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## Affective Border Regimes

### Fear, Compassion and Truth in Asylum Adjudication in Ireland – Truth and the Politics of Border Crossing

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»What's the panic button for?« I asked Tomás,<sup>1</sup> a supervisor who had been assigned by the Office of Refugee Applications (ORAC) to give me a tour of its new facilities in Dublin. I gestured to a big red button on the white-washed, cinder-block wall of a small interview room. »We've had asylum seekers hide razor blades in their mouths and threaten to harm themselves if it looks like their case is not going well« he replied evenly, holding my gaze as if to see how I received this piece of information. As Tomás shuffled me out of the interview room and into his office, I could not help but speculate upon the torrent of affect that must saturate its generic walls – desperation, despair, violence, suffering and fear on the part of asylum seekers; compassion, skepticism, hostility and, importantly, anxiety on the part of caseworkers – one traumatic interview after another.

This essay examines what Coutin has called »the promise yet limitations of legal rights« as a means to illuminate the ways in which the political subjectivity of asylum seekers may be constrained by the liberal and humanitarian systems that were designed to afford them protection.<sup>2</sup> At the heart of this conundrum is the tension described long ago by Arendt between the notions of asylum as the intrinsic right of a person suffering persecution versus asylum as a benefit which is given at the discretion of nation-state governments.<sup>3</sup> Suffering is key here, and the meaning of the role of suffering in claims-making upon states has been the focus of much anthropological scholarship of late, including that of Ticktin who asks how particular performances and narrations reconfigure suffering and whether the exchange of suffering in return for being allowed to cross borders detracts from a sense of full personhood?<sup>4</sup> Despite its primacy as the *sine qua non* of a »genuine« asylum claim schol-

1 All names used are pseudonyms.

2 Susan Bibler Coutin, *The Oppressed, the Suspect, and the Citizen: Subjectivity in Competing Accounts of Political Violence*, in: *Law and Social Inquiry* 26 (2001) 1, pp. 63–94, here p. 67.

3 Hannah Arendt, *The Origins of Totalitarianism*, New York 1976, p. 279; Coutin, *The Oppressed*, p. 72.

4 Miriam Ticktin, *Where Ethics and Politics Meet: The Violence of Humanitarianism in France*, in: *American Ethnologist* 33 (2006) 1, pp. 33–49, here p. 25. See also Jean Comaroff, *Beyond Bare Life: AIDS, (Bio)Politics, and the Neoliberal Order*, in: *Public Culture* 19 (2007), pp. 197–219; Didier Fassin/Estelle d'Halluin, *Critical Evidence: The Politics of Trauma in French Asylum Policies*, in: *Ethos* 35 (2007) 3, pp. 300–329; Sarah S. Willen, *Darfur through a Shoah Lens: Sudanese Asylum Seekers, Unruly Biopolitical Dramas, and the Politics of Humanitarian Compassion in Israel*, in: Byron Good/Mary-Jo Del Vecchio Good/Sarah S. Willen/Michael J. Fischer (eds.), *A Reader in Medical Anthropology: Theoretical Trajectories, Emergent Realities*, Malden, MA (in press).

ars have begun to argue that suffering has lost some of its currency and now lacks the moral gravitas that would compel liberal states to care about the trauma-based claims of its border-crossers.<sup>5</sup> The shifting moral valence of suffering has heightened the difficulties facing those who must deploy it in order to make claims upon the state.

In the European and Irish contexts, anxieties about citizen/non-citizen distinctions in the aftermath of neo-liberal restructuring processes have led to the emergence of new configurations of inclusion and exclusion. Animated via highly moralized imaginaries that accompany the ubiquitous spectre of the »illegal« or »bogus refugee«, these new configurations are evidenced by a surge in asylum refusal rates, as states retreat from an ethos of refugee protection towards one that privileges increasingly securitized borders.<sup>6</sup> This essay tries to excavate these socio-political processes of »illegalization« by examining how such imaginaries are linked to the bureaucratic and juridical practice of asylum decision-making, most visibly through the stringent management of asylum seekers' verbal evidence and narrativity.<sup>7</sup> Probing the ways in which truth-telling and truthfulness are produced and administered within asylum regimes helps us to understand not simply how the political subjectivity of border-crossers may be distorted when states attempt to recognize them solely through the »lens of suffering«<sup>8</sup>, but also to assess the various ways in which becoming a country of destination for thousands of asylum seekers has impacted Ireland's principled commitment to the modernist project of asylum protection.<sup>9</sup>

5 Jean-Luc Nancy, *The Sense of the World*, Minneapolis 1997, p. 149.

6 Didier Fassin/Estelle d'Halluin, *The Truth from the Body: Medical Certificates as Ultimate Evidence for Asylum Seekers*, in: *American Anthropologist* 107 (2005) 4, pp. 597–608. For a more detailed discussion of the ongoing delegitimization of asylum, see for example Didier Bigo, *Protection: Security, territory and population*, in: Jef Huysman/Andrew Dobson/Raia Prokhovnik (eds.), *The Politics of Protection: Sites of Insecurity and Political Agency*, London/New York 2006; Peter Nyers, *Abject Cosmopolitanism: the politics of protection in the anti-deportation movement*, in: *Third World Quarterly* 24 (2003) 6, pp. 1069–1093; Raffaella Puggioni, *Resisting Sovereign Power: camps in-between exception and dissent*, in: Huysman et al., *Politics of Protection*, pp. 68–84.

7 Nicholas P. De Genova, *Migrant »Illegality« and Deportability in Everyday Life*, in: *Annual Review of Anthropology* 31 (2002), S. 419–47, here p. 419; Liisa Malkki, *The Politics of Trauma and Asylum: Universals and their Effects*, in: *Ethos* 35 (2007) 3, S. 336–343, here p. 338.

8 Erica C. James, *The Political Economy of »Trauma« in Haiti in the Democratic Era of Insecurity*, in: *Culture, Medicine and Psychiatry* 28 (2004), pp. 127–149, here p. 132.

