of the case against the benchmark connects to legal questions, the conditions of the norm and ultimately the final written judgement. Over the course of the decision-making process, a conviction evolves from the oral hearing, to the individual thought processes and routines back into the public sphere via the common standards, expectations and language of the written verdict. As a result, writing the judgement is also perceived as transforming an impression, an intuition and ultimately a personal conviction into transparent legal

[716] 20180123_K.

reasoning. Hence, writing forms part of the process, as part of intuition is legitimised by the use of legal reasoning, which ultimately serves to integrate emotion and reason, thus transgressing these seemingly binary concepts. In the words of one judge,

> "*Some things are difficult to write into the judgement. For example, if someone gives off a clumsy or weak impression, then you think to yourself, 'his father, brother, they are all dead, he won't be able to survive alone.' Normally, you would have to somehow write that into the verdict, but that is difficult. But I also don't want to hide behind meaningless catchphrases. Also, I don't want to leave out any counterarguments. I believe, my task is to write a well-rounded judgement, including laying open eventual doubts. Often, I therefore try to just write in my own words and not lawyerly or in catchphrases. Or I just try to write down, why I believe, it is not that way. In the end, you can still change out adjectives or a wrong comma. It just helps to start writing down what you believe the reasons for the decisions are. At the end, if you don't get it written down, then you know, it might not be the right decision.*"[717]

4.3. Time

Time forms part of 'intuition' as a method for evaluating a claim. Time as a method can mean both simply waiting or giving it time, but also the conscious or sometimes subconscious pondering and reflections that ultimately enable a decision. This is frequently alluded to by judges as almost a magical process, unique to the person involved (i.e. the judge). More concretely, time refers to the time after the oral hearing and serves to distance the judge from the immediate experience of the story, claimant and pressure of the decision. Judges refer to it in terms, like "letting it sink in", "sleeping on it", "mulling over it", "pondering about it", which makes it seem like an almost passive process, as judges describe how leaving the case be for a few days will in most cases yield a conviction about its outcome.

> "*Maybe I should just start writing immediately [*laughs*]. Sometimes you postpone it a little, you don't actively take two or three days. You go and work on something else, but constantly shuffle the case in the back of your mind. It's not like taking two, three days to write the verdict, for heaven's no! But that it takes two, three days, to finally sit down to write, that's more the case. And sometimes it really just needs a few nights of good sleep.*"[718]

[717] 20180123_K.
[718] 171114_003.

What plays a role during that time seems to be the distance judges gain from the claimant as well as the oral hearing, which they describe as an exhausting and all-encompassing experience. The fact that a single judge alone is responsible for asking questions, navigating the interaction between claimant, lawyer and translator as well as dictating the protocol into their Dictaphone, renders the hearing itself exhausting. Some judges even describe it as an adrenaline rush, after which they are "physically tired". The time after this physical and performative hearing is then of a completely different nature: It is more akin to other administrative law cases, in which judges work from the safety of their offices, with the available documentation, evidence and file. Even if, in their description, time has a magical dimension thanks to which a conviction simply materialises, this seems at least partially due to the changing nature of the situation and surrounding.

In that sense, time is also intrinsically connected to the process of writing. In a first place, there are existing timeframes for writing a decision. In Oasis - the smaller court - there was a clear internal rule, that the basic rationale of the decision had to be submitted two weeks after the hearing. However, the verdict as such only had to be completed months afterwards. Nonetheless, judges stressed the fact that they would not make a decision and put the basic rationale of the decision down if they lacked any crucial evidence or were not fully convinced. Like in this case, where a judge let the two-week time period pass because she "*was not sure yet*", saying: "*I need to make my decision within two weeks. In these two cases, which I told you about this morning, where the claimants had a very serious heart and kidney condition, I just let the two-week timeframe pass, because I said, no, in these cases, I still need to gain certainty.*"[719]. More generally, time and writing interact to create a holistic picture (*Gesamtbild*). Judges describe how they wait until the written protocol (*Niederschrift*) of the hearing (which they dictated during the oral hearing) arrives and how they use this

[719] 180620_2B.

account of the hearing to verify, test and remind themselves of the case, its contradictions and weaknesses. In contrast to the oral hearing, the written protocol is a concise summary using an abstract, legalistically sounding language, which provides the fodder for the final written judgement. It hence seems to bridge the gap, between the life story of the applicant and the final written verdict. The way in which the *Niederschrift* removes the judge from the imminence of the case and allows for an 'outside' view, is also illustrated by the self-critical nature some judges exhibit in relation to the written protocol. Judges describe, for example, how by reviewing the written protocol they become aware of the questions they forgot to ask or where they could have asked follow-up questions.

The time factor also became visible in the interviews I conducted straight after oral hearings, when judges remained reserved about their decisions, explaining in many cases, that they "*do not know, what to do about someone*". Like this judge, who said,

> *"Maybe I will now just leave these proceedings be, at least over the weekend… I can't really describe it to you, but I often tell the younger judges as well, if they come straight to me after the oral hearing, asking me what to do, telling me, 'it went like this or that'…Then I tell them, 'we can always talk, but wait one night or two and then'…I cannot tell you how and why, but it is just …somehow it just transpires and you think like, 'that's how I will decide it' and then you are also convinced of it. There are some proceedings where you can say immediately 'that's how it is', but for me, if I really don't know, then I just have to wait 1, 2, or even 3 days to just let it sink it…and then I just know somehow."*[720]

Her quote further reveals how the intuitive process of taking time and thinking about it is closely connected to a professional conception of experience. As the more senior judges herald this skill as part of their professional experience urging younger judges to employ and to trust it as well, they make it an accepted and reasoned part of the decision-making process.

