

The American University in Cairo
Center for Migration and Refugee Studies

**Refugee credibility assessment and the
“religious imposter” problem**
A case study of Eritrean Pentecostal claims in Egypt

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The Center for Migration and Refugee Studies Working Paper Series is a forum for sharing information on migration and refugee issues in Egypt and the region of the Middle East and North Africa. This working paper, by a former International Human Rights Fellow at the American University in Cairo, is addressing the challenges of refugee status determination when the asylum seeker is a member of a persecuted religious minority.

ABSTRACT

Credibility assessment in refugee status determination poses unique challenges when the outcome of asylum applications turns on the question of whether an asylum-seeker is actually a member of a persecuted religious minority. Such cases lead secular adjudicators to delve into matters of religious identity and faith that are by their nature subjective and beyond the realm of objective analysis. This article explores practical means of addressing this challenge through the case study the RSD interviews of Eritrean asylum-seekers in Egypt who based their refugee claims on Pentecostal religious associations. Analysis of the interview methods used indicates that RSD decision-makers operated from several implicit assumptions about how to conduct religious credibility assessment in refugee cases. Attempts to test the sincerity of asserted religious faith via knowledge quizzes and inquiries into subjective beliefs have questionable logical justifications and were fraught with significant risks. By contrast, the most logically defensible approaches were based on the "eye of the persecutor" test, which focuses on observable triggers of persecution that put individuals at risk.

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1) Introduction

Refugee status determination (RSD) is a rare type of adjudication where one can regularly find officials from secular governments and the United Nations conducting formal hearings into religious faith, with lives at stake. The interviews are lengthy and often intense, sometimes forcing people to recite Bible citations, to retell how and why they started going to one church instead of another, or to explain for the record why they pray in a particular way. These awkward scenes are not anticipated by any theoretical dispute in refugee law. While there has been substantial controversy about the interpretive boundaries of the international definition of a refugee,¹ few governments would contest that a person whose life or freedom is in danger because of her religious beliefs can be a refugee under international law. Given the 1951 Refugee Convention's roots in the aftermath of the Nazi Holocaust, one might consider religious persecution cases to be prototypical refugee claims, especially when the persecution emanates from a central government.

Yet, when asylum-seekers from Iran, China, Eritrea and elsewhere file such claims, based on their adherence either to a banned religious movement or fear of punishment for conversion, they encounter significant practical challenges in winning refugee protection. When asylum adjudicators set out to decide whether to accept such refugee claims, they can quickly find themselves administering a process that seems on the surface much like a religious trial. In one case, for example, an American appeals court admonished a government attorney for having "administered a sort of mini-catechism."² The source of this difficulty is not the substantive legal criteria for refugee status but instead evidentiary difficulties in convincing adjudicators that they are indeed members of a targeted religious group. Previous writers have called this the problem of the "religious imposter."³

This article is intended to examine how adjudicators can address such cases systematically and objectively, ensuring as well as possible that refugees genuinely at risk will find protection without endangering the integrity of the asylum system or infringing on the religious liberty of asylum-seekers. Section two explains the gap in standards that I hope to address, my analytical approach, and the methodology of the case study that will be presented. In section three I will provide background on the situation of Pentecostal Eritrean asylum-seekers in Egypt, and the reasons why this presented an ideal case study for

¹ A refugee is any person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country." 1951 Geneva Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 150 [hereinafter Refugee Convention]. Major interpretive disputes have developed around questions such as the definition's applicability in civil war cases, gender-based persecution and family violence, victims of people trafficking, and draft evaders and military deserters, among other issues.

² *Yan v. Gonzales*, *infra* note 28, at 1252.

³ Tuan N. Samahon, *The Religion Clauses and Political Asylum: Religious Persecution Claims and the Religious Membership-Conversion Imposter Problem*, 88 GEO. L. J. 2211 (2000).

examining the religious imposter problem. In section four I examine various approaches to religious credibility assessment that have been proposed in literature and jurisprudence, and attempt to match these approaches to specific types of questions used in RSD interviews in Egypt. In the course of this analysis I reach conclusions about the best approaches to use in religious-based refugee claims, and conclude in section five by suggesting how a more systematic framework for assessment of credibility in religious cases might be developed.

2) Methodology

a) A gap in standards

The religious imposter problem develops when oppression of a particular religious group in a particular country rises to a level of severity whereby any person of that nationality who subscribes to the targeted faith is likely to have a well-founded fear of being persecuted and thus would meet the substantive requirements for refugee status. But it is difficult as an evidentiary matter to determine whether a claimant is actually a member of the persecuted religious group, and states naturally do not want to open their asylum systems to any person who simply declares herself to be a member of an oppressed group. As the New Zealand Refugee Status Appeals Authority wrote, “In the absence of any truly independent evidence, it would be easy to manufacture a claim based on personal religious belief.”⁴

Because evidence of persecution in foreign lands is often lacking, refugee cases are commonly determined by assessment of the credibility of an applicant’s own testimony.⁵ If credible, an applicant’s testimony will be entitled to the “benefit of the doubt,” but if not the refugee claim will usually fail.⁶ Credibility assessment in refugee cases is nearly always a challenge because it requires judging the veracity of a vulnerable person from another country,⁷ in circumstances in which fraudulent applicants have an incentive to lie⁸ and genuine applicants may appear unconvincing.⁹ In easier cases, an applicant’s testimony can be judged against independent evidence, such as documents (and assessment of their validity), reports about her country of origin or the testimony of other witnesses.¹⁰ This is often called external credibility assessment.¹¹ But the most challenging cases are those that rely most extensively on affording asylum-seekers the benefit of the doubt because of the lack of corroborating or contradictory evidence.¹² In these cases, credibility is assessed

⁴ REFUGEE APPEAL NO. 74611/2003 (New Zealand Refugee Status Appeals Authority 2003) at 10.

⁵ Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17:3 GEO. IMMIGR. L. J. 367, 369 (2003); Guy Coffey, *The Credibility of Credibility Evidence at the Refugee Review Tribunal*, 15 INT’L J. REFUGEE L. 377, 378 (2003).

⁶ *Id.* at 371-374.

⁷ *Id.* at 413.

⁸ *Id.* at 373,

⁹ *Id.* at 413.

¹⁰ For a summary of the types of evidence considered in refugee status determination, see Steve Norman, *Assessing the Credibility of Refugee Applicants: A Judicial Perspective*, 15 INT’L J. REFUGEE L. 273, 282-286 (2007). See also Sweeney, *supra* note 19, at 700-701.

¹¹ United Kingdom Border Agency, *Asylum Policy Instructions: Assessing Credibility in Asylum and Human Rights Claims* (2008), unnumbered, available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> (last accessed December 7, 2009).

¹² Kagan, *supra* note 5, at 384.

mainly by analyzing the applicant's testimony in reference only to itself, looking for consistency, detail, vagueness and contradictions, among other factors.¹³ This is sometimes referred to as internal credibility.¹⁴

The process of credibility assessment in RSD capsulizes many of the fundamental tensions and conflicts at the core of the refugee system. In theory, the refugee definition should be applied liberally in light of its purpose, but there are limits and states are not obligated to pursue refugee protection at all costs.¹⁵ Mariham Iskander Wahba, who was one of my students at the American University in Cairo, interviewed refugee service providers in Egypt and observed that credibility assessment, and a corresponding fear of refugee fraud, is a pervasive concern in official interactions with refugees in Cairo, not only in refugee status determination. Focusing especially on gender-related concerns, she notes that obtaining a multitude of monetary, medical and other services requires refugees to have been victimized, which then creates official suspicion that refugees will fake victimhood, for instance by lying about being raped in Egypt, even after they have passed the test of refugee status determination.¹⁶

A previous study of UNHCR's refugee status determination decisions in Egypt found that negative credibility assessment accounted for seventy-seven percent of rejections, and studies of other jurisdictions have found similar patterns.¹⁷ Despite its importance, credibility assessment remains a relatively undeveloped aspect of international refugee law for several reasons.¹⁸ First, in many legal systems credibility assessment is treated as a question of fact rather than a question of law, and as a result it is not subject to rigorous appellate review.¹⁹ This means that standards for credibility assessment do not evolve gradually through jurisprudence to the same extent that other central questions in refugee law have been answered over time.²⁰ Second, as James A. Sweeney observed recently, legal culture tends not to encourage as much critical thought about evidence and fact-finding as it does for the refinement of abstract normative rules.²¹ Lawyers are inclined to seek "truth," while contemporary social science has been built a great extent on the understanding that empirical

¹³ Id. at 384-397.

¹⁴ I have previously proposed an analytical method by which to assess the countervailing factors that are relevant in assessing internal credibility. Id. at 399-403. Cf. UK Border Agency, *supra* note 11.

¹⁵ Norman, *supra* note 10, at 275-276.

¹⁶ Mariham Iskander Wahba, *Reading Between the Lines: The Issue of Credibility in Refugee Status Determination Interviews and Service Provision for Victims of Sexual and Gender Based Violence in Cairo*, Student paper on file with author (2009).

¹⁷ Kagan, *supra* note 5, at 369.

¹⁸ Brian Gorlick, *Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status*, 15 INT'L J. REFUGEE L. 357, 359 (2003).

¹⁹ Jens Vedsted-Hansen, *The Borderline Between Questions of Fact and Questions of Law*, in PROOF, EVIDENTIARY ASSESSMENT AND CREDIBILITY IN ASYLUM PROCEDURES 57 (Gregor Noll, ed., 2005); See also Coffey, *supra* note 5, at 404-405; James A. Sweeney, *Credibility, Proof and Refugee Law*, 21 INT'L J. REFUGEE L. 700,724-725 (2009)

²⁰ Kagan, *supra* note 5, at 409. Cf. Norman, *supra* note 10, at 291-292 ("Concern has been expressed that, particularly with respect to RSD decision makers from whom the only avenue of appeal is on narrow points of law, they might on occasion 'be tempted to seek to insulate their decisions from judicial review by disposing of all issues by adverse findings on credibility'. [INTERNAL REFERENCES OMITTED.] However, the assessment of evidence does not lend itself to anything like scientific precision; and findings of fact are clearly something about which reasonable minds may differ.")

²¹ Sweeney, *supra* note 19, at 725.

certainty is often unrealistic.²² Third, for a considerable time it was normal for credibility assessment to be considered a subjective matter of impression for individual adjudicators, so that determinations were made by intuition rather than explicit analysis.²³ Fourth, developing comprehensive guidelines on credibility assessment is challenging because the specifics of each case are unique, and assessing the believability of refugee testimony is not a simple matter of analyzing answers given by a witness. In real life, credibility assessment involves many more factors, including not just the answers given but also the questions asked, the way they are asked and the environment in which they are asked. Even vague and incoherent testimony may not definitively indicate fraud, because cultural barriers, language and interpretation problems, mental health issues and the general limitations of human memory and communication can produce honest testimony that nevertheless appears superficially to be not credible.²⁴

The credibility assessment challenge in religious-based cases is more specific and in some ways more perplexing than that in other refugee cases. Religious affiliation often cannot be confirmed by independent evidence and often must be proved only by an applicant's own testimony.²⁵ In one case, the U.S. Seventh Circuit Court of Appeals wrote: "Where asylum turns on apostasy, word of conversion is not enough. We need evidence that corroborates this turn from Islam."²⁶ But in the same case the court said, "Determination of a religious faith by a tribunal is fraught with complexity as true belief is not readily justiciable."²⁷ Since religion is by nature a subjective matter that is beyond the powers of state adjudication, there is considerable confusion and debate about what adjudicators should do when forced to assess credibility of a religion-based refugee claim. Adjudicators have been conflicted about how to meet the challenge posed in these cases, and some attempts made by officials at the frontlines have been subject to severe criticism later. In 2006, the Tenth Circuit Court of Appeals criticized a lawyer for the Department of Homeland Security for forcing an asylum-seeker to answer a series of quiz-like questions on religious doctrine, and accused the Immigration Judge of essentially setting a rigged game:

To the extent Mr. Yan was unable to answer the questions posed to him, some of which were phrased as "trick" questions, the IJ concluded that Mr. Yan was not really a Christian. To the extent he was able to answer the questions, the IJ concluded that Mr. Yan had been coached.²⁸

Inconsistencies abound. Some decisions focus extensively on an applicants' lack of knowledge about religion²⁹ and demand that they be able to provide convincing explanations

²² Id.

²³ Id. at 377-378.

²⁴ See Norman, *supra* note 10, at 287-288; Zachary Steel, Naomi Frommer, and Darreck Silove, *The mental health impacts of migration: the law and its effects: Failing to understand: refugee determination and the traumatized applicant*, 27 INT'L J. OF L. AND PSYCHIATRY 511 (2004).

²⁵ *Fassehaye v. Gonzales*, 414 F.3d 746, 756 (7th Cir. 2005).

²⁶ *Najafi v. INS*, 104 F.3d 943, 949 (7th Cir. 1997).

²⁷ Id.

²⁸ *Yan v. Gonzales*, 438 F.3d 1249, 1252 (10th Cir. 2006). See also *Guo v. Ashcroft*, 361 F.3d 1194, 1200 (9th Cir. 2004) (criticizing Immigration Judge for interpreting ambiguities against the asylum-seeker).

²⁹ See e.g., Canadian Immigration and Refugee Board, File/Dossier CA0-00119 (November 21, 2001) (In a case concerned an alleged Jehovah's Witness, the decision-maker considered it a negative factor that he

for their religious faith. For instance, a Canadian adjudicator refused to believe that an Iranian woman was Bahai because

- “She only knew a couple of the important dates on the Baha’i religious calendar – no more than could be expected, as the Refugee Claim Officer (RCO) observed, for someone who had Baha’i relatives.”
- “She was unable to explain the basis of her assessment that the Baha’i religion was the best. Her comparisons with Islam were vague even though she declared there were many differences.”³⁰

But other courts have severely criticized focusing on an applicant’s level of religious knowledge,³¹ and have instead urged attention to an applicant’s testimony about their personal religious experiences instead.³² While some adjudicators seem to be inclined to disbelieve claims of religiosity that would benefit a refugee claim,³³ others are notably willing to believe based on positive impressions of applicants’ demeanor.³⁴ Some decisions give asylum-seekers significant credit for joining religious organizations in exile,³⁵ while others regard such activities as self-serving.³⁶ Some tribunals argue that the central issue is

could not provide specific bible references for his beliefs given that in general Jehovah’s Witness theology places great stress on scripture.)