9 UNHCR's 2009 annual report indicates that there are 16 million refugees worldwide with South Africa (207.000) being the largest single recipient of individual claims in 2008, followed by the United States (49.600 – UNHCR estimate), France (35.400) and Sudan (35.100). While this represents a slight drop from 2007 figures, UNHCR estimates the number of asylum seekers making individual claims rose by 28% to 839.000. Conflict appears to be a major factor, as the primary countries of origin include Afghanistan (2.8 million), Iraq (1.9 million), Somalia (561.000), Sudan (419.000), Colombia (374.000) and D.R. Congo (368.000). While developing countries (e.g., Pakistan, Syria, Iran and Chad) continue to host 80 percent of all refugees, over the past three decades, Europe has witnessed a twenty-fold increase in the numbers of asylum seekers arriving in what is now the European Union. In the 1970s, approximately 15.000 asylees arrived each year; today, that number is closer to 300.000 per year (Timothy J. Hatton, *Seeking asylum in Europe*, in: *Economic Policy*, April 2004). Asylee arrivals in Europe increased continuously after 1989, with the UK, France and Germany receiving the bulk of the applicants. Beginning in the 1990s Ireland became a receiving country for the first time and explanations for why asylum seekers began to choose Ireland typically link these arrivals to the emergence of

Within the asylum adjudicative procedure, truth is understood to unfold objectively through a process of successive discovery. To be found credible, asylum seekers' fear-based narratives must adhere to subjective criteria such as ›internal consistency‹, ›external credibility‹ and overall ›plausibility‹. Asylees must also – as UNHCR itself puts it – ›bear a considerable burden in relation to the standard of proof required to ›create in the judge the ›intime conviction‹ that their allegations are truthful (UNHCR 1998).<sup>10</sup> However, while caseworkers' subjective assessments of these unwieldy criteria are benchmarked by UNHCR guidelines, the recent surge in Ireland's asylum refusal rates accompanied by the government's vehement discourse concerning asylee ›bogusness‹, suggests that establishing *intime convictions* of asylee fear and truthfulness has become exponentially more difficult.

In addressing this question of why individuals' narratives are treated with such suspicion at this particular political moment, I am concerned to illustrate how the legal evaluation of narratives and other evidence as credible is easily translated into a moral evaluation of individual asylum seekers, rendering them perpetually discreditable subjects. I argue below that much of this translation process involves the interplay of contradictory affects such as fear and compassion.<sup>11</sup> Throughout the adjudication process – as asylees exchange fear-based narratives of suffering for political protection – Irish asylum caseworkers find themselves embroiled in a moral economy wherein *their* affective promptings (doubt, anxiety, hostility, etc.) must be negotiated alongside their compassion for a suffering Other. As the red panic button suggests, bureaucratic parsing of fear – the cornerstone of refugee protection legislation – is much more complicated than the legal definition provided by the 1951 Geneva Convention might have anticipated.

As part of this latter question, this essay will discuss the emotional dynamics of asylum presence in Ireland. I approach this issue through a combination of ethnography (interviews conducted with rejected asylum seekers and refugee support workers, and archival material such as public statements by asylum judges and ORAC officials), and an analysis of the evidentiary assumptions concerning fear and truth in the adjudicative procedure. I consider how contradictory affect, such as doubt, fear and compassion, may impact the evaluation of evidence and notions of asylee credibility at two key procedural moments in the adjudica-

a boom period in Ireland's economy during this time. Obviously, the dramatic improvement in the Irish economy created particular labour market dynamics which are important factors in the demographic shifts under discussion here. However, the Irish government has also suggested that its *jus solis* citizenship regime, which until 2004 awarded citizenship to anyone born in the territory of the state, was a pull factor, as was its comparatively generous welfare system (see Anwen Tormey, ›Everyone With Eyes Can See The Problem‹: Moral Citizens And The Space Of Irish Nationhood, in: *International Migration* 45 (2007) 3, pp. 69–100). Other less prominent considerations include Ireland's history of missionary presence in Africa. Several asylees expressed to me their sense of connectedness to parts of rural Ireland because of a relationship to an Irish missionary priest or nun in their home country.

10 UNHCR Guidelines: Note on Burden and Standard of Proof in Refugee Claims, 1998, §3: <http://www.unhcr.org/refworld/docid/3ae6b3338.html> (Date accessed December 21, 2009).

11 James A. Sweeney, Credibility, Proof and Refugee Law, in: *International Journal of Refugee Law* 21 (2009) 4, pp. 700–726. Note: Sweeney's work is based on UK law but this point is supported in the case of Ireland, see Siobhán Mullally, Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determinations, Dublin 2001; idem, Too Fast to be Safe? Regular/Irregular Asylum Determination Procedures, in: Ursula Fraser/Colin Harvey (eds.), *Sanctuary in Ireland: Perspectives on Asylum Law and Policy*, Dublin 2003, pp. 146–167.

tion process: (1) the standard of proof and (2) the notion of ›well-founded‹ fear. I show how seemingly objective procedural criteria and legal safeguards embraced at the level of institutions are oftentimes undermined *in practice* at the moment when individual asylees must convince individual caseworkers of the truth of their fear-based claims.<sup>12</sup>

The affective and moral geographies implicit in the state's assumptions concerning truth and credibility are revealed through my examination of ORAC's rejection of a well-known asylum case on the grounds that the claimant, Mrs. Pamela Izevbekhai (pron. *Izzy way ee*), failed to prove that her *future* fears for her daughters were credible. Mrs. Izevbekhai claimed asylum in 2005 on the basis of her fear that her daughters would be subjected to Female Genital Cutting (FGC) should the family be returned to Nigeria. Her case generated intense support among prominent members of her adoptive community in Sligo and also at the highest level in Irish political circles. However, she also attracted hostile reactions from members of the Irish and Nigerian publics, culminating most recently, in threats to her and her solicitors.<sup>13</sup>