[720] 171114_003.

Conclusion

In sum, this chapter explored the way in which judges determine whether a case in its entirety merits the award of protection status. It illustrated how judges use both law and experience to do so, by analysing the role rule-like knowledge plays in interpreting the law as well as the added impact of a judge's experience in shaping the benchmark to assess a case. It explored how a judge's experience is constituted, dissecting three core areas: other cases, exchange with colleagues, and intuition. It argues that the bundle of other cases - ideal cases, the development of cases over time and cases from other courts - is at the core of how judges develop and use experience. Beyond that, the interaction and exchange with colleagues around these cases further forms judges' stance and experience. Finally, intuitive thinking is developed and utilised in personal techniques, like writing or simply letting time pass.

The chapter therefore aligns with claims in the decision-making literature, in that intuitive thinking may shape judicial decisions on the basis that judges fall prey to the same cognitive shortcuts as any other human being.[721] At the same time, my findings go beyond this 'head vs heart' binary in that it shows the synthesis of the two. The main argument of this chapter's analysis is therefore that even though perceived as irrational, experience in the form of other cases, exchange and interaction with colleagues as well as intuition is intertwined with the rational legal reasoning process. Together law and experience form a benchmark, which is used to assess a claim and develop a justifiable solution or conviction about the case at hand. Ultimately this synthesis that materialises between law and experience might serve to align cases and outcomes among different judges and courts.

[721] Guthrie, Rachlinski and Wistrich (n 27).

As this statement summaries:

> "*As I said, it is totally subjective, what I decide, because…of course, we all talk with each other, we have our schemes and frameworks, our experience. This is how in the end decisions align with each other very much. Also, because of the existing jurisprudence. There is not a case that gets completely out of hand, normally. Maybe a single case, but not really…also because of this exchange with colleagues. Otherwise, every decision is of course, a very personal decision, because it depends on whether I am convinced. And that depends on my personality, my experiences, my values and that's why it is subjective.*"[722]

Leading back to my research question, this chapter consequently found that judges deal with uncertainty in asylum decisions by recurring simultaneously to law and experience. As a result of which, they create both certainty for themselves as well as for the public *à travers* the written (legally reasoned) verdict. However, the use of intuition as part of experience in asylum decision-making does not necessarily mean asylum decisions are indeed a 'lottery' as the literature on refugee status decision-making suggests.[723] Instead, as precisely the interrelation of law and experience in the decision-making process indicates, it reflects a professional routine, similar and essential to the interpretation and use of the law by judges: the same professional strategies used by judges in any other area of the law. Thinking in these binaries is hence unhelpful for better understanding the decision-making practices of judges in the context of asylum law.

Finally, in this chapter, the earlier findings from my previous chapter on the collection of facts and evidence, including the use of 'common sense' therein, re-appeared. However, in this chapter intuition and experience take centre-stage, because it examined the assessment stage of the whole case within the decision-making process. The overarching finding of these two chapters is thus the fact that much of experience, including the use of 'common sense' in order to make sense of the facts of the case, is part of a judge's

[722] 171114_03.
[723] Ramji-Nogales, Schoenholtz and Schrag (n 10); Schittenhelm and Schneider (n 125); Neumayer (n 10); Rousseau and others (n 7).

strategy to simplify decisions, in order to deal with uncertainty as well as to efficiently solve the case.[724]

[724] Applegarth (n 31).

CHAPTER VIII - CONCLUSION

In this final section of my thesis, I want to go back to the two research questions that drove this inquiry: how do judges make asylum determinations and how do they deal with the uncertainties inherent in making these decisions. By taking a socio-legal approach inspired by the idea of holistic decision-making or 'judgecraft'[725], this thesis attempts to take a step back from the idea of exceptionality that surrounds refugee law scholarship bringing the 'how' of judicial decision-making to the forefront. It argues that judges make decisions by drawing on different strategies and methods that make up the judges' craft. These include the relational aspects of judging, the grading scale in a self-feeding system made up of other or previous cases, and intuitive techniques, like writing. Following on from the exploration of fact-finding and the use of 'common sense' and personal experience in how judges arrive at a decision, I argue that intuition and experience play a crucial role in how judges weigh the different contradictions and implausibilities found in the appellant's story. This reveals two things: the active use of intuition and professional experience in the form of techniques, like writing, and the role that relational elements of judging and the interactions in the chamber play in co-creating knowledge. Both are elemental strategies of decision-making. I argue that by using both law and experience judges create certainty for themselves as well as for the public *à travers* the written verdict towards which they work.