³⁰ Canadian Immigration and Refugee Board, File/Dossier VA0-00941 (June 27, 2001).

³¹ *Ahmadshah v. Ashcroft*, 396 F.3d 917, 920 n. 2 (8th Cir. 2005) (“[e]ven if [petitioner] did not have a clear understanding of Christian doctrine, this is not relevant to his fear of persecution.”); *Yan, supra* note 28, at 1252-1255; REFUGEE APPEAL NO. 74611/2003 (New Zealand Refugee Status Appeals Authority 2003) at 10 (“[A] comprehensive knowledge of Christianity is no indicator of the strength of an individual’s conviction.”).

³² *Yan, supra* note 28, at 1255.

³³ In a case concerning and asserted Eritrean Pentecostal, a British adjudicator came to a negative credibility finding – which was ultimately upheld by the Immigration Appeal Tribunal and Court of Appeal – despite an acknowledgement that the applicant’s testimony was internally consistent and also consistent with independent information about conditions in Eritrea. *T v. Secretary of State for the Home Department* [2006] EWCA Civ 483 at para. 18. (U.K. Court of Appeal). The adjudicator doubted the plausibility of evangelical parents not passing their religion to their young children. *Id.* at para. 5.

³⁴ REFUGEE APPEAL NO. 74862, 74863, 74864 and 74865 (New Zealand Refugee Status Appeals Authority 2004) at 19.

³⁵ See REFUGEE APPEAL NO. 74611/2003 (New Zealand Refugee Status Appeals Authority 2003) at 11 (“Rather than relying on a claimant’s own description of his internal state of mind, the Authority sought to establish the genuineness of his convictions by considering other evidence – namely, his activities since arriving in New Zealand, when for the first time he was free to practice his Christianity.”); REFUGEE APPEAL NO. 72356/2000 (New Zealand Refugee Status Appeals Authority 2001) at 14 (citing regular attendance at church in New Zealand as a positive credibility factor); REFUGEE APPEAL NO. 72323/2000 (New Zealand Refugee Status Appeals Authority 2001) at 8 (citing testimony of a pastor in New Zealand as highly persuasive in accepting religions sincerity); Canadian Immigration and Refugee Board, File/Dossier AA0-00442 (April 5, 2001) (reaching a negative credibility finding in an application by a Chinese man who claimed to be a member of the Falun Gong in part because the claimant had barely made any effort to participate in the movement in Canada).

³⁶ *T v. Secretary of State for the Home Department* [2006] EWCA Civ 483 at para. 7. (U.K. Court of Appeal).

whether a professed faith is sincere or genuine,³⁷ while others have held that this is not the relevant question at all.³⁸

There are today no extensive guidelines from either UNHCR or governments that provide adjudicators guidance about how to conduct such credibility assessment in religious persecution cases. There are three published articles on this subject in US law reviews, all of them focused to varying degrees on particular domestic and political questions that are peculiar to the American legal system.³⁹ UNHCR’s 2004 Guidelines on Religion-Based Refugee Claims contain six paragraphs of advice on this subject, and appear to constitute the most extensive such material available.⁴⁰ One of the challenges facing adjudicators in this field is that, aside for the 2004 UNHCR Guidelines, there are few clearly established standards of best practice.

b) Defining the question

The central difficulty of credibility assessment in religious cases is that the underlying question which we must answer is in fact different than in standard credibility cases. In what we could call the classic form of refugee credibility assessment, an applicant makes an assertion, and the adjudicator must decide whether to accept it as true for the purposes of refugee status determination.⁴¹ The classic form of refugee credibility assessment thus bears a similarity to the common law concept of heresy, in that the central issue is whether to accept the asserted fact as true or believable. If I describe a past event of persecution, the adjudicator must determine whether to believe for RSD that the event actually occurred.

Classic Credibility Assessment

<p>Applicant (A) assertion: A says that an event (P) of persecution happened in the past.</p>	<p><i>“I was in prison.”</i></p>
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³⁷ REFUGEE APPEAL NO. 74611/2003 (New Zealand Refugee Status Appeals Authority 2003) at 11.

³⁸ *Mezvrishvili v. U.S. Attorney General*, 467 F.3d 1292, 1296 (11th Cir. 2006); *Rizal v. Gonzales*, 442 F.3d 84, 90 n. 7 (2nd Cir. 2006); *Abbas v. Ashcroft*, 126 Fed. Appx. 38; 2005 U.S. App. LEXIS 5721 (2nd Cir. 2005) (lack of credibility regarding Christian conversion did not defeat an asylum application based on imputed religious conversion; “the BIA was obliged to consider, regardless of its assessment of petitioner's actual religious beliefs, whether the *fatwa* had created a well-founded fear of persecution based on imputed Christianity.”).

³⁹ Samahon, *supra* note 3; Craig B. Mousin, *Standing with the Persecuted: Adjudicating Religious Asylum Claims After the Enactment of the International Religious Freedom Act of 1998*, 2003 B.Y.U.L. REV. 541 (2003); Brigette L. Frantz, *Proving Persecution: The Burdens of Establishing a Nexus in Religious Asylum Claims and the Dangers of New Reforms*, 5 AVE MARIA L. REV. 499 (2007).

⁴⁰ UNHCR, Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees ¶¶ 28-33, HCR/GIP/04/06 (28 April 2004).

⁴¹ An adjudicator need not decide that the asserted statement is actually true, but only that it is believable and should be accepted as true for the purposes of RSD. *See* Kagan, *supra* note 5, at 381-382; UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* at para. 11 (16 December 1998) (“Credibility is established where the applicant has presented a claim which is ... on balance, capable of being believed.”).

Credibility = We accept that P happened	<u>We accept that she was in prison.</u>

The challenge is that in religious cases the core assertions by applicants are matters of conscience, and are not subject to objective or neutral adjudication regarding their truth or believability. An RSD adjudicator cannot rule on whether it is true or believable that Mohamed is the last prophet, or that the Book of Mormon is a sacred text. There is no objective means by which to decide such questions, and to attempt to do so would bring secular adjudication into the world of faith, interfering with religious liberty in the process. As a result, it is not immediately obvious what question an RSD adjudicator should ask when a refugee claim turns on religious credibility.

Religious Credibility Assessment

Applicant (A) assertion: A makes a statement of religious faith (F)	<i>“God sacrificed his only son.”</i>
Credibility ≠ F is true	We have no means by which to judge the truth or believability of this statement.

This dilemma is especially clear when an applicant makes a statement of faith. But it similarly occurs when an applicant makes an assertion of religious identity. The risk lies in the adjudicator attempting to determine whether person X is indeed a member of religion A, and in the process of relying on an explicit or implicit judgment about what genuine member of religion A would be like. If I say, “I am a Jew,” an adjudicator can judge the credibility of this statement only by making an initial determination about what it means to be a Jew. This is a controversial question, and one that depends on subjective belief nearly to the same extent as a statement of religious faith. Must a Jew have a Jewish mother? Do real Jews always keep kosher and pray on the Sabbath? Who can convert a non-Jew into the religion, and how? The only thing that can be said objectively is that Jews disagree about the answers to these questions, which would leave an RSD adjudicator in a difficult spot. One could call religious scholars to provide expertise, but trying to adjudicate such a question head on will ultimately position an official of the state between two quarrelling rabbis.

Credibility assessment in these cases requires a government or UN adjudicator to wrestle directly with the ambiguities of religious identity and faith, in a situation where the adjudicator’s judgment is in effect an assertion of power over an individual. This poses a

danger that a process intended at protecting victims of religious repression may actually impair religious freedom and compromise the state's neutrality. As Tuan N. Samahon warns, "The act of definition entails exclusion or inclusion."⁴² If the adjudicator adopts a rigid conception of the alleged religious identity, refugees with a genuine fear of persecution would feel pressure to conform to the judge's orthodoxy in order to avoid deportation.⁴³ This would run afoul of the rule in international human rights law that religious freedom is not limited to traditional or institutionalized religions,⁴⁴ and could arguably be said to violate the prohibition on compelling a person to adhere to a certain form of religious belief.⁴⁵

c) Analyzing questions in RSD

Most training guides and scholarship on refugee credibility assessment focus on the way adjudicators analyze the information provided by asylum-seekers during the RSD process.⁴⁶ Others have been based on surveying the reflections of decision-makers.⁴⁷ Psychologists have produced clinical studies documenting the gap between evidentiary expectations in RSD and the frailties of human memory.⁴⁸

In this case study I focus primarily on the questions asked by RSD adjudicators, more than on the answers given by applicants. The testimony that adjudicators must assess comes to light during the course of an interview, a two-way process in which the information given by asylum-seekers comes typically as answers to questions asked by adjudicators.⁴⁹ My premise is that it is artificial to examine an adjudicator's analysis of an asylum-seeker's answers without also paying attention to the questions asked. Because my goal is to provide guidance to adjudicators, it is essential to focus on the questioning strategies that they can use, since this is the aspect of the interview most within their control.

My analysis is built on the idea that adjudicators make assumptions, explicitly and implicitly, when they decide asylum cases. This insight has been developed by Dr. Jane Herlihy, a psychologist with the Centre for the Study of Emotion and the Law in London.⁵⁰

⁴² Samahon, *supra* note 3, at 2217.

⁴³ *Id.* at 2228-2229.

⁴⁴ Human Rights Committee, *supra* note 138, at para. 2.

⁴⁵ *Id.* at para. 3.

⁴⁶ See, e.g., International Association of Refugee Law Judges, Seminar for New Refugee Law Judges – Facilitator's Manual, Chapter 5 (June 1999); C. Dauvergne and J. Millbank, *Burdened by Proof: How the Australian Refugee Review Tribunal has failed lesbian and gay asylum-seekers*, 31 FEDERAL LAW REVIEW 299 (2003); C. Rousseau, F. Crepeau, P. Foxen, F. Houle, *The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board*, 15 J. REFUGEE STUD. 43 (2002); Jenni Millbank, *'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations*, INT'L J. REFUGEE LAW (2009).

⁴⁷ C. Jarvis, *The Judge as Juror Re-visited*, IMMIGRATION LAW DIGEST 7 (Winter 2003).

⁴⁸ Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT'L J. REFUGEE L. 293, 308 (2001); Jane Herlihy et al., *Discrepancies in autobiographical memories -- implications for the assessment of asylum seekers: repeated interviews study*, BMJ 324, 324 (Feb. 9, 2002).

⁴⁹ See Kagan, *supra* note 5, at 393-395.

⁵⁰ In conducting this research, I had the opportunity to discuss with Dr. Herlihy her parallel research project analyzing the way British asylum adjudicators analyze credibility, which was ongoing simultaneous to my

Herlihy and her colleagues analyze British asylum decisions and use a coding framework to identify and categorize the assumptions made by the decision-makers in the course of reaching a result.⁵¹ In an initial survey of 30 RSD decisions, she found that adjudicators made more than 400 separate identifiable assumptions in the course of reaching their determinations.⁵² In conducting credibility assessments, adjudicators made explicit and implicit assumptions about how they believed foreign governments would behave, how they believe people and families who experience danger and trauma would act, about how genuine refugees would behave in the UK asylum system, and about what a truthful account should look like.⁵³ She notes that several assumptions made by adjudicators contradicted each other, and that the assumptions made draw on subjective understandings of human behavior.⁵⁴ In a similar vein, Hilary Evans Cameron compared assumptions made by Canadian adjudicators about how a genuine refugee would behave in the face of a danger of persecution. She wrote, “These assumptions are not based on any evidence, and yet evidence is close at hand,” since social science has developed considerable knowledge about how human beings respond to danger.⁵⁵ To combat these problems, Herlihy calls for the development of an analytical methodology by which to identify those assumptions that should be considered valid based on actual empirical knowledge.⁵⁶

Building on Herlihy’s work, my premise is that adjudicators’ assumptions about what credibility means will surface and impact refugee adjudications long before the final judgment on the application, and before the applicant even has the chance to answer questions. The questions asked of asylum-seekers should have an underlying implicit logic, and thus by asking certain questions (and not asking others) a decision-maker is displaying underlying assumptions about the kind of information that would be relevant to the credibility assessment. For instance, if interviewers ask applicants about their knowledge of the Bible, they are acting from the implied logic that such knowledge, or lack thereof, would show something useful in reaching an assessment of credibility. Analyzing the questions asked can be revealing because it indicates an adjudicator’s orientation – including assumptions already made – *before* encountering the applicant’s actual testimony.

The ideal study following this approach would be to analyze the questions asked in RSD interviews, the decisions about those applications, and quantitative correlations between types of questions/assumptions and the positive or negative result of refugee applications. However, I have not had access to sufficient data for this more ambitious study. My approach thus is more modest, as described below.

d) Source of interview transcripts

own work. I also have benefited from reviewing an unpublished draft an article by Dr. Herlihy, Kate Gleeson and Stuart Turner, entitled “What assumptions about human behaviour underlie asylum judgments?” which is pending review in the INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY (on file with author).

⁵¹ For an example of similar recent research, *see* Millbank, *supra* note 46.

⁵² Herlihy, Gleeson, and Turner, *supra* note 50.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Hilary Evans Cameron, *Risk Theory and ‘Subjective Fear’: The Role of Risk Perception, Assessment, and Management in Refugee Status Determination*, 20 INT’L J. REFUGEE L. 567, 568 (2008).

⁵⁶ *Id.*

This research was conducted in cooperation with a non-governmental organization, Africa Middle East Refugee Assistance (AMERA), that provides free legal aid to asylum-seekers applying for refugee recognition in Egypt.⁵⁷ AMERA permitted me to analyze the transcripts of its clients' RSD interviews at UNHCR on the condition that I comply with the *Nairobi Code: Model Rules of Ethics for Legal Advisors in Refugee Cases* by avoiding publication of any unique identifying details about the individuals involved.⁵⁸

In order to understand the nature of the transcripts that I analyzed, it is essentially to put them in context of refugee status determination (RSD) in Egypt. Egypt is a party to the 1951 Refugee Convention but it has never established its own asylum system and has no refugee legislation. Instead, as in many countries in Africa, the Middle East and Asia, RSD is conducted by the U.N. High Commissioner for Refugees (UNHCR). In principle, the Egyptian Government grants resident permits to refugees recognized by UNHCR and also to asylum-seekers with applications pending at UNHCR.⁵⁹ Once in the country, an Eritrean⁶⁰ could register as an asylum-seeker at UNHCR, and would receive an interim UNHCR identity document known locally as a "yellow card" as well as a renewable six-month residence permit from the Ministry of Interior for as long as the RSD application remained pending, including at the appeal stage. Asylum-seekers would normally be interviewed by a UNHCR RSD eligibility officer, and after this a first instance RSD decision (recognized or denied) would be issued. Rejections could be appealed within 30 days, but appeal applications typically remained pending for months or years. Recognized refugees could receive UNHCR papers known as "blue cards" which also entitled them to renewable residence permits. Blue card holders were eligible for UNHCR-provided medical care and other social services funded by UNHCR.