The threats refract a complicated miasma of racist, xenophobic and exclusionary impulses which have to do with a range of factors: the suddenness with which Ireland became a country of destination for proportionately high numbers of asylum seekers, the complicated entailments of Ireland's Celtic Tiger boom which enriched sections of Irish society but ultimately led to an ›acute awareness of how the majority of the population have fallen behind‹, and the pervasive governmental discourse I describe below concerning the purposive deception implicit in ›bogus‹ asylum claims.<sup>14</sup> These overwhelmingly negative associations generate residual affect that works in unpredictable ways in the context of media pressure and political lobbying in high-profile cases, such as Pamela Izevbekhai's. While much of this lobbying was extremely negative, a significant proportion was positive: It argued along the lines of the highly-visible anti-FGC campaigns funded by human rights interest groups, that FGC is a barbaric cultural practice that is misogynistic and repugnant and that, as such, its victims deserved the right to sanctuary in Ireland. Thus, while I focus here primarily on the lack of legislative clarity in asylum-related evidentiary procedures and the under-scrutinized effects of affect in this bureaucratic/judicial domain, I am also concerned to note an emerging corollary: The tendency for sympathetic citizens to retreat to a logic of compassion, or affect-driven humanitarianism, when legal and rights-based arguments fail as they did in this case. This convergence of humanitarian politics with techniques of sovereign statecraft such as border control and immigration legislation requires our careful attention, I suggest, because sentimental politics are notoriously fickle. While the generalized figure of the asylum seeker may be viewed as in need of protection and thus as an object of pity or compassion, it can also quickly become an object of disgust, outrage and repugnance. As the Izevbekhai family lost one court hearing after another, unsympathetic members of the public called for their immediate deportation. Her supporters, on the other hand, called upon

12 The state of individuality is crucial here because the category of ›suffering strangers‹ as *generalizable* subjects has a recognizable moral superiority that is somehow less vulnerable to doubt. In contrast, as Malkki notes, ›the *particularity of a single person's* stories and claims is suspect‹, Malkki, *The Politics of Trauma and Asylum*, p. 337; emphasis added.

13 Maeve Sheehan, Postcard ›threat‹ leads to Pamela going solo on case: Judge criticises Izevbekhai legal team for dropping deportation case after receiving mail from Spain, in: *Irish Independent*, Nov 8, 2009; <http://www.independent.ie/national-news/courts/postcard-threat-leads-to-pamela-going-solo-on-case-1937059.html> (Date accessed: December 18, 2009).

14 Kieran Allen, *The Celtic Tiger: The Myth of Social Partnership in Ireland*, Manchester 2000, p. 34.

the government to grant them asylum. Their pleas were based, not on the legal or procedural hurdles of their case, but instead on an unabashedly sentimental politics that argued for sympathy and compassion as the moral duty of nation-states in such cases. My point here is that beyond the kinds of culturally mediated expressions of liberal outrage that accompany cases of FGC in the West, calls for compassion on this basis become inadvertently complicit in perpetuating an adjudicative regime rather than critically engaging its systemic failures and deafnesses. In addition to failing to deflect the government's rhetoric of bogusness or to illustrate the shortcomings of the decision-making process itself, these periodic shifts to a logic of affect run the risk of forsaking a politics of rights secured by transparent, appropriate legislation for one that is precarious and subject to the caprice of the affective political moment.<sup>15</sup> As the experience of individual asylees like Pamela Izevbekhai at the hands of adjudicators, the judiciary, the media, and the Irish public suggests, sometimes this can be a moment of compassion, tolerance and pity, but equally, it can shift to one of presumptive scepticism and hostility.

The systemic shortcomings I point to within the adjudication process are considerable. What I describe here as an oscillation between juridical and affective logics has meant that much of the procedure, policy, and even legislation asylees encounter during the adjudication process, remains under-developed and overly discretionary. Such poorly defined legislative and bureaucratic moments have two potentially damaging outcomes.<sup>16</sup> The first is an undue reliance by decision-makers on the testimony and personal credibility of individual asylees; the second is the corrosive suspicion on the part of those asylees that decision-making rationales are unclear and seemingly arbitrary. It is a perception which fuels despair and desperation and is, in turn, the source of much anxiety on the part of caseworkers.

### FGC and Humanitarian Intervention<sup>17</sup>

Although Pamela's case raises the controversial topic of FGC, it is important to be clear at the outset that I am not engaging here in a debate about the rights or wrongs of the practice *per se*. I am concerned, rather, with the ways in which the strong affect this bodily practice generates in the West is often marshalled into ›humanitarian intervention‹. This is not accidental. As Hernlund and Shell-Duncan's edited volume *Transcultural Bodies* notes, one of the most significant shifts in the global movement to ›eradicate FGM‹ has been a gradual shift from justifying anti-FGC efforts based on medical grounds to one based on human rights arguments.<sup>18</sup>

15 See Ticktin, *Where Ethics and Politics Meet*, p. 36.

16 See Mullally, *Manifestly Unjust*; idem, *Too Fast to be Safe?*; Gregor Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (The Raoul Wallenberg Institute Human Rights Library 16), Leiden/Boston 2005.

17 Female Genital Mutilation/Modification (FGM), and Female Genital Cutting (FGC) are terms used to indicate a bodily practice within which there is enormous variability. It may range from a symbolic nick of the clitoris to a cut in the prepuce to a complete ›smoothing out‹ of the genitals by removing the visible part of the clitoris and the external labia. In some regions such as the Sudan and Somalia, this procedure is often followed by infibulation, a stitching closed of the vaginal opening (Richard Shweder/Martha Minow/Hazel Rose Markus (eds.), *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies*, New York 2000).

18 Ylva Hernlund/Bettina Shell-Duncan (eds.), *Transcultural Bodies: Female Genital Cutting in Global Context*, New Brunswick 2007, p. 5.