Thereby, this thesis speaks to debates in the socio-legal literature: it shows that even though some of the methods judges use seem to fall on the discretionary or emotional side of the 'reason vs emotion' binary that implicitly undergirds 'legal realists'[726], 'formalists'[727] and

[725] Moorhead and Cowan (n 174); Tata (n 14); Kritzer (n 30).
[726] Holmes (n 198); Llewellyn, 'A Realistic Jurisprudence--the next Step' (n 198); Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (n 198).
[727] Dworkin, *Law's Empire* (n 22); Dworkin, 'No Right Answer' (n 22); Neuborne (n 22).

critical legal scholars'[728] thinking, experience, exchange and routine form part of a holistic ideal of decision-making. As a result, this thesis shows how imposing the 'reason vs emotion' binary fails and is even unhelpful in analysing judges' work, for it imposes a one-sided lens, thus not leaving space for the integration of different decision-making strategies in practice.

Therefore, 'judgecraft' as conceived in this study enables a perspective that goes beyond the ubiquitous notion of discretion - as understood primarily in opposition to rules - reflecting the flexibility and ambiguity inherent in law and policy, irrespective of how precisely these have been formulated. It helps to de-mystify asylum decision-making, allowing for the routine, every-day and intuitive aspects of any form of human decision-making to materialise. It also shows the synthesis of different decision-making strategies and even the conscious and pro-active use of strategies like experience and intuition. It thereby uncovers the "minutiae of judging"[729], going beyond pinpointing heuristic biases, ideologies or the high-level cases in the limelight.

The Elements of Decision-Making

This thesis argues that there are three core elements to the decision-making process through which the judges' 'craft' and its strategies materialise. These form the core constituent parts of how judges make asylum decisions and deal with the uncertainties therein: finding conviction, making sense of a case and solving a case.

Finding Conviction

Speaking to the integrationist idea of 'judgecraft', this thesis establishes the core concept of personal conviction (*Chapter V*) which drives decision-making and illustrates the fluidity

[728] Kennedy (n 203).
[729] Moorhead and Cowan (n 174) 316.

between different elements of decision-making that have traditionally been viewed as contrasting in decision-making models: reason and emotion, rules and discretion. It further shows how judges proactively navigate between involvement and dispassion, and how the outside perspective - the representation and performance of independence - creates an additional layer of transparency shaping the confines of their role. Therefore, my thesis offers a more nuanced perspective on existing debates in the literature on refugee status determination. While it proves the complexity of asylum decision-making and the challenges the morally and politically loaded question of 'who belongs?' brings with it, my thesis further reveals the effects of a legal environment that creates sometimes futile and frustrating decisions on the role perception of judges. This becomes particularly apparent in the case of non-enforcement or 'paper-bin' cases on the basis of which I show how judges navigate the ambiguities of their job and their power to make a decision while distancing themselves from the political nature of their decision. I argue that the judges' strategies of public performance and representation of independence, such as hiding behind procedure and referring to the purpose of asylum law, as well as following procedural principles like inquiry and transparency, offer ways for judges to do so. Going beyond the existing debates in the asylum literature, my research argues that judges interpret, form and construct their role and responsibility around the challenges of asylum adjudication, navigating the nuances and boundaries of belonging within the confines of the law and their independence.

Making Sense of a Case

Similarly, this thesis discusses the role that 'common sense' and a seemingly 'logical' plausibility assessment play in the construction and co-creation of the applicant's story. Thereby, it acknowledges and explores the stereotypisation and categorisation other

authors have attributed to the credibility assessment as such.[730] Similar to what previous studies have focused on primarily in relation to the credibility assessment, it identifies and discusses the power of cultural assumptions inherent in the plausibility assessment of a mostly un-documented account.[731] However, my thesis argues that judges navigate and reflect these issues by revealing how the decision-making process can in fact be broken up into its key constituent parts and strategies: beginning with the collection and assessment of facts and evidence, judges move to construct a story, make sense of it in light of existing evidence and finally engage in a form of problem-solving where law and experience come together to produce a decision. Again, the holistic decision-making approach enables a perspective that identifies and integrates the different strategies of weighing and assessing the value of evidence, showing how judges bring together the available, albeit limited documentary evidence and the appellants' story (*Chapter VI*). For instance, judges reference their personal experience to test the plausibility of a story while also relying on the country of origin information to compare, corroborate and contrast different parts of the story.

Solving a case

Finally, judges solve the case as a whole by bringing facts and evidence of the case in line with the law and their experience asking themselves 'is it enough?'. Here, this thesis argues, the legal and personal benchmark, law and experience converge. It dissects the judges' experience into three core areas: other cases, exchange with colleagues and intuition. Together with the tools judges use to interpret the law, such as rule-like knowledge, judges create a benchmark which epitomises the synthesis of "head and heart". This thesis therefore further proves that socio-legal ideas of decision-making, like 'judgecraft', which derive from other areas of law, can be applied to asylum and refugee

[730] Dahlvik (n 104); Kagan (n 107); Wikström and Johansson (n 120); Wettergren and Wikström (n 120).
[731] Kalin (n 88); Blommaert and others (n 99); Maryns and Blommaert (n 99); Thomas Spijkerboer (n 119); Spijkerboer (n 121).