AMERA's transcripts are unique records of RSD interviews because of the context in which they are produced. In 2003, UNHCR for the first time issued a set of Procedural

⁵⁷ I was the director of AMERA's operations in Egypt in 2007 and 2008, and I continue to be a consulting attorney. Also, I have practiced refugee law in Egypt dating back to 1998. This personal involvement provides some of the factual background for the context of refugee status determination which I relate in this article.

⁵⁸ 19:4 INT'L J. OF REFUGEE L. 736 (2008) (Article 6.7: "A legal advisor or organization employing a legal advisor may use information collected from clients' cases in publications and writings without the consent of affected clients only if the publication is sanitized of any unique details that would allow an interested person to identify the person involved.").

⁵⁹ My description of the refugee protection system is based on my own knowledge of it as a practitioner, having been the director of Africa Middle East Refugee Assistance in Egypt from 2006 to 2008. *See also*, Michael Kagan, *Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-2002*, American University in Cairo Forced Migration and Refugee Studies Working Paper No. 1 (2002); Kagan, *surpa* note **Error! Bookmark not defined.**, at 4-5.

⁶⁰ In the period studied, different nationalities of refugees were subject to different registration and RSD systems. In general, most Iraqis were recognized as refugees on a *prima facie* basis. RSD for Sudanese was suspended indefinitely, and all Sudanese registering at UNHCR were given temporary protection. The system described in this article applied only to Eritreans who were not in detention. For many Eritreans, especially for those arrested at Egypt's borders who those who lacked documentation, serious protection problems occurred in the period studied. Many of these problems are summarized in Human Rights Watch, *Sinai Perils: Risks to Migrants, Refugees, and Asylum Seekers in Egypt and Israel* (November 12, 2008) (available at: <http://www.hrw.org/en/reports/2008/11/12/sinai-perils-0>, last accessed November 11, 2009).

Standards governing its own refugee status determination operations.⁶¹ These standards recommended, but did not require, that UNHCR field offices give rejected applicants individualized reasons for rejection in writing.⁶² During the period studied, UNHCR's office in Cairo had declined to do so, and instead gave applicants rejected at first instance oral explanations only during meetings known as appeals counseling sessions, some of which were attended by AMERA legal advisors who made their own record of the reasons given. The absence of written reasons for decision made it impossible to analyze UNHCR's RSD reasoning process in the way Herlihy approaches British adjudications.

When asylum-seekers attend RSD interviews with a UNHCR eligibility officer, they are allowed to be accompanied by a legal advisor, which was a key part of the services that AMERA provided to asylum-seekers. During the RSD interviews, there is no independent recorder or stenographer. Other than the UNHCR eligibility officer, applicant and legal advisor, the only other person present is normally an interpreter, if one is needed. The eligibility officer types a transcript of the interview, including both the questions asked and the answers given, but UNHCR policy explicitly prohibits providing asylum-seekers with copies of their own interview transcripts. This policy has been criticized for violating basic principles of due process as well as UNHCR's own advice to governments.⁶³ I requested access to UNHCR's transcripts and case files for this research, but UNHCR declined.

In an effort to develop a detailed record of the proceedings, AMERA directed its legal advisors to record their own detailed transcripts of the RSD interviews that they attend with clients. These AMERA transcripts form the raw data for this study. Since most of the RSD interview consists of questions and answers involving the eligibility officer and applicant, the legal advisor can concentrate on making a high quality transcript, and the AMERA transcripts are generally highly detailed, including in many cases a record not only of the substance of the questions and answers but also the filler words (uh, hmm), half sentences and grammatical errors which are normal parts of oral communication. They also reference in some cases interruptions, external noises and other ambient factors in the interviews.

In total, I analyzed 30 AMERA interview transcripts of Eritrean asylum-seekers who said they were in danger of persecution because of associations with Pentecostalism (hereafter "the Cairo transcripts"). Sixteen of the interviews took place in 2007, 13 in 2008 and one in 2009. All but three (27 of 30) were at the first instance stage, while the others were appeals or in one case a re-opening of a previously closed file. I have a record of the names and UNHCR file numbers of the cases examined, but for confidentiality I have re-numbered them (1 through 30), and where I give examples in this article I reference these arbitrary transcript numbers.

The transcripts included 1144 separate questions about religion or religious persecution, which I analyzed by classifying them by topic.

General topics	Specific categories
Narrative questions	Past religious activities

⁶¹ UNHCR, Procedural Standards for Refugee Status Determination under UNHCR's Mandate (2003) available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/openssl.htm?tbl=PUBL&id=4316f0c02> (accessed 14 June 2009).

⁶² UNHCR, *supra* note 61, at 6.4.

⁶³ Asylum Access, Disclosure of evidence in UNHCR's refugee status determination procedures (2008) (available at <http://www.rsdwatch.org/Disclosure%20of%20Evidence%20in%20UNHCR%20RSD.pdf>) (accessed 14 June 2009).

	Religious persecution
Faith and knowledge	Theological knowledge Theological clarification or dispute Religious belief or practices Religious motivation
Other topics:	Religious practice in exile

Each of the narrative and faith/knowledge questions were further categorized based on whether it was framed in an open or closed manner. The precise definition of these categories will be described in more detail in the body of this article. I also made a record of the order in which different topics were addressed in the course of the RSD interviews.

Because I have been able to analyze a large number of actual questions asked in refugee interviews in religious cases, but only a relatively small number of cases, I make no effort to draw correlations between questions and results.⁶⁴ I do report here proportions, indicating that one type of question was asked more or less than others. But this study depends less on statistics than on simply finding real world examples by which to analyze different approaches to credibility assessment. The focus in this article will thus be more on categorizing different types of questions and evaluating their relative utility, with the aim of developing arguments about the interview strategies most likely to produce a reliable and fair determination of credibility in these cases, and thus propose an approach that would help decide these cases more objectively.

UNHCR's refugee status determination procedures have been subject to criticism for failing key benchmarks of procedural fairness,⁶⁵ but have also been subject to a recent reform process.⁶⁶ In some ways, my analysis holds up aspects of UNHCR-Cairo interview techniques as a positive model, especially the reliance on narrative questions. However, I also found concern about some interview techniques used by UNHCR in Cairo, and this may add to the criticism of the quality of UNHCR's RSD operations. During 2007 and 2008, UNHCR-Cairo posted a relatively low recognition rate of Eritrean refugee claims compared to other RSD systems, as the following chart illustrates.

⁶⁴ Results (recognition or rejection) were known in 20 of 30 cases; 14 of 20 were eventually recognized as refugees, while the others were rejected.

⁶⁵ See generally, Kagan, *supra* note **Error! Bookmark not defined.**

⁶⁶ See generally, RSDWatch.org (www.rsdwatch.org); Gregor Noll and Jennifer Beard, *Concerning True and False Penance: UNHCR Refugee Status Determinations and the Path to Reform*, Paper presented at the annual meeting of the The Law and Society Association, TBA, Berlin, Germany, Jul 25, 2007 available at http://www.allacademic.com/meta/p177291_index.html.

Refugee Status Determination for Eritrean Applicants in 2007-2008⁶⁷
UNHCR-Cairo compared to selected⁶⁸ asylum states

	New applications	RSD Decisions	Number of Convention Refugees Recognized	Grants of Complimentary Protection⁶⁹	Composite Recognition Rate⁷⁰
UNHCR-Cairo	1,461	901	497	-	55%
Canada	376	186	165	-	89%
Germany	710	697	307	109	60%
Italy	5,194	4,127	395	3,482	94%
Malta	515	525	10	461	90%
Netherlands	389	407	31	259	71%
Sweden	1,735	1,792	255	846	61%
Uganda	3,080	2,251	1,150	492	73%
United Kingdom	4,250	4,150	2,355	145	60%
United States	588	575	352	-	61%

However, this data reflects only a rough measure⁷¹ of RSD tendencies at a particular point in time. UNHCR-Cairo informed me that efforts were made in late 2008 and early 2009 to

⁶⁷ Data source: UNHCR Statistical Yearbook 2007 (Annex: Table 12) (31 December 2008) and UNHCR, 2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons (Annex: Table 12) (16 June 2009),

⁶⁸ I have included here those countries for which UNHCR reported at least 100 RSD decisions in, at least, 2007 or 2008, but I have excluded some due to apparent anomalies in the data that appear to make the reported recognition rate artificially high or low. On the high end, I excluded countries where the reported recognition rate was over 95 percent, suggesting that the jurisdiction may have been practicing was a form of *prima facie* or group-based recognition rather than RSD based on the individual merits of the cases. Others were excluded because more than 30 percent of the decisions were listed by UNHCR as “otherwise closed,” meaning that the overall recognition may be artificially deflated by an unusually large number of cases not decided on the merits.

⁶⁹ Defined here as any affirmative grant of protected status other than recognition as a refugee under the 1951 Convention.

⁷⁰ Composite Recognition Rate = (No. Recognized Convention Refugees + Grants of Complimentary Protection)/RSD Decisions.

⁷¹ First, although statistics published by UNHCR make it possible to compare Eritrean applications in different RSD systems, this does not mean that all systems receive the same assortment of types of refugee claims, even from the same nationality. Second, a number of states, especially in Europe, tend to be very

improve credibility assessment in religious cases. In the first half of 2009 UNHCR-Cairo reports that approximately 85 percent of Eritrean asylum-seekers were recognized, a marked increase from 2007-2008,⁷² although it is difficult to pinpoint a single cause for this change. More to the point, the present study was not designed as an assessment of the quality or fairness of UNHCR's RSD procedures *per se*, but rather uses the case study of a particular group of asylum-seekers at a UNHCR office as an example of a wider challenge that could confront any RSD system.

3) Background on Eritrean Pentecostal asylum-seekers in Egypt

a) Pentecostalism in East Africa

Pentecostal Christianity is notably difficult to define, which makes more daunting the task of determining the credibility of someone's claim to be Pentecostal. The movement's origins are traced to early 20th Century America, beginning in Topeka, Kan., in 1901,⁷³ and moving to Los Angeles in 1905 where it spread from a revival meeting on Azusa Street (known as the Azusa Street Revival).⁷⁴ A century later Pentecostalism may account for around one quarter of all Christians worldwide, second only to Catholicism.⁷⁵ The fastest areas of growth in the movement are in Africa and East Asia.⁷⁶ Theologically, this movement appears most closely related to evangelical Protestantism,⁷⁷ but it includes members of Catholic and Orthodox denominations as well. It has produced new churches, and has also led to changes within existing ones. In this article I use the term Pentecostal somewhat loosely to include a range of Christians who are variously called "renewalists," charismatics, and "spirit-filled movements."⁷⁸

The origin of the name "Pentecostal" is Acts Chapter 2 which tell how on an autumn harvest festival fifty days after Passover believers were filled by the Holy Spirit, began to speak in tongues,⁷⁹ and received a message that in the end times the Spirit would lead men

limited in their willingness to recognize Convention refugee status, but relatively generous in their willingness to extend complimentary forms of protection (Defined here as any affirmative grant of protected status other than recognition as a refugee under the 1951 Convention.) to asylum-seekers. UNHCR and North American jurisdictions tend to do the reverse; they generally did not grant complimentary forms of protection to Eritreans but recognized Conventional refugee status at a relatively high rate. In this study, because I am not focusing on different legal interpretations of the Refugee Convention, I have focused on the practical question of whether an asylum-seeker ultimately received some form of protection after RSD. I thus list a composite recognition rate, including both the convention refugee recognitions and grants of complimentary protection.

⁷² Private communication with the author.

⁷³ Pew Research Center, *supra* note 78, at 2.

⁷⁴ Pew Research Center, *supra* note 78, at 2.

⁷⁵ Pew Research Center, *supra* note 78, at 2.

⁷⁶ Paul Freston, Conference transcript, *Moved by the Spirit: Pentecostal Power & Politics after 100 Years*, University of Southern California (April 24, 2006) (available at pewforum.org/events/?EventID=109, last accessed 10 June 2009).

⁷⁷ Pew Research Center, *supra* note 78, at 1.

⁷⁸ Pew Research Center, *Spirit and Power: A 10-Country Survey of Pentecostals 1* (October 2006).

⁷⁹ Book of Acts 2:1-4, 17-18.

and women to prophesy.⁸⁰ If there is a single unifying belief of the diverse strands of the Pentecostal movement, it would appear to be a faith, in the words of the Pew Research Center, “in the spiritually renewing gifts of the Holy Spirit,” which is why the general movement is sometimes called renewalist.⁸¹ Part of the challenge of defining the Pentecostal movement is the fact that these core beliefs are evident in other streams of Christianity as well. While one can identify themes that form the theological foundations of the movement,⁸² it is difficult to find a definitive specific belief or practice that distinguishes the movement, other than a focus on the presence of the Holy Spirit in modern day believers.⁸³ Many beliefs are very common among Pentecostals, but few are universal. For instance, in a 10-country survey, more than 80 percent of Pentecostals and renewalists said they believe in the rapture, when the Christian faithful will be rescued to heaven before the end of the world.⁸⁴ Large majorities believe that miracles still occur today⁸⁵ and in the active intervention of angels and demons in the world.⁸⁶ But these beliefs are not held by all. Many reported that they never speak or pray in tongues, even though this is often perceived as a definitive feature of Pentecostalism.⁸⁷

The Azusa Street Revival led to two new denominations, the Assemblies of God, and the Church of God in Christ, but tens of thousands of other Pentecostal groups (many of which are independent local churches) have emerged in other countries more recently, without formal affiliation to a larger organization or denomination.⁸⁸ In Eritrea, Pentecostalism arrived in the late 1970s during rule by the Ethiopian Dergue regime, when Ethiopian Pentecostal missionaries came to Asmara in order to preach,⁸⁹ but the resulting movement includes a number of churches and groups that vary in approach. Some renewalists and charismatics do not form new religious organizations at all. The Pew Center explains:

Charismatics share many of the experiences that are distinctive to Pentecostalism but remain members of mainstream Protestant, Catholic and Orthodox denominations. This movement, sometimes referred to as “second wave” Pentecostalism, emerged in significant numbers in the 1960s as part of

⁸⁰ Book of Acts 2:1-4, 17-18.