Women have predominated within new migrant groups in Ireland and this has increased awareness of the need for gender-specific legal regimes, e.g. gender-aware trafficking and discriminatory legislation. However, the contradictory responses of European legislators in cases of excision that occur in Europe – ranging from acquittal to suspended condemnations to strong condemnation – have not only complicated the blurred limits of liberal tolerance for Other's cultural practices. They brought an affect-laden gaze to bear upon the bodies and cultural practices of asylee women. In such contexts, human rights (e.g., the right to bodily integrity and to be free of ›persecution‹ and ›torture‹) and cultural rights (the right to practice one's traditional culture) end up at two extremes of a classic liberal dilemma: »the desire to protect personal freedom and multiculturalism versus the desire to protect individuals from exploitation and to promote social justice«. <sup>19</sup> The former UN Special Rapporteur on Violence against Women (VAW), Radhika Coomaraswamy, writes that »violence due to customary practices has been the hardest to address because culture comes under attack«. <sup>20</sup> She also notes, however, that the anti-VAW movement has transformed the image of ›Third-World‹ women into one of powerless victims, incapable of self-determination, self-expression, or reasoned decision-making.

Indeed, one of the most persistent critiques levelled at Pamela Izevbehai as she battled the Irish government through the court system was that she did not properly inhabit the figure of suffering Other. As an elite Nigerian businesswoman, she was articulate, outspoken, strong-willed and decisive; in many ways refuting the humanitarian imaginary of the disempowered suffering asylum seeker. Thus, beyond what one might argue are false dichotomies between culture and rights, we must be concerned here with the ways in which humanitarian imaginaries of suffering-subjects collide with the political subjectivity of individual asylum seekers.

The over-heated terms of this debate, its relationship to colonial ›civilizing‹ missions, the intense contemporary focus on this practice by Western interest groups, and under-examined mandates of international agencies such as Amnesty International, Human Rights Watch, UNICEF, USAID, IrishAid etc., demand that we do not merely engage the already-established terms of this debate, but consider as well a guiding question of anthropology:

19 Dembour argues that while universalism and relativism are often presented as two irreconcilable moral positions, they cannot be considered independently of each other and must be considered with a kind of ›pendulum motion‹ which, while unstable, may pursue a moral end but in good awareness of the limitations of any outcomes (Marie-Bénédicte Dembour, *Following the Movement of a Pendulum Between Universalism and Relativism*, in: Jane Cowan/Marie-Bénédicte Dembour/Richard Wilson (eds.), *Culture and Rights: Anthropological Perspectives*, Cambridge 2001, p. 56–79). While the embattled issue of FGC appears to have reached an impasse in tolerant liberal democracies, the role that culture has been forced to assume here is cause for concern. Stolcke, for example, has warned of the new ways in which »the idea of cultural distinctiveness was being endowed with a new divisive force« (Verena Stolcke, *Talking Culture: New Boundaries, New Rhetorics of Exclusion in Europe*, in: *Cultural Anthropology* 36 (1995) 1, pp. 1–13, here: p. 2–3). Holmes has also cautioned us concerning the turn to a culturalist sensibility, that he terms ›integralism,‹ in the context of increasing pluralism across the EU. This sensibility, when taken to extremes (e.g., in the case of France, by Le Pen; in Austria, by Haider), has resulted in cultural nationalism, racism, and a politics of exclusion that locates itself in the discourse of cultural rights (Douglas Holmes, *Integral Europe: Fast-Capitalism, Multiculturalism, and Neofascism*, Princeton 2000).

20 Hernlund/Shell-Duncan, *Transcultural Bodies*, p. 29.



›why and why now? Why, to paraphrase Berlant, are so many Western scholars, NGOs, and governments so obsessed with others' ›offensive‹ intimate practices? What does it enable in ourselves and what might it disable in others? And how are this bodily praxis and the affect it generates linked to the regime of the border?21

## Asylum Recognition and the Work of Bureaucracy

In the early 1990s, when a trickle (39 to be exact) of asylum seekers began to arrive, Irish citizens – and more importantly the civil servants who were to administer their claims – were relatively unfamiliar with the process of asylum.<sup>22</sup> Between 1995 and 2000, approximately 250,000 people migrated to Ireland.<sup>23</sup> Half of these were returning Irish emigrants and 12 % of the remainder originated from outside the EU and the USA, a proportionately high number of ›non-Western‹ migrants which, according to MacÉinrí, had no parallel in other EU countries at the time. During this period, asylum seekers from countries as diverse as Angola, Algeria, Nigeria, the Congo, Somalia, Iran, Iraq, Kenya, Cuba, Pakistan, Sudan, the Former Yugoslavia and Romania began to arrive. Ireland's asylee arrival figures rose from 39 in 1992 to an all-time high of 11,632 in 2002 before declining to 4,700 in 2004.<sup>24</sup> Between 1995 and 2000, over 10,000 asylees were granted asylum. However, by 2001, Ireland's generous recognition rate<sup>25</sup> had slowed dramatically. Of the 7,098 cases adjudicated between 2000 and 2001, only 467 (or 6.6 percent) were positive.<sup>26</sup> Recognition rates have remained quite low, with Nigerians (who have consistently represented the highest single-source group in terms of asylum applications) having on average a proportional recognition rate of less than 1 percent.<sup>27</sup>

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21 Lauren Berlant, *The Subject of True Feeling: Pain, Privacy and Politics*, in: Austin Sarat/Thomas R. Kearns (eds.) *Cultural Pluralism, Identity Politics, and the Law*, Michigan 1999, p. 49–84.