law. This not only expands the scope of the existing decision-making literature from a criminal law focused inquiry to other seemingly more distant areas of law. Through its novel application and the empirical evidence gathered this thesis also develops the concept of 'judgecraft' further. Filling it with life, it expands, identifies and integrates the different elements of the judicial decision-making process. These include in particular the professional experience and intuition fed by past cases into what seems like a grading system, the different types of interactions with colleagues and discussions in and out of the chamber as well as methods like writing and waiting which judges routinely employ. As a result of the implicit distinction the asylum literature draws between legal factors understood as "informal and thus arbitrary and capricious", and legal factors governed by rules and policies[732], it has so far centred on a vague concept of discretion in the evaluation of evidence and the assessment of credibility as the source for divergent decisions. I argue instead that the concept of 'judgecraft', applied to asylum decision-making, shows that thinking in binaries of rules and discretion is unhelpful in understanding the decision-making practices of judges in the context of asylum law. Since much of the refugee studies literature centres on the legal and practical complexity, as well as the human, political and moral factors in asylum decisions, it mystifies the decision-making procedures in asylum cases and gives it an air of exceptionality. As a result, scholarship is implicitly driven by the question of "what <u>really</u> goes on?", attempting to discover hidden bias, subjectivity, unfairness or discrepancies, focused on finding the secret ingredient to the decision-making process. While this literature is valuable in its own right, this thesis returns to these assumptions to draw on socio-legal theories of decision-making in order to shed new light on the decision-making practices of judges in asylum cases. By doing so, it shows that, albeit complex and rich in uncertainties, asylum decision-making

[732] Tata (n 14) 428.

might not be so fundamentally different from other legal decision-making. As a result, the outcome-oriented focus on 'arbitrariness' or 'the lottery' in previous studies does not go far enough in understanding the choices and practices of decision-makers in asylum cases in courts.

Finally, focusing in this way on the work of judges also exposes a new perspective on the intricate question of 'who is a refugee?'. It shows the complexity and uncertainty that surrounds both refugee law and 'refugeeness' and the pressure the task of navigating these questions puts on the different participants in the system, including judges. Undoubtedly the more powerful actor within the system, judges in their way bear some of the burden of an imperfect asylum system. In that light, the repertoire of strategies and routines that this thesis identifies can also be conceived, as taking on another function: helping judges to reconcile the ethical dilemma they are faced with day in day out. The judges' craft creates both reassurances and certainty about the processes judges follow, as well as establishes an approach that allows judges to rely on appropriate methods and strategies to remain human in the face of tragedy. By relying on experience - professional, past and present - together with a body of relationally built knowledge, a reliance on the confines of the law and its reasoning, as well as the apparent 'logic' of common sense and fact-finding, judges in fact turn to build their own processes and rationality arguably overcoming the inadequacies of the law.

Further Contributions

Besides answering the research questions as outlined above, I want to point to three other areas this research contributes to: asylum decision-making and the administration, civil law socio-legal theory and law and emotions scholarship.

Asylum Decision-Making and the Administration

By introducing the concept of 'judgecraft', expressly focusing on the world of judges, this

thesis offers a new perspective on the existing literature on asylum decision-making set in the administrative context.[733] By identifying how judicial strategies of decision-making are intertwined with judges' identity as legal professionals, it allows for a critical reflection on the differences between the administrative and judicial decision-making levels. Highlighting the role that performative aspects and transparency - both in the court hearing as well as in the written verdict - play, this thesis shows that the research that has so far focused on the administrative level needs to be viewed in light of its specific context. As much as some of the titles of the administrative research, like Jubany's *Understanding Asylum Screening from Within*[734] or Eule's *Inside Immigration Law*[735], seem to allude to an assumption of a closed-off, difficult to reach secretive 'inside' in which decisions are made far from the public eye, this research argues that, while judicial deliberations and ponderings might happen in private, there are decisive public elements to making a decision that differentiate the way decisions are made in the courts from that of the administration.

Civil Law Socio-Legal Theory

Given the specific context of this research in a civil law system like Germany my findings speak to yet another debate in the literature. Indeed, arguing for a holistic understanding of decision-making in the administrative courts expands the ground in a context in which authors have decried an absence of a uniquely socio-legal school of thought.[736] While both legal traditions have historically grown, built up and developed their own knowledge base and theories, interchange or cross-pollination between the two are rare. However, looking at my research and its findings, the differences between the two legal traditions no

[733] Eule (n 9); Scheffer, 'Asylgewährung. Eine Ethnographische Verfahrensanalyse' (n 16); Campbell (n 16); Schneider and Wottrich (n 139); Schittenhelm and Schneider (n 125).
[734] Jubany (n 12).
[735] Eule (n 9).
[736] Wrase (n 34); Morlok and Kölbel (n 34); Machura (n 239).

longer seem as clear-cut and the applicability of traditionally common-law based decision-making theories to a civil law administrative process becomes possible and arguably beneficial. In the words of Kunz and Mona, "the realistic assessment that law is what the courts make of it brings the civil law legal systems based on legal specifications closer to the common law systems based on precedents. Even where they have to make their decisions on the basis of a law, judges are more than mere executors of the law."[737]

Therefore, beyond its immediate findings, this thesis reinforces the idea that based on their practical similarities common law derived socio-legal theory can be applied to further develop civil law socio-legal perspectives. My thesis is an example that the existing scholarship on judicial decisions in the German context[738] can be advanced by drawing on more widespread developments in common-law socio-legal theory. Furthermore, successfully evidencing the transferability of socio-legal theories to administrative law might also move German socio-legal scholarship from a focus on criminal cases to that of other legal domains, like asylum or administrative law.