⁸¹ Pew Research Center, *supra* note 78, at 2.

⁸² Anthea Butler has identified three thematic foundations of the Pentecostal faith: First, an apocalyptic Messianic orientation (i.e. the expectation that Jesus will return soon). Second, a belief in the restoration of the apostolic age, meaning that religious and social transformations that occurred in Jesus’ time can occur now. Third, an egalitarian commitment stemming from a belief that the Spirit is “poured out on all flesh,” without discrimination. Anthea Butler, Conference transcript, *Moved by the Spirit: Pentecostal Power & Politics after 100 Years*, University of Southern California (April 24, 2006) (available at pewforum.org/events/?EventID=109, last accessed 10 June 2009).

⁸³ Pew Research Center, *supra* note 78, at 1.

⁸⁴ Pew Research Center, *supra* note 78, at 26.

⁸⁵ Pew Research Center, *supra* note 78, at 27.

⁸⁶ Pew Research Center, *supra* note 78, at 28.

⁸⁷ Pew Research Center, *supra* note 78, at 6, 15.

⁸⁸ Pew Research Center, *supra* note 78, at 2, 3.

⁸⁹ Abbebe Kileyesus, *Cosmologies in Collision: Pentecostal Conversion and Christian Cults in Asmara*, 49 AFRICAN STUDIES REVIEW 75, 77 (2006).

what its members considered to be a much-needed spiritual renewal with these older churches.⁹⁰

Scholars have raised doubts about the utility of applying specific labels to a movement that evolve so rapidly.⁹¹ Around the world, charismatics tend to affiliate with the Christian denominations most prevalent in their countries,⁹² so that the movement eschews the classic Catholic-Orthodox and Catholic-Protestant distinctions that typically categorize Christianity. The result is a movement that “is difficult for even religious scholars to describe.”⁹³

b) Religious repression in Eritrea

In 2007, Eritreans submitted more individual asylum applications around the world than any other nationality, except for Iraqis and Somalis.⁹⁴ In 2008, Eritreans filed more asylum claims than Iraqis, behind only Zimbabweans.⁹⁵ The scale of the Eritrean search for asylum abroad is notable not just for its gross size but also for its proportionality to the small total population of the country.

<u>New asylum applications (global)</u>	<u>2007</u> ⁹⁶	<u>2008</u> ⁹⁷	<u>TOTAL 2007-2008</u>	<u>Country Population</u> ⁹⁸
Zimbabweans	20,847	118,626	139,473	11,392,629
Iraqis	58,713	52,075	110,788	28,947,657
Somalis	47,117	53,021	100,138	9,832,017
Eritreans	36,391	63,242	99,633	5,647,168

Amnesty International summarized some of the reasons for this:

Two-thirds of the population remained dependent on international emergency food aid. The government did not allow opposition parties, independent civil society organizations or unregistered faith groups and tolerated no dissent. Thousands of prisoners of conscience were held. There was no recognizable rule of law or justice system, civilian or military. Detainees had no means of legal redress and judges were unable to challenge or question arbitrary

⁹⁰ Pew Research Center, supra note 78, at 2.

⁹¹ Charlotte Spinks, *Panacea or Painkiller: The Impact of Pentecostal Christianity on Women in Africa*, 21 CRITICAL HALF (Fall 2003).

⁹² Pew Research Center, supra note 78, at 32.

⁹³ Pew Research Center, supra note 78, at 1.

⁹⁴ United Nations High Commissioner for Refugees (UNHCR), UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea at 9 (April 2009).

⁹⁵ UNHCR, 2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons (Annex: Table 12) (16 June 2009)).

⁹⁶ UNHCR Statistical Yearbook 2007 (Annex: Table 11) (31 December 2008)

⁹⁷ UNHCR, 2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons (Annex: Table 12) (16 June 2009)).

⁹⁸ Central Intelligence Agency, CIA World Factbook (<https://www.cia.gov/library/publications/the-world-factbook/>) (last accessed 22 June 2009).

detentions or government or military actions violating human rights. Constitutional and legal protections of human rights were not respected or enforced.⁹⁹

Eritrea is a religiously diverse country, described by Amnesty International as “a highly religious population, with some 98 percent of its 3.7 million people belonging to a long-established branch of a major world religion.”¹⁰⁰ There are somewhat different estimates of Eritrea’s precise demography, but the vast majority of the population are affiliated either with Sunni Islam or the Eritrean Orthodox Church.¹⁰¹

In 1995, Eritrea’s Proclamation on Religious Organizations required all religious organizations to register with the government.¹⁰² The government immediately allowed only four registrations, for Sunni Islam, the Eritrean Orthodox Church, the Roman Catholic Church, and the Lutheran Church, which is the only Protestant denomination to be officially recognized in Eritrea. The government postponed action on all other registration requests.¹⁰³ Not all religious groups submitted registration applications,¹⁰⁴ and the registration process involves substantial government judgment about the relative merits of religions. According to Eritrean law, religious groups seeking registration must prove the “uniqueness” or benefit that their religion offers relative to other religions, disclose its sources of funding from abroad and the names of its leaders.¹⁰⁵ The government judges the applications on the basis of whether they conform to local culture.¹⁰⁶

In 1997 the National Assembly approved a new Constitution which provides for freedom of religion,¹⁰⁷ but this has had little apparent impact on the policies of the Eritrean state. Until 2002, unregistered religious groups were tolerated to some extent, often allowed to hold prayer meetings in private homes.¹⁰⁸ But in May 2002 the government decreed that all unregistered religious groups must cease operations until they are permitted to register, and from this time only the four registered religions have been able to operate openly.¹⁰⁹

⁹⁹ Amnesty International, Annual Report 2008.

¹⁰⁰ Amnesty International, Eritrea: Religious Persecution 3, AFR 64/013/2005 (2005).

¹⁰¹ According to the U.S Department of State, the largest religious affiliation in Eritrea is Sunni Islam, accounting for an estimated 50 percent of the population. Orthodox Christians account for around 30 percent, followed by Roman Catholics at 13 percent. The remainder include an assortment of Christian affiliations, including various types of Protestants, Seventh-Day Adventists, and Jehovah’s Witnesses. There are also a small number of Buddhists, Hindus and Baha’is. U.S. Department of State, International Religious Freedom Report 2008 (Eritrea). *See also* United Kingdom Home Office (UK Border Agency), Country of Origin Information Report: Eritrea 69: ¶ 19.01 (21 April 2009). *But see* Amnesty International, *supra* note 100, at 3 (estimating the Eritrean Orthodox Church and Sunni Islam together account for around 90 percent of the population, with Roman Catholics at 5 percent, 1 percent Lutheran, and one percent belonging to other Christian movements, including Pentecostals, various Evangelical churches, and Jehovah’s Witnesses).

¹⁰² Home Office, *supra* note 101, at 70:¶ 19/05.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 69:¶ 19/06.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Constitution of Eritrea, article 19(4), 23 May 1997, available at Refworld.org: <http://www.unhcr.org/refworld/docid/3dd8aa904.html> (accessed 2 June 2009) (“Every person shall have the freedom to practice any religion and to manifest such practice.”).

¹⁰⁸ Department of State, *supra* note 101.

¹⁰⁹ Home Office, *supra* note 101, at 69:¶ 19/02.

Since 2002, the Government has closely monitored the activities of unregistered religious groups, often arrested their members and generally held them without charge.¹¹⁰ There were estimates that at the end of 2008 more than 3,225 Christians from unregistered groups were detained.¹¹¹ This would mean that close to one in ten members of dissident Christian churches in Eritrea were in prison at the end of the year, given that these churches are estimated to account for only one percent of the population to begin with. In addition to the Pentecostal and unregistered evangelical groups, Amnesty International reports that authorities have targeted a Bible study group within the Eritrean Orthodox Church called *Medhane Alem* (Savior of the World).¹¹² Some Muslim dissidents have been detained,¹¹³ as well as government critics from within the four recognized faiths, including the head of the Eritrean Orthodox Church.¹¹⁴

Those detained were reported to endure brutal treatment. Common features included being held for long periods in crowded metal shipping containers,¹¹⁵ or underground cells,¹¹⁶ and use of a torture technique known as “the helicopter,”¹¹⁷ by which a person is forced to lie on his stomach with his hands clutching his feet for hours or days until he or she agreed to not participate in the banned church’s activities again.¹¹⁸ The shipping containers are reported to be “often swelteringly hot in the day and very cold at night, with no sanitary facilities and very poor food provided.”¹¹⁹ Amnesty International reports that detainees are often forced to sign documents agreeing to stop worshipping.¹²⁰ “Some were reportedly forced to recant their faith and agree to rejoin the Orthodox Church,” Amnesty reported.¹²¹

The Government of Eritrea is not theocratic in the manner of Iran, Saudi Arabia or Spain in the time of the Inquisition, and its repressive policy cannot be explained by any particular religious orientation of the state. A wide variety of religious groups have been both authorized and repressed. Official recognized national holidays include several Christian festivals (Christmas, Epiphany, Good Friday), Meskel, which is specific to the Ethiopian and Eritrean Orthodox Churches, and several Muslim holidays (Eid al-Adha, the Prophet’s Birthday, and Eid al-Fitr).¹²² Most sources report that Jehovah’s Witnesses have been treated most harshly since 2002, mainly because of that religion’s objection to military service.¹²³ But this explanation cannot cover the other targeted religions, which do not object to military service.¹²⁴ Amnesty International reports that evangelical movements have grown rapidly in Eritrea since the 1990s, and have received converts from the registered religions, leading to

¹¹⁰ Department of State, *supra* note 101.

¹¹¹ Department of State, *supra* note 101.

¹¹² Amnesty International, *supra* note 100, at 5.

¹¹³ *Id.* at 74; para. 19.16, Amnesty International, Urgent Action: Eritrea: Torture, AFR 64/005/2008 (5 September 2008).

¹¹⁴ Amnesty International, *supra* note 99

¹¹⁵ Tanya Datta, Eritrean Christians tell of torture, BBCNews (6 June 2008) available at news.bbc.co.uk/2/hi/africa/7015033.stm (last accessed 3 June 2009).

¹¹⁶ Amnesty International, *supra* note 100, at 2.

¹¹⁷ Amnesty International, *supra* note 100, at 2.

¹¹⁸ Datta, *supra* note 115.

¹¹⁹ Amnesty International, *supra* note 100, at 2.

¹²⁰ Amnesty International, *supra* note 100, at 1, 8.

¹²¹ *Id.*

¹²² Department of State, *supra* note 101,

¹²³ *Id.* at 77; Amnesty International, *supra* note 100, at 6.

¹²⁴ Amnesty International, *supra* note 100, at 9.

tensions and disapproval from the main religious groups.¹²⁵ Amnesty International argued that the targeting of religious minorities “reflected the government’s general repression and intolerance of freedom of opinion and association. The government appeared to be punishing any kind of expression of dissent, religious or political.”¹²⁶

c) Eritrean refugee claims under international refugee law

I am assuming for the purposes of this study that if a decision-maker accepts as fact that an Eritrean claimant is in fact a Pentecostal Christian or is otherwise a dissenter from the four registered religions, she would likely conclude that the claimant has a well-founded fear of being persecuted for reason of religion, and is thus a Convention refugee.¹²⁷ The Eritrean policy limiting religious practice to only four religions is a fairly straight-forward violation of international human rights law, which guarantees:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.¹²⁸

I should note an outlying decision by the U.S. Fifth Circuit Court of Appeals, *Li v. Gonzales*,¹²⁹ concerning a man who had been tortured for belonging to an unregistered church in China, and who did not want to register his church because doing so would give the Chinese government control and force endorsement of socialism. The Board of Immigration Appeals overruled an Immigration Judge’s grant of asylum, reasoning that Li was punished for violating the religious registration law, not for religious reasons. The U.S. Government insisted that China’s aim was to maintain social order, not to harm religion *per se*. The Court of Appeals initially upheld, stating in its ruling: “While we may abhor China’s practice of restricting its citizens from gathering in a private home to read the gospel and sing hymns, and abusing offenders, like Li, who commit such acts, that is a moral judgment not a legal one.” Widespread outcry and the intervention of the U.S. Commission on International Religious Freedom persuaded the government to reverse its opposition to granting Li asylum, and eventually led to the Court of Appeals vacating its original judgment.¹³⁰ The *Li* judgment

¹²⁵ Amnesty International, *supra* note 100, at 6.

¹²⁶ Amnesty International, *supra* note 100, at 9.

¹²⁷ See UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea at 10 (April 2009).

¹²⁸ Universal Declaration of Human Rights art. 18, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). See also International Covenant on Civil and Political Rights art. 18(1), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

¹²⁹ 420 F.3d 500 (5th Cir. 2005), vacated as moot, 429 F.3d 1153 (2005)

¹³⁰ Xiaodong Li v. Alberto R Gonzales, 429 F.3d 1153 (2005). See also, Brigitte L. Frantz, Proving Persecution: The Burdens of Establishing A Nexus in Religious Asylum Claims and the Dangers of New Reforms, 5 AVE. MARIA L. REV. 499, 515-516 (2007).

appears to be an aberrational error that was corrected, and in any case is out of line with most international jurisprudence on the issue.¹³¹

International human rights law does not prohibit *per se* requiring religious organizations to register, so long as the system is subject to law, does not have the aim or effect of creating discrimination, is subject to judicial review and maintains the state's neutrality in matters of belief and practice.¹³² However, the U.N. Special Rapporteur on Freedom of Religion or Belief has observed an increasing tendency by states to use administrative regulations to restrict the exercise of freedom of religion.¹³³ Distinguishing religious persecution from persecution for lack of religious registration would appear to be a distinction without a difference. In *Hasan and Chaush v. Bulgaria*, the European Court of Human Rights held that the organization of religious communities is often just as much an expression of religious faith as more abstract matters of spirituality, so that restrictions by the state on religious organization may be infringements on the right to freely manifest one's religion.¹³⁴ The Court held that a state must remain neutral on matters of religion, "meaning that the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."¹³⁵ The duty of neutrality forbids states from favoring one religious leadership over another and prohibits using state authority to prevent religious groups from dividing or splitting from each other.¹³⁶ Elsewhere the European Court has warned:

the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed¹³⁷

The UN Human Rights Committee has expressed concern about discrimination against religions or beliefs based on "the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community."¹³⁸ Official recognition of a religion or religions should not lead to impairment

¹³¹ *Id.* at 517. See also *Fassehaye v. Gonzales*, 414 F.3d 746, 755 (7th Cir. 2005) (Eritrean religious minorities have a well-founded fear of persecution so long as their asserted religious affiliations are credible).