22 Fraser/Harvey, *Sanctuary in Ireland*, p. 1. Ireland, as part of its responsibilities upon signing the 1951 Convention, accepted Programme Refugees from Hungary, from Chile in 1973 and 1974, from Vietnam in 1979, from Iran in 1985, from Bosnia in the early 1990s and Kosova in 1999. As with many countries however, Ireland's protection record is not unblemished. The Irish Government resisted the presence of Jewish refugees before, during and after the Second World War, arguing that they would be inassimilable. For further discussion on racism and closure in asylum policy see, for example, Eilís Ward, *Ireland and refugees/asylum seekers: 1922–1966*, in: Ronit Lentin (ed.), *The Expanding Nation: Towards a Multi-Ethnic Ireland. Proceedings of a Conference Held in Trinity College Dublin (Vol. I)*, Dublin 1998, pp. 41–48; Ronit Lentin/Robbie McVeigh (eds.), *Racism and Anti-racism in Ireland*, Belfast 2002; Bryan Fanning, *Racism and Social Change in the Republic of Ireland*, Manchester/New York 2002.

23 Space does not permit discussion of the related factor of Ireland's economic boom, however for an overview of the impact of the ›Celtic Tiger‹, see among others Steve Garner, *Racism in the Irish Experience*, London 2004; Breda Gray, *Redefining the Nation through Economic Growth and Migration: Changing Rationalities of Governance in the Republic of Ireland?*, in: *Mobilities 1* (2006) 3, pp. 353–372; Ann Marie Hourihane, *She Moves Through the Boom*, Dublin 2000.

24 Piaras MacÉinrí, *Immigration into Ireland: Trends, Policy Responses*, in: *Outlook 2001*, <http://migration.ucc.ie/images/firstirelandreport/chart12.gif> (Date accessed March 19, 2010); Ronit Lentin/Robbie McVeigh (eds.), *After Optimism? Ireland, Racism and Globalisation*, Dublin 2006, p. 41.

25 I. e., legal recognition that an asylee merits refugee or subsidiary protection status.

26 ORAC, 2001 Annual Report Statistics, p. 8.

27 Michael McDowell, *Statement Made by the Minister Regarding the Real Facts about the Asylum and Deportation Systems*. June 7, 2005: (<http://www.inis.gov.ie/en/INIS/pages/PB07000133>)

By the late-1990s, as yearly arrival figures had risen steeply, a small number of Irish civil servants struggled to process and adjudicate these cases. The Department of Justice, Equality and Law Reform (DOJ), whose unenviable task it was, allowed a situation to develop wherein the Refugee Applications Centre (as ORAC was known then) remained understaffed and under-funded for several years. In addition to the adjudication of asylum claims, sourcing housing, education, and health-care for a relatively high number of asylees from diverse countries of origin overwhelmed Ireland's inexperienced civil servant sector, which relied heavily on the growth of a structured NGO sector to assist them.<sup>28</sup> An embarrassing backlog (ca. 10.000 cases by 2000) developed and bureaucratic delays forced asylum applicants to wait in legal limbo, often as long as three years or more, for a decision.<sup>29</sup> This bureaucratic log-jam and the additional suffering it caused to asylees led to public outrage when it was described as a 'refugee crisis' by the national media in 1999.<sup>30</sup>

By November of that year, understaffed caseworkers were so overwhelmed by the numbers of asylees that the Refugee Application Centre closed its doors. The civil servants there went on strike, and union representatives from IMPACT expressed concern about »their safety and that of the refugees using the centre«. The strike resulted in chaotic scenes outside the centre, as asylum seekers queued through the night, viscerally demonstrating, as one newspaper reporter, put it »how the whole application system was in a virtual state of collapse«.<sup>31</sup>

### The Case of Pamela Izevbekhai

March 17th, 2008. It is *Lá Naomh Phádraig* (St. Patrick's Day) and prominent among the expected media coverage of the festivities is a story about the St. Patrick's Day parade in Sligo, a small county on the west coast of Ireland. Two young Nigerian girls are hoisted to shoulder-level by the crowd and cheered along the parade route. Their handsome mother, Pamela, reportedly fights back tears as she watches Naomi (7) and Jemima (5) participate in the parade. In a skillfully mediated moment of pathos, the reporter tells us that when the parade finishes the Izevbekhai family must leave their friends in Sligo for good and travel to the Baleskin Refugee Centre in Dublin to prepare for their deportation back to Nigeria.<sup>32</sup>

(Date accessed April 10, 2010). Refusal rates are extremely high in general. In 2008 only 7.5 % of all adjudications were positive. ORAC, 2008 Annual Report Statistics, p. 62.

28 See Refugee centre closed after call for more staff, in: Irish Times, November 9, 1999: <http://www.irishtimes.com/newspaper/frontpage/1999/1109/99110900003.html> (Date accessed December 21, 2009); Refugees have to stand and wait as the crisis worsens, in Irish Times, November 11, 1999 <http://www.irishtimes.com/newspaper/features/1999/1113/99111300054.html> (Date accessed December 21, 2009) and Another day, another queue, another dose of shabby treatment. Welcome to Ireland?, in: Irish Times, November 13, 1999.

29 DOJ: Statement by the Minister regarding the Real Facts about the Asylum and Deportation Systems, June 2005 ([www.inis.gov.ie/en/INIS/pages/PB07000133](http://www.inis.gov.ie/en/INIS/pages/PB07000133)) (Date accessed March 24, 2009).

30 See for example, Refugee Crisis, in: Irish Times, November 10, 1999, <http://www.irishtimes.com/newspaper/opinion/1999/1110/99111000119.html> (Date accessed December 21, 2009).

31 Ibid.

32 Paddy Clancy, Girls Facing Deportation Cheered through Streets, in: Irish Times, March 2008, <http://www.irishtimes.com/newspaper/ireland/2008/0318/1205706623143.html> (Date accessed December 21, 2009). Breda Heffernan, Hope fades fast as deportation looms, in: Irish Independent, March 19, 2008, <http://www.independent.ie/national-news/hope-fades-fast-as-deportation-looms-1321181.html> (Date accessed December 21, 2009).



Pamela Izevbekhai, with the help of a community-based anti-deportation campaign called ›*Let Them Stay*‹, and the public support of the Mayor of Sligo, Veronica Cawley, had seemingly lost her lengthy battle for asylum in Ireland.