Law and Emotions

As this thesis argues, the concept of 'judgecraft' is intimately connected to a re-thinking of the role of emotions in decision-making.[739] This speaks to similar approaches in the literature. For instance, Walzer argues in relation to politics that reason and passion cannot and should not be separated or "locked in a dichotomy".[740] By that dichotomy he refers to the 'good' reasonable and the 'bad' passionate. What Walzer describes for politics

[737] Karl-Ludwig Kunz and Martino Mona, *Rechtsphilosophie, Rechtstheorie, Rechtssoziologie: Eine Einführung in Die Theoretischen Grundlagen Der Rechtswissenschaft*, vol 2788 (UTB 2015) 9.
[738] Stegmaier (n 34); Erhard Blankenburg, *Vom Nutzen Der Empirischen Rechtssoziologie* (na 2000); Blankenburg (n 34); Wrase (n 702); Thomas Scheffer, 'Materialities of Legal Proceedings' 17 International Journal for the Semiotics of Law 356; Schneider (n 237).
[739] Bandes (n 4); Diana Richards, 'When Judges Have a Hunch-Intuition and Experience in Judicial Decision-Making' (2016) 102 Archiv für Rechts-und Sozialphilosphie 245; Abrams and Keren (n 26).
[740] Michael Walzer, 'Passion and Politics' (2002) 28 Philosophy & social criticism 617, 622.

proves to be equally true for traditional debates in legal scholarship: emotional distance, reasoning, rational and legalistic arguments are perceived as 'good', whereas emotional involvement, discretion, subjectivity or enthusiasm are perceived as prone to bias and arbitrariness. However, as this thesis argues, reason and emotion are intertwined on different levels within the concept of 'judgecraft'. It therefore speaks directly to those critical voices in socio-legal scholarship that have challenged the marginalised and dichotomised view of emotions in traditional scholarship.[741] Staying with the normative ideas of good and bad, one might go as far as arguing that judging not only aligns, but requires, both elements present in each component of the decision-making process: A passion and enthusiasm that drives the willingness to find facts, to investigate, to understand the story, despite the repetitiveness of the work. This might in fact serve to create more fairness than a seemingly reasoned assessment which could equally be a smokescreen for a lack of investigation or involvement. Moreover, the 'emotion vs reason' dichotomy falsely correlates with the dichotomy between discretion and rules, uncertainty and certainty, subjective and objective decision-making. In fact, there might be an argument, that anything that allows the individual to break out of the bureaucratic monotony and constraints - like in the conception of personal conviction or in the fluidity between law and experience - renders the modern state and its organs more human and less prone to turning into machineries of evil.[742] Where a decision-maker becomes personally liable, because a verdict is based on personal conviction, there is a liability and accountability that goes beyond the letter of the law or the metaphorical 'chain of command'.

[741] Bandes (n 4); Posner (n 5); Abrams and Keren (n 26); Maroney, 'Why Choose? A Response to Rachlinski, Wistrich, & Guthrie's' Heart versus Head: Do Judges Follow the Law or Follow Their Feelings?'' (n 674); Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (n 490).
[742] Hannah Arendt, *The Human Condition* (University of Chicago Press 2013).

Concluding Remarks

No doubt, there is much scope to expand on this research in the future. Given the dominance of quantitative research that seems to illustrate the divergent outcome of similar cases[743], further research could for instance assess whether and how the use of different decision-making strategies serves to align case outcomes or even homogenise them and how and whether these strategies differ between groups of judges or case constellations. During my fieldwork, I encountered some case constellations, like the so-called conversion cases from Iran or the Syrian defector cases, that would seem particularly promising to investigate in more depth and detail. Similar inquiries might also look more closely at how institutional or organisational ideas shape routines and strategies investigating their co-creation and construction as well as lifting the veil further to include the reception and interaction with other participants in the asylum process, including not only asylum seekers but lawyers, administration officials and interpreters alike. Moving to increasingly normative considerations, subsequent research might want to explore whether and how intuition and experience as equal components to legal reasoning in the decision-making process, affect the quality and fairness of decisions similar to research conducted in other disciplines.[744]

Beyond plugging those holes left unexplored and expanding the literature's remit, my findings can equally be used and applied as an inspiration for further research into other areas of law. Criminal law, which bears crucial similarities with asylum law, in that "the evidence on which verdicts are based is of unknown and often of compromised

[743] Ramji-Nogales, Schoenholtz and Schrag (n 10); Neumayer (n 10); Riedel and Schneider (n 10).
[744] Carlo Massironi and Marco Guicciardi, 'Investment Decision Making from a Constructivist Perspective' [2011] Qualitative research in financial markets; Tilmann Betsch, Susanne Haberstroh and Cornelia Hohle, 'Explaining Routinized Decision Making: A Review of Theories and Models' (2002) 12 Theory & Psychology 453; Marta Sinclair, 'Misconceptions about Intuition' (2010) 21 Psychological Inquiry 378.

quality"[745], might be an area in which further research could investigate whether and how criminal law judges use similar strategies and methods. In that way, going back to its socio-legal origins in criminal law, the 'judgecraft' idea might come full-circle. Ultimately, by understanding one of the law's most humanly complex, morally and politically conflicting areas, we can learn about how legal professionals deal with the challenges they face in other areas of law. By revealing judges' humanity, we witness how the law's deficiencies and uncertainties might be resolved.