¹³² See generally, Note by the Secretary General: Interim report prepared by Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights on freedom of religion and believe, A/58/296 at para. 135 (19 August 2003); *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000-XI; UNHCR, Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees at para. 19, HCR/GIP/04/06 (28 April 2006).

¹³³ Note by the Secretary General: Interim report prepared by Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights on freedom of religion and believe, A/58/296 at para. 135 (19 August 2003).

¹³⁴ *Application no. 30985/96 at para. 62 (26 October 2000)*.

¹³⁵ *Id.* at para. 78.

¹³⁶ *Id.*

¹³⁷ *CASE OF LEYLA ŞAHİN v. TURKEY (Application no. 44774/98) JUDGMENT STRASBOURG* (10 November 2005) Para. 107.

¹³⁸ Human Rights Committee, General Comment 22, para. 2, Article 18 (48th session), U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

of rights to minority religions or non-believers,¹³⁹ and there can be no restriction on the “right to replace one’s current religion or belief with another.”¹⁴⁰

4) Questions and assumptions used in religious refugee cases in Cairo

In the Cairo RSD interviews that I analyzed, the questions asked by interviewers typically fell into two broad categories. The first type were narrative questions, which asked applicants to describe their experiences. These could include religious experiences, but focused on concrete actions, activities and tangible interactions with other people rather than abstract belief. UNHCR’s Guidelines favor narrative questions,¹⁴¹ and they accounted for 66 percent of the questions in my sample.¹⁴² By contrast, 34 percent of the questions focused on abstract theology or belief,¹⁴³ for instance asking applicants to describe their religious beliefs and practices, asking them to articulate their religious motivations, or asking them to display knowledge of the religion to which they claim to be a member.

In attempting to discern the underlying rationale for the different type of questions, I will begin with those questions focused on abstract belief because they are most clearly rooted in a particular set of assumptions about religious credibility, and also illustrate many of the pitfalls of this terrain. This will then provide a background for understanding the utility of narrative questions, which were more numerous in the cases I analyzed.

a) The sincerity test

One common means of avoiding the problem of defining religion or ruling directly on the truth of religious beliefs is known as the sincerity test, which has roots in the American Supreme Court’s 1944 decision in *U.S. v. Ballard*.¹⁴⁴ This case had nothing directly to do with refugee protection, but it dealt with an analogous attempt by the government to find a way to adjudicate religion-based behavior without judging religious faith itself. The Ballard family was prosecuted for mail fraud for recruiting people to contribute money to a purportedly religious group called the “I Am” movement. The prosecution believed that the Ballards were essentially con artists who peddled quasi-religious faith as a scam. But by accusing them of fraud, the Ballard trial could easily have been construed as an adjudication of whether the “I Am” movement was a false religion. In order to avoid this, the jury was instead asked to decide, “Did these defendants honestly and in good faith believe those things?”¹⁴⁵ The Supreme Court upheld this approach as a legitimate means of avoiding

¹³⁹ Human Rights Committee, *supra* note 138, para. 9.

¹⁴⁰ *Id.* at para. 5.

¹⁴¹ UNHCR, Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees ¶ 29, HCR/GIP/04/06 (28 April 2004).

¹⁴² 759 questions, or 66.3 percent of 1144.

¹⁴³ 385 questions, or 33.7 percent of 1144.

¹⁴⁴ 322 U.S. 78 (1944).

¹⁴⁵ *Id.* at 81.

judicial inquiries into questions of theology,¹⁴⁶ creating a precedent under which the government may punish religious preachers who raise money from people they convince to believe, if it can be proved that the preacher himself does not sincerely believe what he is preaching.

The sincerity test has been offered by some as a useful way of framing the credibility issue in religious-based refugee cases.¹⁴⁷ In theory, if an applicant states “God sacrificed his only son,” I need not investigate the truth or believability of this statement in order to determine whether she genuinely believes it to be true. I can instead assess whether she believes it to be true, which is potentially a more objective and neutral inquiry.

Sincerity Test

Applicant (A) assertion: A makes a statement of religious faith (F)	<i>“God sacrificed his only son.”</i>
Credibility = A genuinely believes F	We accept that she believes that God sacrificed his only son.

This approach is based on an underlying understanding of refugee status that boils down to the following logic:

- All members of X religion have a well-founded fear of being persecuted.

THEREFORE:

- If A is sincere in her belief in X, she has a well-founded fear of being persecuted.
- If A is not a sincere believer in X, she is not a refugee.

Following this logic, an adjudicator would need to develop an interview and assessment technique that would provide a basis for deciding whether A is sincere in her claim to belong to X.

a) Neutral questions on religious beliefs and practices

One type of question clearly focused on testing religious sincerity are queries about what a person believes, or how she practices her religion. An applicant’s ability to provide such explanations is sometimes cited as bolstering her credibility, and in some cases it makes

¹⁴⁶ Id. at 88.

¹⁴⁷ Mousin, *supra* note 39, at 571.

a profound impact on decision-makers. Consider this New Zealand decision, accepting the credibility of a family who had already admitted that their first application was fraudulent:

All of the adult appellants gave consistent evidence. They did not dissemble. They each spoke at length about their own attraction to Christianity and what it meant for them. They acknowledged their earlier deceit with contrition, but inviting consideration that their earlier, 'pre-Christian' selves were responsible. The involvement of the appellants in the church has been intense. It dominates their lives on a daily basis. Such wholesale, sustained commitment to the church is probably genuine.¹⁴⁸

By the same logic, an inability to explain one's religious beliefs and practices might make an applicant appear less sincere.

This category of questions is distinguished from two others that also address religious beliefs and practices. Unlike the category of questions that I call "theological clarifications or disputes" (see below), in this category the form of the question maintains neutrality toward the answer, implying no sense of confusion, disapproval or disagreement. This type of question asks a person to describe their beliefs and practices in the abstract. I differentiate these abstract questions from those that seek out a narrative of religious practice. A narrative question could focus on the same subject, but would ask specifically about concrete actions rather than abstract beliefs, focusing specifically on what a person has done, how they have done it, where, and so on.

Of the questions asked in the Cairo transcripts, 12 percent fit this category, though in general they were used only a few times per interview and the exchanges in this category were typically brief.¹⁴⁹ For example:

Q: How can a person join the Pentecostal church?

A: First, one has to believe in Jesus.

Q: And?

A: When he believes, he has to be baptized. This means you die as a sinner and are reborn as a holy person.

-- Transcript 13

In order to use such questions and answers to assess credibility, one would have to have a preconception of the beliefs that would be held by sincere followers of the religion, and as we have seen it is difficult to pin down the distinguishing beliefs of Pentecostals relative to other Christians. To the degree that genuine beliefs can be defined, these questions contain a weakness that we will also see in religious knowledge quizzes, in that because they press only for abstract information so that an insincere person who knows how to study could learn the right answers. For instance, one could ask a Muslim a neutral but abstract question about

¹⁴⁸ REFUGEE APPEAL NO. 74862, 74863, 74864 and 74865 (New Zealand Refugee Status Appeals Authority 2004) At 19. *For another example of apparent leniency, see* REFUGEE APPEAL NO. 72323/2000 (New Zealand Refugee Status Appeals Authority 2001) at 8. ("[A]t the conclusion of the hearing the Authority was satisfied that this appellant has genuinely converted to Christianity and is a serious and dedicated member of an Evangelical Christian church in New Zealand.")

¹⁴⁹ In 21 of 30 transcripts, there were between 1 and 9 neutral questions about religious beliefs or practices. In six of 30 transcripts, no questions of this category appeared, while in three cases there were 10 or more.

religious practice such as “How many times a day do you pray?” and the person could answer, “I should pray five times,” but many non-Muslims know that this as well. If one follows up by asking “How many times do you actually pray?” the applicant could give any number of answers and it would reveal relatively little, since many genuine Muslims do not in fact pray five times a day every day, even if they believe that they should.

b) Religious knowledge quiz

Among the most common and controversial means of discerning religious sincerity is to ask a question or line of questions that tests whether a witness knows certain information about a religion. The 2000 documentary *Well-Founded Fear*, by Shari Robertson & Michael Camerini, about the US asylum system¹⁵⁰ contains a vivid example of this type of question when a self-proclaimed Anglican is asked by an American official if she knows who the head of the Church of England is. She is first rejected and later granted asylum because of confusion about the accuracy of her answer. Such questions were commonly asked of purported Pentecostal applicants at UNHCR’s office in Cairo as well. The following series of questions from the Cairo transcripts illustrates the form:

Do you know what the name Pentecostal means?
Was Pentecostal mentioned in the Bible?
Can you tell me the verses?
Do you remember what was mentioned in these verses?
How many Apostles gathered?
So what happened when the Apostles were gathered?
Why did they gather?
[Later in the same interview]
Do you know who Michael and Gabriel are?
[Later in the same interview]
Do you know who is Saint Paul?
Can you tell me how many letters Saint Paul wrote?
Do you know who wrote the Book of Acts?

-- Transcript 17

What is baptism?
What is the relevance of baptism?
[Answer: “The Bible says you have to believe and then get baptized.”]
Where does it say that?
[Later in the same interview]
Who wrote the Corinthians?
[Answer: “Saint Paul.”]
How many others did he write?

¹⁵⁰ The Epidavros Project, *Well-Founded Fear* (2000) (information available at <http://www.wellfoundedfear.org/ss>, last accessed April 27, 2009).

Who else wrote in the Bible, other than John?

[After the applicant volunteered three more names, the interviewer asked four more follow up questions seeking additional names of authors of the Bible, both New and Old Testaments.]

-- Transcript 12

Questions testing applicants' knowledge of specific religious information constituted 11 percent of the total questions analyzed for this study, but there seemed to be notable inconsistencies in their use. In a few cases, knowledge quizzes appeared to be a major focus of the interviews; in seven cases at least five knowledge questions used. In one case, the asylum-seeker faced 18 separate knowledge questions, and in another case a different interviewer asked 17 religious knowledge questions. Yet in six cases no knowledge questions appeared in the transcript, and in five only one or two appeared. It thus appears, statistically at least, that most of the time UNHCR-Cairo did not rely extensively on knowledge-based questions, but in a significant minority of cases knowledge quizzes were used with notable emphasis.

Knowledge questions appear like a quiz or test because of the way in which they were used in these interviews. When used heavily, they frequently appeared as a consecutive series of questions, giving the appearance of an oral exam. In six cases interviewers asked at least five religious knowledge questions in a row. In the most extreme case, an interviewer asked 20 separate knowledge questions, including separate consecutive series of 10 questions, five questions and four questions in a row at different points in the course of the interview.

One question – What is the origin or meaning of the word “Pentecostal” or the Pentecostal faith? – was asked in some form in 14 cases. No other specific question was repeated in nearly so many cases. Yet the themes and forms of the questions were fairly consistent, especially in their focus on specific Biblical sources for religious beliefs or practices. Applicants were asked, variously, about rules governing baptisms, about the names, number and works of the Apostles, and about particular angels. The form of the questions was consistent. Applicants were asked for a specific substantive piece of knowledge, then asked the specific citation from scripture from which this derives, and often pressed to relate the chapter, verse and content of the reference. For example:

Question: Do you have any idea about who established the Pentecostal faith in the world?

Answer: I don't know who established it. The only thing I know is that it's from the Bible, from the Apostles.

Question: Where was the word Pentecostal in the Bible?

Answer: Book of Acts.

Question: Where in the book of Acts exactly?

Answer: Chapter 2. From verses 1 to 3.

Question: What are these verses talking about?

Answer: It was a feast of 50 days that the Holy Spirit falls or comes upon the disciples.

Question: What else is mentioned in this chapter?

-- Transcript 5

One might expect this frequent pressing for specific chapter and verse citations to be intimidating for some applicants, and this effect was evident in the transcripts of some interviews. For example, one interview ended abruptly after the applicant stated that a friend had preached the Bible to her, leading to her conversion. The interviewer followed up by asking for a specific Bible reference, leading to this exchange:

Question: Which part of the Bible did she, I mean your friend, preach to you?

Answer: The Book of John.

Question: Do you remember which part?

Answer: I couldn't remember which part, but it was around Chapter 3.

Question: What was the chapter about?

Answer: You want me to tell you one verse or the whole chapter?

Question: What you know. I don't want you to worry. It's okay if you don't remember.

Answer: I am very stressed.

Question: Okay, are you willing to continue the interview today or do you want to reschedule?

Answer: I am not in a good mood now.

Question: I am here for you. You have the choice to reschedule or take another break.

Answer: I know I make you tired, but maybe we can reschedule.

-- Transcript 22

Knowledge quizzes ask for objective information about externally verifiable facts and thus do not require actual religious belief to answer. The advantage for adjudicators is that knowledge quizzes are objective, and do not delve into more subjective matters of faith. They are easily standardized, so that the same set of knowledge questions can be asked repetitively of all asylum-seekers. But this objectivity exists only at the surface level, because knowledge quizzes directly test only whether a person knows a very specific piece of abstract data. For knowledge quizzes to have relevance in refugee status determination, one must make an assumption that a certain type of religious person would necessarily know a certain piece of information, and an insincere applicant would be unlikely to possess the knowledge. If this assumption is true, then a decision-maker could conclude that lack of knowledge is a factor indicating lack of credibility. A decision-maker need not believe that this assumption is always the case; one could use knowledge quizzes as a factor in credibility assessment but not make them always decisive. Nevertheless, the heavy reliance on an assumption about what religious people usually or always know is inescapable. Without such an assumption, knowledge quizzes would be irrelevant.