Upon arriving in January 2005, Pamela stated in her asylum questionnaire that her eldest daughter, Elizabeth, had died after undergoing FGC at the insistence of her husband Tony's family. With his agreement and support she determined that her younger daughters would not undergo the procedure. However, Tony's family had allegedly attempted to abduct the girls in order to have it carried out. After moving several times, they believed their daughters would never be safe in Nigeria and so Pamela took the girls and fled the country, leaving a teenage step-son Adrian, (from Tony's previous marriage) and her husband who remained in Nigeria to take care of their business interests.

As a Nigerian claiming asylum in Ireland, Pamela's case was automatically subject to ›accelerated procedures‹, a concept which was created by UNHCR in 1983 and introduced in Ireland as one of a number of efficiency measures following the strike by understaffed asylum caseworkers in 1999. By December 2003, Ireland began to automatically ›fast-track‹ certain claims based on nationality; high-source countries like Nigeria and Romania were two of the first nationalities to be included in this measure. The category of accelerated procedures, was initially intended by UNHCR to be used only in a limited number of cases that were considered to be ›manifestly unfounded‹ (MU); that is, so patently without foundation ›as not to merit full examination at every level of the procedure‹.<sup>33</sup> MU claims were defined by UNHCR as ›clearly fraudulent‹ (e. g., a claimant who persisted in declaring that false travel documents were genuine, or who had ignored internal refuge options in their country of origin). Having one's case sent into accelerated procedures meant that caseworkers could dispense with some of the usual procedural safeguards (such as the right to an oral hearing and unrestricted access to judicial review) allowing for greater efficiency, speed and the ability to promptly deport unsuccessful applicants. UNHCR guidelines suggest that cases must be suspected of or already have failed an initial set of criteria before being sent to accelerated procedures. However, the practice of automatically routing specific nationalities through abbreviated procedures signifies that the state already *presumes* that the credibility of Nigerian and Romanian applicants is compromised. As the head of ORAC himself put it: ›[Nigeria] is a country with a proven record internationally of unjustified applications for asylum status, as is evidenced by the enormous international rejection rate.‹<sup>34</sup> Once lost, applicants face significant difficulties in restoring their credibility. Rather than starting from a ›clean slate‹ when presenting their claim, they are forced to rebut the presumptive scepticism of a caseworker who already suspects they may be ›bogus.‹<sup>35</sup>

Pamela was interviewed by ORAC caseworkers on February 18, 2005 and less than six days later ORAC submitted its decision that neither Pamela nor her daughters should be given refugee status because they had failed to prove their fear of FGC was well-founded. Pamela avoided deportation by going into hiding and the state placed her children in care. After two weeks of intense public speculation about her seeming abandonment of her daughters, she surrendered to the Irish police, was arrested and spent several weeks in

33 Mullally, Manifestly Unjust.

34 DOJ: Statement by the Minister Regarding the Real Facts about the Asylum and Deportation Systems. <http://www.inis.gov.ie/en/INIS/pages/PB07000133> (Date accessed December 21, 2009).

35 Guy Coffey, The Credibility of Credibility Evidence at the Refugee Review Tribunal, in: *International Journal of Refugee Law* 15 (2003), pp. 377–417.

Mountjoy Prison in Dublin before being granted a conditional release pending the outcome of a Judicial Review which her lawyers had managed to obtain for her case. The family was granted a further injunction to stay a second order of deportation while the court examined legal arguments concerning the transparency of the Minister's decision-making process and new evidence relating to assertions by the Irish and Nigerian governments that Pamela's daughters are safe from FGC in Nigeria.<sup>36</sup>

### The Problem of Evidence: Fear, Proof, and Credibility

What is fascinating about the refusal of Izevbekhai's case is that despite initially being subject to accelerated procedures, Pamela's narrative was in fact considered to be credible. Judge Feeney's Opinion in »Izevbekhai & Ors v. Minister for Justice and Law Reform, 2008 [IEHC] 23« makes clear that both ORAC caseworkers and the Refugee Appeals Tribunal (RAT) believed her testimony concerning the death of her daughter Elizabeth following an FGC procedure. Indeed, the Judge made a point of noting that her oral evidence, augmented by a death certificate and an affidavit from an attending physician, Dr. Joseph Unokanjo, was useful. The problem was (and this is the difficulty of applying a well-founded test to asylum claims) that the evidence accepted as credible did not speak directly to the Court's central concern. As it turns out, none of the adjudicators found Pamela's fears regarding the possibility of *future* harm to Naomi and Jemima to be entirely credible. Specifically, while all accepted the truth about her first daughter's death – and the suffering already incurred by the entire family – Pamela could not prove that future harm would come to her other daughters. Judge Feeney expressed it as follows:

*»The applicants' applications for asylum were rejected on the basis that the Tribunal found that on the present evidence that there was no substantiation of the alleged risk to the applicant or of her children when considered objectively. The history was not disbelieved but rather, on a forward looking test, it was deemed that it had not been demonstrated that there was a reasonable degree of likelihood of a well-founded fear of persecution in the future.«<sup>37</sup>*

The Convention definition of a refugee hinges (disconcertingly?) on the affective quality of fear, an emotion that does not lend itself well to narrative form or to the techniques of adjudication employed by caseworkers.<sup>38</sup> Beyond the obvious fact that fear is subjective and culturally specific – »rational« reactions to fearful situations are not easy to adjudicate – Martin et al. point out other difficulties in relation to this cornerstone of asylee protection.<sup>39</sup> How exactly *does* one determine when a fear is well-founded? What constitutes persecution? When is the feared harm sufficiently linked to one of the five grounds listed in the 1951 Convention? What kinds of evidence are necessary to prove the needed facts? In practice, all of these evidentiary questions remain frustratingly imprecise or burdensome given the

36 Izevbekhai & Ors v. Minister for Justice and Law Reform, 2008 [IEHC], 23.

37 Ibid.

38 Jan Blommaert, Investigating narrative inequality: African asylum seekers' stories in Belgium, in: Discourse & Society 12 (2001) 4, pp. 413–449.