[745] Dan Simon, *In Doubt: The Psychology of the Criminal Justice Process* (Harvard University Press 2012) 145.

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VG Augsburg, Urteil vom 782013 – 6 K 1330161
VG Düsseldorf, Urteil vom 932012 – 21 K 5844/10A
VG Gießen, Urteil vom 1772014 – 2 K 3472/12GIA
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Gesetzesentwurf der Fraktion der CDU/CSU und SPD 2015
Stellungnahme des Bundesrates, Entwurf eines Gesetzes zur besseren Durchsetzung der Ausreisepflicht 2017 [Drucksache 179/17 (Beschluss)]
6 K 152/14WIA (Verwaltungsgericht Wiesbaden)
[1973] 1 BvR 23 15573 (BVerfG (Ester Senat))
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APPENDIX

1. Observed Cases at Fieldwork Site 'Metropolis'

NR	Date	Time	Lawyer (present)	Official File Number	Country of Origin[746]	Outcome[747]	+/-[748]	Verdict Available[749]	Notes
1	17/10/2017	12:15	yes	VG 17 K 458.17A	AFG	PFR	+	Y	
				VG 17 K 398.17A		PFR	+	Y	
2	23/10/2017	09:00	yes	VG 16 K 312.17A	AFG	RJCT	-	Y	*Additional oral hearing on 22/11/2017*
3	23/10/2017	10:30	yes	*VG 16 K 252.17 A*	AFG	PFR	+	Y	
				VG 16K	AFG	RJCT	-	Y	

[746] AFG = Afghanistan, PAK = Pakistan, SYR = Syrian Arab Republic, IRN = Islamic Republic of Iran, IRQ = Iraq, GMB = Gambia, ERI = Eritrea, MDA = Republic of Moldova, RUS = Russian Federation, GEO = Georgia, ARM = Armenia, EGY = Egypt, ETH = Ethiopia, MAR = Morocco.

[747] Status obtained based on the four different grounds for protection in German Asylum Law: Asylum Status (Art. 16a Grundgesetz/GG) = AS, Convention Refugee Status (*Flüchtlingsschutz*, §3(1) AsylG and § 60(1) AufenthG) = CRS, Subsidiary Protection Status (*Subsidiärer Schutz*, §4 Abs.1 AsylG) = SPS, Protection from Removal (*Abschiebungshindernisse*, §60 Abs. 5, 7 AufenthG) = PFR, Rejection (*abgewiesen*) = RJCT

[748] Positive (+), meaning any form of protection status obtained by the claimant or negative (-), meaning rejection. This binary is reflected in the different colouring of columns.

[749] Anonymised written verdict of the judgement obtained. Yes (Y) or No (N).

				356.17A					
				VG 16K 676.17A	AFG	PFR	+	Y	
4	25/10/2017	10:30	yes	-	PAK	RJCT	-	N	
5	30/10/2017	09:00	no	VG 16K 351.17A	AFG	RJCT	-	Y	
6	30/10/2017	11:30	yes	VG 16K 680.17A	AFG	RJCT	-	Y	
7	30/10/2017	14:00	yes	VG 16K 740.17A	AFG	RJCT	-	Y	
8	07/11/2017	09:00	yes	VG 17K 11.17A	AFG	RJCT	-	Y	
9	07/11/2017	11:30	yes	VG 28K.207.17A	ERI	RJCT	-	Y	
10	07/11/2017	14:00	yes	VG 28 K. 256.17A	ERI	SPS	+	Y	
11	14/11/2017	10:30	yes	VG17 K 231.17 A	AFG	RJCT	-	Y	
12	16/11/2017	11:00	no	VG 4 K	SYR	CRS	+	Y	

				1121.16A					
13	20/11/2017	9:30	yes	VG 6 K 1540.16 A	PAK	RJCT	-	Y	
14	20/11/2017	10:45	yes	VG 6K 1539. 16 A	PAK	RJCT	-	Y	
15	20/11/2017	13:30	yes	VG 4K 754.16 A	SYR	CRS		Y	
16	20/11/2017	14:15	yes	VG 4K 1122.16A	SYR	CRS		Y	
17	21/11/2017	10:00	yes	VG 31K 155.17A	GMB			N	
18	22/11/2017	10:00	yes	OVG 3 B 12.17 Salwa Alfadel vs. Germany	SYR	RJCT		Y	"*Top-up claim*"

19	4/01/2018	12:00	yes	VG 26 K 201.17A	IRQ	RJCT	-	Y	*Claimant not present*
20	08/01/2018	10:00	yes	VG 21 K 659.17 A & VG 21 K 658 17 A	MDA			N	*According to email (15/10/201)8 no verdict passed yet. Awaiting further information from the embassy, which might make verdict unnecessary.*
21	08/01/2018	11:30	yes	VG 11 K 397.17A	AFG	RJCT	-	Y	
22	09/01/2018	14:00	yes	VG 21 K 22.18A	IRN	RJCT	-	Y	
23	11/01/2018	10:00	yes	VG 33 K 60.16.A	RU (Chechen)	CRS	+	Y	