This points to the core danger of this type of question, since the underlying assumption is itself difficult to prove. One would have to possess an empirical study showing

that the relevant group of people usually or always knows a certain thing. Moreover, not every religion prioritizes abstract knowledge in the same way, and not every religious person is drawn to a particular religion for the same reason. Thus, knowledge quizzes involve a significant risk of a false negative in credibility assessment, of errantly judging an applicant to be insincere because she does not know something, when in fact her devotion is genuine.

Much of the guidance that UNHCR has given about credibility assessment in religious persecution cases is focused on warning against over use of knowledge quizzes. UNHCR's guidelines caution:

While decision-makers will often find it helpful during research and preparation to list certain issues to cover during an interview, extensive examination or testing of the tenets or knowledge of the claimant's religion may not always be necessary or useful. In any case, knowledge tests need to take account of individual circumstances, particularly since knowledge of a religion may vary considerably depending on the individual's social, economic or educational background and/or his or her age or sex.¹⁵¹ ... Women, in particular, are often denied access to religious education.¹⁵²

UNHCR also warns that repression of religious practice may impede adherents' ability to learn about their faith, so that people targeted for persecution may actually have less religious knowledge than others.¹⁵³ This warning would appear to be especially pertinent to Eritrea, where churches were closed and Pentecostals are often arrested while attempting to hold Bible study sessions in secret.

Knowledge quizzes also contain a danger of false positives, of aiding a certain type of fraud. As UNHCR's guidelines warn, "a claimant's detailed knowledge of his or her religion does not necessarily correlate with sincerity of belief."¹⁵⁴ This opening to abuse comes from the fact that knowledge quizzes ask about abstract information rather than personal experience, such as the structure of a church or the content of a section of scripture. Such knowledge is capable of being learned and does not require a fraudulent applicant to invent a coherent and detailed story from scratch. Once it becomes known in a migrant community that adjudicators are asking questions of this nature, fraudulent asylum-seekers would be able to prepare for credibility assessment by studying their assumed religion. One need not have genuine faith to answer questions about another person's religion; an atheist can learn about Christianity, a Christian can learn about Hindu gods and a Buddhist can learn to answer knowledge questions about Islam. In general, knowledge quizzes may simply favor educated people who know how to find and learn abstract information and who can thus perform well on a test.

c) Theological clarification or dispute

¹⁵¹ UNHCR, *supra* note 40, at para. 28.

¹⁵² *Id.* at para. 30.

¹⁵³ *Id.* at para. 30.

¹⁵⁴ UNHCR, Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees ¶ 29, HCR/GIP/04/06 (28 April 2004).

Review of the Cairo transcripts found another variation of questions about religious faith and knowledge, but with more worrying implications. This occurred where in the context of asking about religious beliefs or knowledge the interviewer sought clarifications about a religious issue. Such exchanges usually began innocently, and were usually brief. Only in seven cases out of 30 did the interview ask more than two theological clarification questions, and in 12 out of thirty cases they asked none at all.

In one fairly innocuous example,¹⁵⁵ an applicant described how she had converted from the Orthodox Church to Pentecostalism. When asked her religion today, she said she was Christian, and when asked how long she had been a Christian, she answered since the time of joining the Pentecostal movement. The applicant thus equated Christian identity exclusively with Pentecostalism. When asked about her religion before conversion, she answered “Orthodox,” but avoided the Christian label. This appeared to confuse the interviewer, who asked her to confirm whether both she and her husband “were Christian before [conversion],” to which the applicant avoided saying yes and instead repeated her explanation of conversion. It is clear that the interviewer was attempting to clarify and confirm a potentially confusing chronology of events. The interviewer also asked for the clarification only one time, and once the interviewer understood the applicant’s use of words she accepted the applicant’s phrasing without further inquiry. Similar inquiries for clarification can be seen in other exchanges.¹⁵⁶ Seeking such clarifications is often essential to conducting a coherent interview, and can generally benefit applicants by lessening the risks of misunderstandings. Ideally, interviewers seeking clarifications will ask applicants to explain their own beliefs in their own words, and will not appear outwardly to dispute them.

However, in the minority of cases where there were several questions seeking clarifications on matters of faith, the tone sometimes shifted away from neutrality to the extent that the interviewer appeared to be doubting or debating the asserted beliefs of the claimant. The difference between seeking clarification and religious disputation is a matter of degree and interpretation, and even where I conclude that the interviewer crossed this line I do not necessarily believe that the intentions were hostile. But the danger is that probing for clarification or for a more full explanation of belief may lead interviewers to come across as provocative or hostile, and this could lead applicants to feel more hesitant about speaking. In several cases, (examples: transcripts 9 and 26) interviewers asked applicants to explain why they left their previous churches for Pentecostalism. When applicants gave general statements about a desire to be saved or connect with God, they were asked why they could not achieve these objectives in other churches. Presumably the intent of such questions is to probe for a compelling statement of genuine belief, but the questioning can appear to communicate skepticism or disapproval on the part of the interviewer about the conversion.

In one example¹⁵⁷ the interviewer repeatedly invoked her own religious beliefs (“I am Christian and I don’t want to intimidate you”) and then engaged in a highly personalized argument with the applicant about whether speaking in tongues should be relevant for Christians today.¹⁵⁸ The interviewer pressed the applicant to explain why she had to turn to

¹⁵⁵ Transcript 3 in my sample.

¹⁵⁶ For instance, in one case the interviewer asked for clarification about what the applicant meant by “salvation” (transcript 9).

¹⁵⁷ Transcript 4.

¹⁵⁸ The interviewer asked for specific Bible references for speaking in tongues, and when the applicant mentioned Acts 2, the interviewer replied, “I have the Holy Spirit,” and stated that the applicant’s lawyer and the interpreter did as well, but that they do not necessarily speak in tongues. The applicant then

Pentecostalism in order to accept Jesus as her savior since “he is the savior of other beliefs, too.” When the applicant spoke of believing there should be no mediator between herself and God, the interviewer objected that there are Biblical examples of mediators, and opened a Bible as she listed several. In the same case, the interviewer asked the applicant why Pentecostals rejoice that Jesus died. Evidently exasperated, the asylum-seeker said at one point: “That’s what I believe and no one can change it. . . . I’m telling you the verses, but you still don’t believe me.”

This style of questioning appeared to this extreme in three cases out of thirty, all with the same interviewer, and was clearly not the normal approach at UNHCR-Cairo. UNHCR-Cairo has also told me that their approach more recently has been to avoid asking theological questions, but to allow applicants to describe their beliefs in their own words if they desire to do so.¹⁵⁹ In the three cases at issue, the interviewer clearly lost any pretense of neutrality toward religion, repeatedly invoking her own faith (and that of the lawyer and interpreter). But while these interviews were abusive in effect and offensive in tone, it should be noted that the interviewer may have been attempting to probe religious sincerity and may not have had any actual hostility toward the applicants’ faith. In one case, this interviewer apologized when the applicant seemed offended by a question, and said, “I must provoke you. That is my job. I have to provoke you to find out if you are Pentecostal.”¹⁶⁰ If one assumes that a genuinely religious Pentecostal would react in a certain way to certain types of provocative religious debate, then it would be a logical application of the sincerity test to stage deliberate provocations in order to test how an applicant reacts.

d) Weaknesses of the sincerity test

Any application of the sincerity test must be built on an assumption about how a genuine believer would answer a particular question or act in particular circumstances. Knowledge quizzes, for instance, are based on assumptions about what a sincere believer would know. But since it is difficult to prove how a genuine religious person would behave or speak, the sincerity test may not offer quite as many advantages as promised.¹⁶¹

In *Ballard*, Justice Jackson dissented, arguing that focusing on good faith belief did not really free a court from investigating the truth of the underlying belief. He wrote:

I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute

mentioned that a verse in Corinthians explained more, to which the interviewer said, “I don’t need to read it. You are supposed to tell me.”

¹⁵⁹ Personal communication with the author.

¹⁶⁰ Transcript 11.

¹⁶¹ See generally, Samahon, *supra* note 42, at 2220-2221.

from the very consideration which in common experience provides its most reliable answer.¹⁶²

Returning to the facts of the Ballard case, one can see a significant root weakness of the sincerity test. Even if one assumes bad faith by the Ballards, religious fraud is not actually like other frauds. In a classic fraud case, a person makes an assertion similar to claiming a past event of persecution. To say, “I was in prison” is similar to claiming, “The money is in my account,” or “I own the title to this land.” With statements of this nature, the asserted fact must either be objectively true or false. I may make a good faith mistake about the truth, but ultimately it is not a matter of faith. Either I was in prison, or I was not; the money is there, or it is not; I own the land, or I do not. It is thus plausible that a judge or jury could assess my good faith belief by asking standard questions:

- What information did I have access to before making the assertion?
- What should I have known?
- Did my actions correspond rationally to the assertion that I made?

These questions can yield fruit because, since the asserted fact is knowable, it is possible to investigate whether I knew it. But in religion cases, these inquiries yield little, because (to paraphrase Justice Jackson) the assertion is not something that can be proven true or false based on available information anyway. It was always a matter of faith, and the government is actually prohibited from investigating the reasonableness of faith.

The most tempting strategy to overcome this objection is to attempt to judge assertions against conduct, rather than against the way the applicant answers questions. In extreme cases, this may be effective. For instance, if I say that I am a religious Christian, and I never go to church, never pray, never read the Bible and never engage in any conduct remotely evocative of Christianity, it may be possible to conclude my claim to believe is insincere. The opposite is also true; if I engage in Christian religious practice it should be more believable that I am actually Christian. For instance, in a New Zealand case the Refugee Status Appeals Authority concluded that an asylum-seeker was a genuine convert in part because he is “a serious and dedicated member of an Evangelical Christian church in New Zealand.”¹⁶³ In this case, and in several of the examples described in the introduction,¹⁶⁴ an applicant’s participation in religious activities (or lack thereof) in the country of asylum carried significant positive or negative weight with judges. But other tribunals have been reluctant to place much reliance on religious practice in exile for fear that it will be faked in order to strengthen asylum claims.¹⁶⁵

But using behavior to assess the sincerity of belief can also lead to problematic results. The Australian Refugee Review Tribunal rejected a Ukrainian man’s claim to be homosexual in part because he also said he was a Roman Catholic, concluding that a genuine homosexual would re-consider his Catholic faith.¹⁶⁶ This logic might not even be accepted

¹⁶² 322 U.S. at 92-93.

¹⁶³ REFUGEE APPEAL NO. 72323/2000 (New Zealand Refugee Status Appeals Authority 2001) at 8.

¹⁶⁴ See references at FN 35.

¹⁶⁵ See reference at FN 36.

¹⁶⁶ SZAKD v Minister for Immigration [2004] FMCA 78 (19 March 2004) (“Having regard to the current teachings of the Catholic Church, I am firmly of the view that a person of single sex orientation must have

by the Catholic Church, but the nuances of Church teachings are not the central issues. For RSD purposes the basic problem is objective and empirical. Unless one can prove empirically that there are no Catholic homosexuals, one cannot say that professed Catholicism renders a claim of homosexuality not credible, or vice versa. Sincerity of religious membership “is not easily judged by outward criteria”¹⁶⁷ because religions often strive for self-improvement, and tend to focus on the conflicting impulses of the human condition. Insisting that asylum-seekers conform perfectly to religious doctrine assumes that a sincerely religious person will not be assimilationist or engage in any kind of heterodoxy, and is ultimately no more accurate empirically than assuming that all genuine Catholics go to confession and oppose birth control.¹⁶⁸

The sincerity test will in most cases be a trap of circular logic that ultimately returns us to the original conundrum of religious credibility. It purports to measure a person’s statements of religious belief against her actual beliefs. But we can only know her actual beliefs through her statements of belief and through her conduct. At most, we may find her statements and conduct to be vague and inconsistent, but this will normally prove little since ambiguity, ambivalence, conflicted deeds and words, and apparent incoherency (especially in the perception of outsiders) are all regular parts of religious experience. The sincerity test can work only by making assumptions about how a religious person would talk or act, but such assumptions are likely to be empirically questionable. This approach also has the unintended effect of imposing a preconception of religious experience, so that asylum-seekers can have their religious affiliation accepted as genuine only by fitting the predetermined mold, and in the process depriving them of the freedom to experience religion through individual choice.¹⁶⁹ Inquiring about pious conduct and knowledge opens the door to disciplined frauds while casting suspicion on genuine but imperfect believers. As Samahon observes, “A well-practiced imposter will impersonate the perfectly orthodox, strait-arrow religionist whereas actual converts may still be learning the formalities of their newly chosen faith.”¹⁷⁰

Nevertheless, many adjudicators find it difficult to depart from a focus on the genuineness of the applicant’s beliefs, and the split in approaches leads both to inconsistency and occasional disagreements among judges. For instance, in a split decision case concerning an Iranian practicing (outwardly, at least) Christianity in the U.S., the 9th Circuit Court of Appeals rejected the asylum claim for insincerity. Although the applicant, Toufighi, was regularly attending church services in the U.S., the Immigration Judge concluded that he was

at least considered their position in the Church and whether they wished to continue practise (sic) Catholicism.”).

¹⁶⁷ Id. at 2212.

¹⁶⁸ Id.

¹⁶⁹ In non-religious cases, credibility assessment may operate to force other types of minorities into a particular mold in an effort to discern genuine refugees from other migrants. For an example that is both colorful and cause for concern, see *WAAG v. Minister for Immigration* [2002] FMCA 191 (Federal Magistrates Court of Australia) (upholding the appeal of an Iranian gay man who was rejected at first instance because the tribunal doubted his sexual orientation, in part because of his failure to be able to cite any inspirational gay-oriented art and showed no knowledge of or interest in icons such as Oscar Wilde, Greco-Roman wrestling, Bette Midler, Madonna, or “any kind of emotion-stirring or dignity-arousing phenomena in the world around him.”).