39 David A. Martin/T. Alexander Aleinikoff/Hiroshi Motomura/Maryellen Fullerton, Forced Migration: Law and Policy, St. Paul/Minnesota 2007.

circumstances that typically precede asylee flight. This imprecision is a nightmarish space of unknowability for asylees.

In contrast to other areas of law, asylum decisions are, for the most part, less dependent on an objective assessment of legal issues than on their evidentiary claims. Evidence regarding well-founded fear is thus called upon to »perform a bewildering amount of political work«<sup>40</sup> in a legal arena which has, according to Byrne, failed to develop a body of precise evidentiary principles suitable to the unique context of asylum testimonials.<sup>41</sup> The *2003 Immigration Act* sought to augment the *Refugee Act 1996* by detailing provisions on the assessment of credibility including the specific criteria to be adjudicated in this regard. However, as Mullally notes, these provisions include opaque directions such as assessing »whether or not the applicant provided a ›full and true‹ explanation of how she travelled to the state« and an overwhelming focus on the method of arrival, signalling an emphasis on abuse rather than protection. Furthermore, credibility assessments must now take account of actions such as the destruction of identity documents – which traffickers routinely demand. Much, Mullally notes, »will turn here on how the test of reasonableness is applied by adjudicators and the extent to which the benefit of the doubt is given to the applicant«.<sup>42</sup>

In a majority of cases asylees cannot produce documentary corroboration of their claimed trauma, and, in the rare case where documentary evidence is available, it is usually difficult to authenticate or assess in terms of relevance or significance.<sup>43</sup> Generally speaking, an applicant's oral account constitutes the bulk of the evidentiary basis of a claim; again, displacing the burden of proof almost entirely upon the credibility of the testimony and the narrator herself. In the case of the Irish asylum system, Donncha O'Connell, law lecturer and Director of the Irish Council for Civil Liberties, believes that »a culture of disbelief pervades the initial interview process and there is a discernible obsession with undermining the credibility of applicants«.<sup>44</sup>

In a similar vein, Australian High Court Justice Gleeson has written that »[d]ecisions as to credibility are often based upon *matters of impression* and an unfavourable view taken upon an otherwise minor issue may be decisive.«<sup>45</sup> Matters are further compounded by the fact that asylum adjudication is most often triangulated between generalized ›country-of-origin‹ data, the caseworker's ›horizon of expectations‹ (concerning the asylee's reasonability, plausibility, demeanour, etc.), and the particular narrative provided by an asylee herself (plausibility, consistency with independent evidence, etc.)<sup>46</sup>. Translators, interpreters and ›expert evidence‹ such as medical affidavits, mediate evidentiary communications between adjudicators and applicants, though none of these are subject to formal review mechanisms. Coffey – a clinical psychologist by training –, finds that credibility assessments heavily

40 Malkki, *The Politics of Trauma and Asylum*, p. 340.

41 Rosemary Byrne, *Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals*, in: *International Journal of Refugee Law* 19 (2007), p. 609–638.

42 Mullally, *Too Fast to be Safe?*, p. 150–151.

43 See also Noll, *Proof*, 2005.

44 Donncha O'Connell, *The Politics of Immigration and Asylum in Ireland: Justice Delayed or Injustice Expedited?* Paper Presented at Merriman Summer School 2002, Ennistymon, Co. Clare, Ireland, p. 5–6; see also Mullally, *Manifestly Unjust*.

45 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 176 ALR 219, 221 (Gleeson CJ) as cited in: Coffey, *Credibility*, p. 378 (Emphasis added).

46 Noll, *Proof*, 2005.

influence the weighing of other independent forms of evidence regardless of their respective probative value.<sup>47</sup> He has also cautioned adjudicators about over-reliance on credibility evidence:

*»Credibility evidence is both conceptually elusive and adjudicatively influential. It occasions considerable ambivalence. The assessment of credibility evidence is acknowledged as a necessary and unavoidable accompaniment to the weighing of a witness's evidence. Nonetheless, evidence regarding the credibility of parties to criminal and administrative proceedings has been criticized as a vehicle for gender and cultural bias and as unreliable in certain circumstances.«<sup>48</sup>*

### Truth, Likelihood and the Standard of Proof

Much is at stake then as UNHCR-trained low-level civil servants come to act as refugee experts weighing probability against risk; the probability that the asylee standing before them is telling the truth versus the risk to that asylee – and the State's moral standing – if they refuse their claim and return them to a situation of danger in their country of origin. Indeed, the Chair of the Canadian Immigration and Refugee Board (2000) once commented that deciding asylum claims is the one of the most complex adjudication functions in contemporary Western societies because of the necessity for the adjudicator to be competent to evaluate the cultural, social and political circumstances of a range of countries of origin, the fortitude to withstand the psychological toll taken by confronting victims of trauma first hand, the pressure that his/her decision might be fatal to an applicant, and the legal savvy to deal with the subtleties of domestic and international protection mechanisms.<sup>49</sup>

Beyond a well-documented »culture of disbelief«<sup>50</sup> and »refusal mindset«<sup>51</sup> among asylum caseworkers, what is significant about the Refugee Legal Code and UNHCR decision-making guidelines followed by case-workers and judges is a disturbing approach concerning the »knowability« of truth. UNHCR Guidelines direct that: »The burden of proof is discharged by the applicant rendering a truthful account of facts relevant to the claim so that, based on the facts, a proper decision may be reached.«<sup>52</sup> It is hard to imagine how this arguably tautological statement might, in practice, guide one in deciding what is and is not truthful. Indeed, evidentiary law expert William Twining has observed that »fact handling

47 Coffey, *Credibility*, p. 379–80. Variance in decision-making is not confined to asylum adjudication alone. See Conley and O'Barr for an influential study of variation in decision-making among judges. They write: » [I]n fact, judges vary so much with respect to their views of the law, their manner of dispensing justice and the remedies they provide that it becomes difficult to appreciate that they are operating within the same legal system« (John M. Conley/William M. O'Barr, *Fundamentals of Jurisprudence: an Ethnography of Judicial Decision-Making in Informal Courts*, 66 *North Carolina Law Review* 467 1987–1988, 1988, p. 468).