24	*17/01/2018*	*13:30*	*yes*	*VG 20 K 8.17A*	*AFG*				*Postponed, see Nr. 31*
25	18/01/2018	11:15	yes	VG 6 K 759.17A	PAK	RJCT	-	Y	
26	22/01/2018	10:00	no	VG 21 K 55.18 A	IRN			N	*withdrawn*
27	23/01/2018	11:30	yes	VG 17 K79.17 A	AFG	RJCT	-	Y	
28	24/01/2018	13:00	yes	VG 20 K 65.17A	AFG	PFR	+	Y	
29	29/01/2018	09:30	yes	VG 21 K 113.18A	IRN	RJCT	-	Y	
30	29/01/2018	12:00	yes	VG 11 K 393.17 A	AFG	RJCT	-	Y	
31	*30/01/2018*	*10:00*	*yes*	*VG 28 K 452.17A*	*ERI*	-		*Y*	*Procedural claim regarding "Dublin" return to Italy. Claimant not present.*

32	30/01/2018	12:00	yes	VG 13 K 421.16A	SYR	RJCT	-	Y	*Top-up Claim SPS to CRS*
33	01/02/2018	09:30	yes	VG 20 K 8.17A	AFG	RJCT	-	Y	

2. Observed Cases at Fieldwork Site 'Oasis'

NR	Date	Time	Lawyer (present)	Official File Number	Country of Origin[750]	Outcome	+/-	Verdict	Notes
1	19/06/2018	10:00	no	B 1 K 18.30899	GEO	RJCT	-	Y	
2	19/06/2018	13:30	yes	B 1 K 17.33575	GEO	RJCT	-	Y	
3	19/06/2018	13:30	yes	B 1 K 17.33580	GEO	RJCT	-	Y	
4	21/06/2018	09:00	yes	B 2 K 17.30244	IRN	RJCT	-	Y	
5	21/06/2018	10:00	yes	B 2 K 17.30335	IRN	RJCT	-	Y	
6	21/06/2018	14:30	yes	B 2 K 16.31450	IRN	RJCT	-	Y	
7	20/06/2018	09:00	yes	B 4 K 17.31470	ARM	RJCT	-	Y	
8	20/06/2018	10:00	yes	B 4 K	ARM	RJCT	-	Y	

[750] See above.

				17.32337 B 4 K 17.32151					
9	20/06/2018	13:00	yes	B 4 K 17.33555 B 4 K 17.33557	ARM	RJCT	-	Y	
10	20/06/2018	14:00	yes	B 4 K 17.32674	ARM	RJCT	-	Y	
11	25/06/2018	11:00	yes	B 4 K 17.31883	EGY	RJCT	-	Y	
12	25/06/2018	12:30	yes	B 4 K 17.31512	MAR	RJCT	-	Y	
13	25/06/2018	15:30	no	B 4 K 17.31400	EGY				*No verdict passed yet*
14	20/06/2018	11:00	yes	B 6 K 17.30154	AFG	RJCT	-	Y	
15	20/06/2018	16:00	yes	B 6 K 17.31066	AFG	RJCT	-	Y	
16	27/06/2018	08:30	yes	B 7 K	ETH	RJCT	-	Y	

				17.32728					
17	27/06/2018	09:30	yes	B 7 K 16.30724	ETH	CRS	+	Y	
18	27/06/2018	12:15	yes	B 7 K 17.31381	ETH	RJCT	-	Y	
19	27/06/2018	13:30	yes	B 7 K 17.32051	ETH	RJCT	-	Y	
20	22/06/2018	10:00	yes	B 7 K 17.33411	ETH	RJCT	-	Y	
21	22/06/2018	11:30	yes	B 7 K 17.31491 B7 K 17.31492	ETH	RJCT	-	Y	

3. List of Interviews (anonymised) at Fieldwork Site 'Metropolis'

NR	Date	Gender	Seniority[751]	Length[752]	Citation Code
1	23/10/2017 08/11/2017	M	Trial	01:32 00:36	171023_02 171108_06
2	26/10/2017	M	Trial	01:09	170206_04
3	06/11/2017	M	Trial	00:50	171106_05
4	06/11/2017	M	Presiding	02:00	171106_G
5	14/11/2017	F	Regular	00:50	171114_03
6	27/11/2017	F	Trial	01:10	171127_07
7	04/01/2018	M	Presiding	01:23	180103_08

[751] Seniority is clustered according to the official positions within the judiciary. All judges, apart from those 'on trial' are appointed for life. President = President of the court; Presiding = Presiding judge of the chamber or Senate (in case of the Higher Administrative Court, OVG); Regular = Judge for life, regular part of a chamber; Trial = Judge in his or her first two years of practice, awaiting appointment for life.
[752] In hh:mm