¹⁷⁰ Samahon, *supra* note 42, at 2215.

not genuine in his conversion to Christianity because he did not know the names of the twelve Apostles.¹⁷¹ The Immigration Judge wrote:

With the Court's understanding that Christianity begins with the life and teaching of Jesus Christ in the New Testament, the 12 apostles have some of the most important, if not the most important, writings of Christianity. ... The respondent's knowledge about Christianity [was presented] to the Court in such general terms that any person of any religion can come up with that description of their religion, namely peace, tranquility, and love.¹⁷²

Judge Singleton and Judge Ikuta upheld the denial of asylum, but because of rules of appellate deference in administrative law they did not engage directly with the analysis that led to the negative credibility assessment.¹⁷³ This led Judge Berzon to issue a dissent arguing that the Immigration Judge had asked the wrong question.¹⁷⁴ She wrote:

In short, the question is *not* what Toufighi believes but what Iran understands him to believe -- or, more accurately, *not* to believe. It is thoroughly plausible that because he attends Christian services and belongs to a Christian church, Toufighi will be taken to have renounced Islam.¹⁷⁵

On the one hand, one might query, as an empirical matter, how many of the world's genuine Christians can actually name all of the apostles, and whether all Christians believe that this list is necessarily the most important aspect of the life and teachings of Jesus. But by the converse, if Toufighi had recited the list correctly, one might object that just as a person of any religion can describe devotion to general principles, any educated person might also be able to memorize 12 names and thus fake genuine Christianity. The hesitancy of some adjudicators to abandon the religious sincerity test is understandable because it would seem that to disregard sincerity would implicitly ignore the core state concerns about religious imposters, by allowing asylum-seekers to win recognition as refugees by fraud. But there is little reason to assume that the sincerity test really keeps out imposters, since it actually opens the door to clever frauds who can effectively learn to look and talk like a genuine believer.

b) The eyes of the persecutor test

The alternative approach to religious credibility assessment proposed by Judge Berzon in *Toufighi* begins with the principle that refugee status does not in fact depend on the genuine religiosity of refugee claimants. Rather, refugee status is defined by the motives of

¹⁷¹ *Toufighi v. Mukasey*, 538 F.3d 988, 990-991 (9th Cir. 2008).

¹⁷² *Id.* at 991.

¹⁷³ *Id.* at 994-996.

¹⁷⁴ *Id.* at 999 (9th Cir. 2008) (J. Berzon, dissenting).

¹⁷⁵ *Id.* at 1000.

persecutors.¹⁷⁶ As the Supreme Court of Canada held, “The examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution.”¹⁷⁷ If a persecutor believes a person to be a member of a targeted faith, it matters little if she actually believes in it.¹⁷⁸ This basic principle reframes the religious credibility assessment by asking adjudicators to imagine, based on available evidence, how the persecutor would perceive the asylum-seeker, rather than attempting to discern the sincerity of her subjective beliefs. The sincerity approach may work as a kind of rule of thumb in that if an asylum adjudicator believes the applicant to genuinely be a member of a prohibited religion, it may be reasonable to assume that the agent of persecutor will as well. It also makes sense to look at the applicant’s religious commitments in order to assess her likelihood of engaging in prohibited activities upon her return and thus triggering persecution. But under this logic the ultimate goal is to anticipate the perceptions of the persecutor, rather than to directly judge religious sincerity.¹⁷⁹

In *United States v. Bastanipour*,¹⁸⁰ the asylum-seeker said that he had converted from Islam to Christianity in prison in the U.S., and thus feared execution as an apostate if returned to his native Iran. The Board of Immigration Appeal concluded he was not a genuine convert and rejected his asylum request, basing its reasoning on the fact that he had never been baptized or formally joined a church, and continued to eat pork-free meals.¹⁸¹ The Court of Appeals vacated the decision because the BIA had focused on its own perceptions of genuine Christian conversion rather than asking “what would count as conversion in the eyes of an Iranian religious judge, which is the only thing that would count so far as the danger to Bastanipour is concerned.”¹⁸² Samahon has called this approach “apostasy analysis”¹⁸³ because it directs the adjudicator to decide whether an Iranian religious judge would be likely to convict the asylum-seeker of apostasy. I would broaden the concept and re-label this approach the “eyes of the persecutor” test, because it is applicable beyond the Iranian context.

The eyes of the persecutor test guides credibility assessment in two critical ways. First, it keeps refugee status determination focused on the actual criteria for refugee status, and on the critical question of whether an asylum-seeker is at genuine risk of persecution. The second important contribution of the eyes of the persecutor test is that it redirects the essential credibility assessment toward observable and objective factors, which is more comfortable ground for adjudication. Agents of persecution are no more capable than

¹⁷⁶ *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

¹⁷⁷ *Patrick Francis Ward v. Attorney General of Canada* [1993] 2 S.C.R. 689, 747.

¹⁷⁸ UNHCR, *supra* note 40, at para. 9.

¹⁷⁹ *Najafi v. INS*, 104 F.3d 943, 949 (“Certainly true conversion does matter in one sense. If one is a believer in a religious faith, one would presumably wish to practice that faith. Religious adherence could take the form of attending services, meeting with others of the same faith, personal prayer, or openly sharing one’s belief, to name a few examples. If any activity necessary to a convert could trigger persecution in Iran, such a practice should be brought to the attention of the immigration judge. To evaluate the relevance of this practice to the life of the alien, the immigration judge should be satisfied with the sincerity of the alien’s new religious commitment.”)

¹⁸⁰ 980 F. 2d 1129 (1992).

¹⁸¹ *Id.* at 1132.

¹⁸² *Id.*

¹⁸³ Samahon, *supra* note 42, at 2233-2234.

adjudicators of knowing what a person genuinely believes or does not believe.¹⁸⁴ Instead, persecution is triggered by the associations and observable behaviors that lead the agent of persecution to perceive the victim to be a member of the targeted group.

The starting point for this analysis is to develop an understanding of the triggers of persecution that when perceived by the persecutor lead to human rights violations. In *Bastanipour*, the Court of Appeals, noted that apostasy in Islamic law was defined by abandoning Islam,¹⁸⁵ not by sincere adherence to Christianity, so that the trigger of persecution was the public act of publicly renouncing Islam.¹⁸⁶ This made credibility assessment more straightforward because it focused on Bastanipour's public assertions of Christian faith while in the United States, even if it remained possible that he was less than sincere in his Christian faith.¹⁸⁷

In Eritrea, the critical triggers might be attendance at certain churches or Bible study groups. The point is to focus on actions that are objectively observable, and thus to avoid interrogating subjective belief systems. In 29 of the 30 Cairo transcripts, the applicant claimed to be Pentecostal, so genuine belief and the triggers of persecution are somewhat difficult to distinguish. But in one case, the applicant said she had attended a Pentecostal Bible study group with friends and had decided *not* to convert, but was still arrested, tortured and accused of being a Pentecostal. In this case, the interviewer asked 14 questions seeking a narrative description of the arrest, interrogation and detention, but asked no questions seeking a description of the Bible study group, which was the original trigger of persecution. There is certainly no reason why the interviewer needed to inquire further if satisfied with the applicant's account of actual past persecution.¹⁸⁸ However, as an example, it would have been possible in this case to further test the credibility of the actions (attending Pentecostal Bible study) that provoked religious persecution even though the applicant did not claim to be a genuine Pentecostal.

The eyes of persecutor test should not allow a person to win asylum through a simple declaration. Credibility assessment is still essential, but it should be redirected toward testing whether the applicant can provide a detailed and coherent account of concrete actions and events that trigger a risk of persecution. Just as in non-religious refugee cases, credibility assessment should focus primarily on the applicant's ability to put forward facts about her life. Questioning can and should be extensive, and it should require an unusually gifted storyteller to successfully provide a detailed and coherent account by invention.

e) Narrative focus

Since the agent of persecution cannot know an asylum-seeker's genuine beliefs, we also do not need to attempt to inquire about them. If an applicant says, "God sacrificed his only son," the RSD adjudicator should note it but should draw no conclusions. It is a subjective statement of faith that could be uttered by a believer or a clever non-believer.

¹⁸⁴ *Bastanipour*, 980 F.2d at 1132 ("Whether Bastanipour believes the tenets of Christianity in his heart of hearts ... would not, we imagine, matter to an Iranian religious judge.").

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ The applicant was subsequently recognized as a refugee

Instead, the adjudicator should focus on what observable factors trigger persecution, such as actual attendance at church. If an applicant says, “I went to church on Sunday,” then she has made a statement of fact analogous to “I was in prison.” It would matter little why an Eritrean a person went to church – for belief, for curiosity, for business connections, to find a spouse. What matters is the impact this outward behavior would have on the motivations of the Eritrean government, the agent of persecution. The credibility of the asserted fact can be assessed much like a claim of having been in prison. Can the applicant describe the church and its functioning in detail, and with consistency? This is the critical issue.

Narrative questions offer three key advantages over theology and belief questions.

First, narrative questions allow for different individual experiences, and do not prejudge what a genuine refugee would know or believe. Because they focus on personal experience, narrative questions do not contain a bias in favor of educated people, which is a weakness of religious knowledge questions, as we have seen.

Second, personal narrative in the context of refugee status determination is more readily assessed based on standard credibility criteria. If an applicant says, “God commands us to pray on the Sabbath,” all an adjudicator can attempt to discern is whether the applicant sincerely believes the statement to be true, and as we have seen it may be impossible to even assess this. Narrative questions avoid these traps because they focus on assertions that are concrete and objective. Credibility assessment is thus a decision about whether to accept the assertion as true, which is a more straightforward inquiry. If a person says, “I went to church on Sunday,” the adjudicator need only decide whether to believe, for the sake of RSD, that the person was in fact present in church as claimed. The adjudicator need not judge the validity or value of going to church, nor the person’s subjective motivation for doing so. Interview questions can thus ask for descriptions of the church and its programs. Judging the credibility of the answers is not necessarily easy, especially if there is no independent information about the church. But this challenge is far more routine, similar to assessing credibility of narrative descriptions of prison or other common events in refugee narratives. It thus avoids the particular pitfalls of religious credibility assessment, and allows adjudicators to rely on standard guidance about how to assess credibility.

Of the questions asked about religious persecution in the Cairo transcripts that I analyzed, 66 percent were narrative in orientation.¹⁸⁹ The majority of the narrative questions – 451 out of 759 – were about the applicant’s religious experience and activities. But these questions did not probe internal beliefs. Instead, they focused on chronology and concrete activities that formed the applicant’s religious history, for instance covering how they first encountered Pentecostalism, and their activities in particular churches or Bible study groups. Most of the others (281 out of 759) were about the applicants’ direct experience of persecution, covering threats, harassment, arrests, detention, interrogation and mistreatment and similar abuses resulted from their religious associations.

The tendency at UNHCR-Cairo to focus more of the narrative questions, and specifically on religious experience, corresponds to UNHCR Guidelines, which advise:

Experience has shown that it is useful to resort to a narrative form of questioning, including through open-ended questions allowing the claimant to explain the personal significance of the religion to him or her, the practices he or she has engaged in (or has avoided engaging in out of a fear of

¹⁸⁹ 759 of 1144 questions.

persecution), or any other factors relevant to the reasons for his or her fear of being persecuted. Information may be elicited about the individual's religious experiences, such as asking him or her to describe in detail how he or she adopted the religion, the place and manner of worship, or the rituals engaged in, the significance of the religion to the person, or the values he or she believes the religion espouses.¹⁹⁰

This is a sensible approach in a case where an applicant has not been persecuted before but claims to participate in religious activities that would put her at risk. In such cases, the success of the refugee claim should depend on the applicant's ability to describe in compelling detail the nature of those activities.

However, given this underlying logic, it is somewhat surprising that in Cairo RSD interviewers asked few questions about applicants' religious practices in Egypt. In my study of RSD interviews in Egypt, I found that UNHCR interviewers rarely asked about Eritrean applicants' religious practice abroad. Only 27 out of 759 narrative questions asked information about religious practice in Egypt, and in 20 of 30 transcripts there were no questions about religious practice in Egypt. As we have seen, religious practice in exile has been a significant focus of cases in other jurisdictions dealing with religious credibility, and offers the potential advantage of local witnesses who can corroborate the testimony. Religious practice in exile may not be directly a trigger of persecution, but it is at least some clue as to the likelihood that the applicant if returned to Eritrea would engage in similar behavior which would trigger persecution.

Inquiring about religious practice abroad does offer some advantages. First, unlike most central issues in RSD, anything that occurs in the country of asylum should be subject to additional evidence, including locally available witnesses, giving adjudicators more independent evidence on which to rely. Second, if an applicant has claimed to be devout and then makes no effort in the asylum state to practice her religion, legitimate credibility doubts are raised. But if a poor liar would claim to be religious and then never attend church, couldn't a smarter one do so just to win asylum? In one case, a Canadian adjudicator refused to give an asylum seeker credit for knowing that Mary was the mother of Jesus and that bread and wine represent the body and blood of Christ during Communion, because

I suspect that the majority of the adult world knows that or heard of that. ... The fact that the bread and wine is related to Christ's body is well known. Just because the claimant was able to give that much information does not necessarily mean that he is a baptized Christian.¹⁹¹

But in another Canadian case concerning an alleged Jehovah's Witness, a decision-maker considered it a negative factor that the applicant could not provide specific Bible references for his beliefs because, according to the adjudicator, Jehovah's Witness theology places great stress on scripture.¹⁹²

¹⁹⁰ UNHCR, *supra*, note 40, at ¶ 29.

¹⁹¹ Canadian Immigration and Refugee Board, File/Dossier AA3-00823 (February 10, 2005).

¹⁹² Canadian Immigration and Refugee Board, File/Dossier CA0-00119 (November 21, 2001).

f) Open v. closed questions

One of the key distinctions in refugee interviewing techniques is the difference between open questions and closed questions. As a UNHCR training manual explains, An open question is one that asks for general information and cannot be answered by ‘yes’ or ‘no.’ ... By using open questions, the interviewer provides the applicant the opportunity to relate events in his or her own way.¹⁹³

By contrast, closed questions can and usually must be answered by either a ‘yes’ or ‘no,’ or with a very specific piece of data. The following chart illustrates how open and closed questions can be framed regarding the same subject matter:

Open Questions	Closed Questions
What did you do after high school? What do you remember most about your college education?	Did you go to college after high school? What did you study in college? For what years were you enrolled?