8	11/01/2018	M	Regular	01:36	180110_09
9	17/01/2018	M	Presiding	01:08	180116_10
10	22/01/2018	M	Regular	01:05	180121_11
11	23/01/2018	F	Regular	00:50	20180123_K
12	30/01/2018	M	Presiding	01:08	180129_13
13	04/10/2018	M	Presiding	01:45	181004_14

4. List of Interviews (anonymised) at Fieldwork Site 'Oasis'

NR	Date	Gender	Seniority	Length	Citation Code
1	19/06/2018	M	Trial	00:55	180619_01
2	20/06/2018 25/06/2018	F	Presiding	00:30 00:20 00:10 00:10	180620_02A 189620_02B 180620_02C 180625_02D
3	20/06/2018	F	Presiding	01:26	180620_03
4	21/06/2018	F	Regular	00:42	180621_04
5	21/06/2018	M	Regular	00:40	180621_05
6	21/06/2018	M	Regular	01:37	180621_06
7	22/06/2018	M	Presiding	00:23 00:50	180622_07A 180622_07B
8	25/06/2018	M	Regular	01:08 01:15	180625_08A 180625_08B
9	26/06/2018	F	Presiding	03:00	180629_09
10	27/06/2018	M	Regular	01:06	180627_10
11	27/06/2018	F	Regular	00:55	180627_11

12	29/06/2018	M	Presiding	01:26	180629_12

5. List of Additional Interviews (anonymised)

NR	Date	Profession	Gender	Length[753]	Citation Code
1	09/01/2018	Asylum Lawyer	M	Shadowing	-
2	16/01/2018	Asylum Lawyer	M	Shadowing	-
3	25/01/2018	Asylum Lawyer	M	01:25	180125_MV
4	26/01/2018	Asylum Lawyer	M	00:42	180125_12
5	27/09/2018	Judge at Criminal Court	M	01:35	180927_C

[753] In hh:mm

6. Interview Guide and Example Questions for Semi-Structured Interviews

1. *Personal Background*

- How long have you been at this administrative court/ in this chamber/working on asylum?
- How would you describe your role and aspirations as a judge?
- How do you view what you do in comparison to what the first instance (BAMF) does?
- How do asylum cases differ from other disputes? Can you explain what is different about asylum decisions in contrast to the other areas you adjudicate on? How does your experiences in other areas of law affect your decision-making in asylum cases and vice versa?
- What are challenges you encounter in asylum cases? What would you say is the biggest challenge for you as a judge in asylum proceedings?

2. *Processes & Routines*

- Can you describe a regular working day? When do you come into court? What is the first thing you do? What do you do in-between cases?
- When you receive a file for an asylum case, how do you go about it? What do you do first? Second?
- How and when do you decide to schedule a hearing?
- How do you prepare for a hearing? What do you do before the hearing? What is the first thing you do after the hearing?
- When you go home, how do you feel about your day?

3. *Challenges and Feelings*

- Can you describe a case you decided recently? When and how did you know how you would decide it?
- Can you describe a case, which proved to be especially difficult to decide for you? Why? What was different? How did you deal with it?
- Can you describe a case that was particularly easy for you to decide? What made it so straightforward?
- Can you tell me a about a case where you changed your mind again after you had thought you had made a decision?
- How do you get a clear picture of the applicant and her story?
- If you find it difficult to decide, what strategies do you use?

- Do you remember a case that is particularly memorable to you? Why and how would you describe it?
- What would you say is the most common reason for a negative decision?
- In your opinion, what role does credibility play in the outcome of a decision? What determines credibility for you? Can you give me an example of a case that represents a typically credible/implausible claim for you?

Hearing

- How do you prepare for a hearing? Do you prepare the questions before the hearing?
- How do you perceive the role of the other participants in the hearing (the translators, lawyers, BAMF)? Can you describe the behaviour of these participants in your experience? How do you view your role in comparison?
- How do you think the presence of an attorney affects the course/outcome/interaction during the hearing?
- What makes someone's account credible or incredible for you?

[Questions after the hearing]

- How different was the hearing compared to the case file? Were you surprised by the way the hearing went? How clear was your picture of the case before the hearing?
- What are your considerations in the case now? What are the difficulties/sticking points? How do you deal with those now?
- How do you feel about the case? How do you deal with this feeling now?
- In this case could the applicant have said or presented something else that would have made you decide differently?

File

- Could you describe the contents of a file that you receive from the BAMF?
- What are the elements of a typical BAMF 'Bescheid' (decision)?
- How do you work with the file? What do you look out for? In a file, what is the most important document for you?
- What do you look at first in the file? How do you prepare the proceedings? How do you work your way through the file?

Country of Origin Information

- How do you obtain information on the situation in the country of origin? How do you use that information?
- How and when do you decide to consult country of origin information?
- How would you describe your knowledge about the countries of origin you decide on? How do you feel about your expertise about the countries of origin you deal with?
- What are you still unclear about?

4. *The Court as a Workplace and Institution*

- How does your work differ from the work of other chambers?
- How would you describe the atmosphere at the court among colleagues?
- How are decisions as a single judge different from those as a chamber?
- How does a chamber decision influence you and your decisions as a single judge?
- Can you describe some major political/institutional/legal developments and changes you experienced during the last two years? How did they affect your work? How did that make you feel?