UNHCR’s training manual on RSD interviewing techniques was published in 1995, and a new version is due.¹⁹⁴ The 1995 versions casts some disfavor on open questions:

Open questions can be time-consuming. If the applicant is nervous, emotionally upset or has misunderstood the type of information you are seeking he or she may become confused and talk at length about irrelevant details. If this occurs the interviewer must gain control of the interview by politely intervening and changing the line of questioning.¹⁹⁵

More recent UNHCR guidance, and specifically the guidelines on religious-based refugee claims, places substantial reliance on open questions.¹⁹⁶ Yet the tendency in Cairo was to use closed questions far more. Of the 1144 interview questions that I analyzed from UNHCR-Cairo cases, 39 percent¹⁹⁷ were open, while 61 percent¹⁹⁸ were closed.¹⁹⁹

¹⁹³ UNHCR, *RLD4 – Interviewing Applicants for Refugee Status* 13, available at <http://www.unhcr.org/refworld/docid/3ccea3304.html>, last accessed 4 May 2009.

¹⁹⁴ UNHCR, Refworld (Online), <http://www.unhcr.org/refworld/docid/3ccea3304.html> (last accessed 4 May 2009) (“Comments: RLD1, RLD2, RLD3, and RLD5 have been updated and re-issues as “Self-Study Modules.” RLD4 will be re-issued in due course.”).

¹⁹⁵ UNHCR, *RLD4 – Interviewing Applicants for Refugee Status* 13, available at <http://www.unhcr.org/refworld/docid/3ccea3304.html>, last accessed 4 May 2009.

¹⁹⁶ UNHCR, *supra*, note 40, at para. 29.

¹⁹⁷ 449 of 1144 questions.

¹⁹⁸ 695 of 1144 questions.

It is important to address the concerns that use of more open questions can make interviews longer, and can lead the interview to go off topic. RSD interviewing when done properly is always time-consuming, and fair RSD requires considerable time. Using general open-ended questions only is potentially problematic because it may not produce adequate detail. For instance, in one Cairo interview the officer asked nearly only general open questions, and did not give the applicant much guidance about any more specific information that might be required:

Q: Can you tell me more about your religious problems?

A: They closed our church ... They also stopped our programs. Besides I had problems with the military and at college.

Q: What problems did you face at college?

A: That college is inside the camp called Sawa. But it was not only at college but also at the military. Because of my religion, they did not give me my rights and they did not treat me equally. For example, if we were running and I stopped because I was tired, he used to hit me.

-- Transcript 16

In this exchange, the applicant gives little concrete detail that would assist credibility assessment, and the topic jumps from church closures to discrimination in the Eritrean military without adequate exploration of either. Open questions are essential to elicit an applicants' account of his or her own experiences, but if only general open-ended questions are used the interview may still fail to produce the necessary detail and coherent narrative. The 1995 UNHCR training manual warns:

When asking open questions you must also take into account the education level and cultural background of the applicant in order to assess whether he or she is capable of providing clear relevant information in response to your questions.²⁰⁰

Such lack of detail may be a sign of evasiveness resulting from lack of honesty. But it also may simply mean that the applicant did not understand the question, or did not understand the type of information required.²⁰¹

At the same time, over reliance on closed questions requires interviewers to make assumptions in advance about what is important in an applicant's story, and because they are closed these questions necessarily prevent applicants from giving information unless the interviewer asks for it specifically. Consider this series of questions in one of the Cairo

¹⁹⁹ There was variation. In six of thirty cases at least half of the questions were open in form, and in one case 73 percent were open. However, in another case only 11 percent (5 of 47) of the questions were open.

²⁰⁰ UNHCR, *RLD4 – Interviewing Applicants for Refugee Status* 13, available at <http://www.unhcr.org/refworld/docid/3ccea3304.html>, last accessed 4 May 2009.

²⁰¹ For an illustration, see Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMGR. L. J. 367, 394 (2003).

transcripts, where the interviewer attempts to solicit information about the church she attended in Eritrea:

- Q: In which church did you used to go to while you were in Asmara?
 A: Full Gospel.
 Q: Do you know approximately how many believers used to attend the prayers in this church?
 A: Yes, I know that there were many.
 Q: Around?
 A: I can't say in figures. I only know that there were many.
 Q: Around 100, 200, 1000?
 A: I'd say more than 1000, because for worship many people visit the church for worshipping.
 Q: Where is the Full Gospel Church located in Asmara?
 A: In Geza Manda.
 Q: Could you tell me please the names of the pastors of this church?
 A: Ok,
 Q: Ok, tell me.
 A: [Gives the names of five pastors].

-- Transcript 10

No other questions were asked about the church. The interviewer errs in pressing repeatedly for the number of parishioners after the applicant says she does not know, and thus increases the risk that the answer she eventually gives may be simply an attempt to please. But even were this not a problem, the questions all focus on trivial details which could easily be memorized. Because she is asked only for very specific pieces of information, the applicant is deprived of the chance to present her own description of the church, and we do not learn whether she is capable of providing a detailed account of the prayer services which she said she attended. A better line of questioning might have asked her to describe what the church looked like, its weekly or daily schedules, and the nature of its worship programs.

The challenge faced by interviewers in these cases cannot be addressed solely by searching for the proper mix of open and closed questions. It is also important to focus on another variable: general v. specific questions. One of the reasons interviewers may be inclined toward closed questions is that they probe for very specific information, and thus fill in gaps and elicit detail (or lack thereof) which provides a basis for assessing credibility.²⁰² But it is possible to ask open questions that are still very specific.

	OPEN	CLOSED
GENERAL	Can you describe the prayer services at your church?	Who were the pastors at the church?
SPECIFIC	What was the first thing that would normally happen at the	What was the name of the first prayer recited on Sunday?

²⁰² See Kagan, *surpa* note 5, at 385-389.

	beginning of prayer services on Sunday?	
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Specific open questions focus on details, but still give applicants the ability to answer with a range of different type of information. While closed questions can elicit detail, they test a person's ability to provide only one type of data, and may be founded on false assumptions about what information would be significant enough to a genuine applicant for her to be able to recall it accurately. They may still be useful, but they should generally play a supporting role in an interview. As Juliet Cohen explains in a study of the cognitive aspects of asylum-seeker testimony, human memory does not function in such a standardized manner; people tend to remember the details that have some subjective importance to them.²⁰³ Asking a closed question such as "What color were the walls of the room?" allows an applicant to provide only one type of detail, which some people may remember better than others. A better alternative is to ask specific but still open questions with possible follow ups to prompt a person to provide whatever type of sensory detail they can actually recall:

- Can you describe the room?
- What did it look like?
- Do you remember if it had a particular smell?
- Do you remember any sounds that you heard in that room?
- Can you draw a diagram or picture of the room?

This type of question gives genuine applicants more opportunity to provide compelling detail. And if applicants fail to produce any specificity, the fact that they have been given more of an opportunity gives adjudicators a firmer footing on which to consider vagueness to be a negative credibility factor.

5) Toward a more systematic approach

My analysis of RSD interview transcripts from Cairo generally found that in Egypt UNHCR assessed credibility in Eritrean Pentecostal claims by focusing more on narratives than about abstract matters of faith, with more questions asked about concrete actions or events of the past than about personal religious knowledge, practice or belief. Yet, while there was a general tendency to focus on narrative, and it is difficult looking both at the cumulative data and at individual transcripts to find any uniform approach to credibility because there was noticeable variability from one interview to the next. Many interviews focused little on religious knowledge and beliefs, but in a significant minority of cases religious sincerity-focused questions were numerous and appeared to carry significant weight.²⁰⁴ I would hypothesize that such variability is likely to produce inconsistency in results.

²⁰³ Julie Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, 13 INT'L J. REFUGEE L. 293, 295 (2001).

²⁰⁴ In seven cases there were five or fewer questions about religious beliefs or knowledge, but in an equal number there were more than 15 questions asked about religious beliefs or knowledge, and it is in this

The specific form of the questions posed a different problem. Because UNHCR eligibility officers generally asked few open questions, the value of focusing on narrative was undermined. An applicant going into such an interview would be unlikely to have much opportunity to take the initiative in describing the events she believes to be most important. She would instead need to be able to provide the specific data requested based on the interviewer's assumptions about what she *should* remember, rather than what she actually does remember. This can be a reliable means of credibility assessment only if the assumptions are themselves empirically correct for all truthful applicants. If the assumption about what a truthful applicant would remember is wrong even for a minority of genuine refugees, there will be an increased risk of errant rejection of people in danger of persecution.

From my analysis, I would hypothesize that in order to have a high chance of being considered credible with the approach used by UNHCR-Cairo in 2007-2008, an Eritrean Pentecostal asylum-seeker would need to be skilled at answering very focused closed questions about her experiences in Eritrea and should also be able if called upon to provide a recitation of her religious beliefs with chapter and verse Bible citations to support them. Yet it is possible that she might not be asked about the Bible at all, or might only be asked a few questions about her experiences in Eritrea. If she performs better on one type of question than another, it is unclear how the relative strengths and weaknesses of her answers would have been judged, just as it is difficult to discern why the approaches used in different interviews vary so much from each other.

I would argue that the different types of questions used in the Cairo interviews are all potentially useful in certain circumstances, with the exception of questions that appear to contest or debate applicants' asserted religious faith. These incidents remind us that in religious cases it is essential that refugee status determination steer clear of invasive questions that could be seen as themselves violations of religious freedom. But while in general each question might be useful in certain circumstances, there must be a more systematic effort to define why a particular question is relevant in a particular case, and to use it appropriately. There is little guidance about how to do this, and what it means when an interview departs from this norm. What is needed, as Herlihy argues cogently,²⁰⁵ are yardsticks by which to assess different approaches to credibility assessment, and greater awareness of the logical steps adjudicators take on their way to reaching credibility decisions. While there is general agreement that refugee status determination cannot adjudicate matters of theology, there is much less agreement about how to meet the challenges posed by the religious imposter problem.

The best place to start would appear to be the refugee definition itself, which is the foundation of the eyes of the persecutor approach. The core question in refugee status determination must ultimately be about what triggers persecution. Credibility assessment should start, therefore, with providing applicants an opportunity to explain the experiences that make them feel at risk, typically through use of mainly open questions, combined with country of origin information that explains the behavior of the persecutor. This approach will normally begin and sometimes end with narrative questions only. It should assume that persecutors are no more capable than asylum adjudicators at looking into men's hearts. Instead, the focus must be on the observable risk factors that raise the chances of persecution.

group that the most contentious exchanges about matters of faith between asylum-seekers and UN refugee eligibility officers.

²⁰⁵ Herlihy et al, *supra* note 50.

Questions about religious knowledge and beliefs could still be useful sometimes, but they should be used as supplements only when factors in the narrative make them relevant. If an applicant says she engaged in years of Bible study, it is reasonable to follow up by asking her to what she studied and to replicate some of what she learned. But here, too, an open questioning approach can be used, letting the applicant volunteer knowledge rather than testing an ability to recall specific citations by rote. One should not assume that people who attend intensive Bible study necessarily recall every topic perfectly, just as lawyers do not always recall every case and rule that they read in law school.

The underlying point is to understand the purpose and logic of every question in an RSD interview. Narrative questions should produce an assertion by the applicant that she participated in Bible study, an observable, concrete behavior that could trigger persecution by the Eritrean government. The credibility of this assertion should be tested mainly by further narrative questions pressing for additional details about the way the Bible study program operated. When and where did it meet? How were the meetings organized? It might be useful to ask, briefly, about the knowledge learned during such study groups, but it is essential to see this line of questioning in its context. The only purpose for inquiring about religious knowledge in such a case is to test the credibility of a claim to have engaged in an observable activity that has significance in the eyes of the persecutor. Refugee status determination should not ultimately be concerned about whether the applicant was sincere in her Bible study.²⁰⁶ It is possible to test the credibility of a claim to have gone to such meetings without testing religious knowledge at all,²⁰⁷ just as one can test the credibility of the claim to have been in prison by asking for detail and looking for consistency.

Traditions of judicial deference toward first instance decision-makers have slowed the development of more systematic approaches to meet this challenge. In this and other aspects of refugee credibility assessment it is essential that UNHCR and scholarly analysis continue to come forward in order to fill a gap in standards in decisions with grave consequences for refugees. It would be useful to expand this research to analyze the type of questions asked in RSD cases along with the subsequent analysis and judgment reached. It would also be useful to test whether the type of questions asked correlates to certain results. For example, I could hypothesize (but I cannot yet prove) that a higher proportion of closed questions in an RSD interview would correlate to a higher chance that the refugee claim will be rejected. This hypothesis could be tested statistically given a large enough sample of cases, and if proven it would help to refine both training and standard-setting about what constitutes a fair interview in the RSD context.

²⁰⁶ For a flawed example of a tribunal focusing correctly on the risk of persecution but rejecting credibility based on a supposition about how a recent Christian convert would behave, see REFUGEE APPEAL NO. 70721/97 (New Zealand Refugee Status Appeals Authority 1998) at 9 (Accepting credibility of conversion, but doubting risk of persecution because “It is implausible that the appellant would specifically telephone his sister to tell her about his conversion, knowing that she was the kind of person who would discuss this information with others even outside her family, and knowing also that in such event the family would suffer great embarrassment and even be placed in great peril.”).

²⁰⁷ Canadian Immigration and Refugee Board, File/Dossier MA0-02843 (January 3, 2002) (In a decision regarding a Nigerian member of a Christian organization who said he had been attacked by Muslims for opposing Islamic law, an adjudicator rejected credibility but without any focus on religious belief directly. The reasoning focused instead on the applicant’s unexplained inability to provide details about the town where he said he had lived and about the Christian community to which he said he belonged.)

Even where the legal basis of an asylum claim is simple, and perhaps especially where it is simple, the evidentiary challenges of refugee status determination are complex. It is easy to say “I am a believer in a persecuted faith,” but so long as refugee status remains a precious exception to the general norms of migration law it is essential for states that winning refugee protection not be quite so easy. But assessing the credibility of such assertions in a way that will be fair, reliable and not offensive to religious freedom is a difficult balancing act. In this effort, it is imperative that adjudicators remember that human rights norms aim ultimately to shield religious faith from official scrutiny. Our goal, as best as possible, should be to keep scrutiny focused on the persecutors, which is in the end the primary concern of refugee law.