48 Coffey, *Credibility*, p. 377.

49 Cécile Rousseau et al., *The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board*, in: *Journal of Refugee Studies* 15 (2002) 1, p. 43–70.

50 Mullally, *Manifestly Unjust*.

51 Sweeney, *Credibility*.

52 UNHCR Guidelines: *Note on Burden and Standard of Proof in Refugee Claims*, 1998, § 5.

skills are taught less intensively to lawyers than rule handling skills<sup>53</sup> and this, combined with lawyers' propensity to approach facts as »philosophically unproblematic«<sup>54</sup> tends to flatten the epistemological complexity of the nature of truth.

At a more pragmatic level, as UNHCR acknowledges in its 1998 *Note on the Burden of Proof* in asylum cases, there has been no EU-level legislation as to the appropriate evidentiary forms and standard of proof to be applied in asylum cases. The Note provides that: »[w]hatever mechanism may be established for identifying a refugee, the final decision is ultimately made by the adjudicator based on an assessment of the claim put forward by the applicant in order to establish whether or not the individual has established a »well-founded fear of persecution«.<sup>55</sup> So, although it provides guidelines, each nation-state is relatively free to follow its domestic legislation on this point. Without the support of EU-level legislation, UNHCR is forced to resort to an advocacy position, exhorting adjudicators who must weigh evidentiary concerns to keep in mind that the »ultimate objective of refugee status determination is humanitarian« and for this reason caseworkers should not attempt to »identify refugees as a matter of certainty, but as a matter of likelihood«.<sup>56</sup>

It also argues that given the particularities of a refugee's situation, adjudicators share the burden of proof or, »the duty to ascertain and evaluate all the relevant facts.« This involves the adjudicator being familiar with country of origin information, of »relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged which can be substantiated«<sup>57</sup>. James Sweeney, a lawyer who works on credibility issues in the United Kingdom, writes that states need to take more seriously the UNHCR injunction that the burden of proof is *shared* by the State and the applicant. This would mean that the State's role does not begin and end with evaluating an applicant's evidence but that the State itself needs to ascertain »facts«, be familiar with relevant country of origin information and so on.

Unfortunately, ethnographic evidence suggests that while asylum judges may acquire this level of expert knowledge, many lower-level civil servants do not. Maqsood, a Pakistani gentleman who was fleeing a blasphemy indictment, told me about the denial of his claim following an initial interview with a case worker he characterized as hostile:

*»I could see it you see ... he knew nothing about Pakistan ... he knew nothing about my faith, about my religion ... he knew nothing. ... I could just see his ... uh ... body language the moment I was told that he was going to interview me, that day he was having a very, very bad flu and he was not at all well. He shouldn't have come that day I would say. And I could see this in the way he was questioning me – when I came out I told my wife »no, it's not going to work« ... I could see it on him, I could smell him.«<sup>58</sup>*

Human rights lawyers in Ireland have long argued that the notion of »well-founded« standard of proof in asylum claims is unreasonable given the particular circumstances of asylum

53 Sweeney, *Credibility*, p. 725.

54 Anthony Good, *Expert Evidence in Asylum and Human Rights Appeals: An Expert's View*, in: *International Journal of Refugee Law* 16 (2004) 3, p. 358–380, here: p. 377.

55 UNHCR *Guidelines: Note on Burden and Standard of Proof in Refugee Claims*, 1998, § 1.

56 *Ibid.*: § 2, emphasis added.

57 *Ibid.*: § 6.

58 Interview with Maqsood, June 2008.

seekers. Sweeney has written extensively on the concept of credibility, arguing that credibility gets used in a range of descriptive senses with varying legal consequences. He is specifically concerned that what he calls the »threshold for ›being credible« is distinguished by caseworkers from the legal significance of credibility findings.<sup>59</sup> Space does not permit much further elaboration of the legal particularities here but Coffey, Mullally, Noll, and Sweeney are part of a growing number of scholars throughout Europe and Canada who are concerned with the question of unreasonably high, nebulous evidentiary standards and the role that they play in poor quality decision-making by low-level civil servants.

In particular, Sweeney maintains that the introduction of basic concepts from the law of evidence would allow the threshold of credibility to be set lower. Statements that are unsupported (i. e., unproven) but which meet the test of general internal consistency, congruence with known facts, and plausibility can and should be considered when assessing a well-founded fear case even if »the decision maker would not go so far as to say that a [...] statement is probably true«<sup>60</sup>.

If this were the case in practice, the accepted evidence concerning the death of Pamela Izevbekhai's daughter would surely meet this standard sparing the family the anguish (and the state the cost) of numerous hearings and appeals – some 24 at last count. Indeed, given the current evidentiary standards, one could argue that it is an impossible task to demonstrate with certainty that future harm will occur. Or, indeed, that a forward looking fear is ›well-founded‹ in any legal sense that an asylee can produce *as evidence*; beyond her narrative, that is.

### The Politics of Truth or Whose Narrative is it?

Despite these seemingly insurmountable difficulties, asylees and their lawyers – when they have one – are painfully aware of the evidentiary importance of properly narrating a perceptively rational fear for a Western audience. This has important consequences for a caseworker's belief in asylees' truthfulness. As most NGO workers and asylum lawyers can vouch, the majority of asylee women have no evidentiary ›proof‹ of their persecution, other than their narratives. As such, the credibility of those narratives is pivotal to their case and yet, *truth*, it seems, can be surprisingly plastic in legal representation. For particular reasons, such as the need to script a persuasive appeal which falls within the narrow parameters laid out by the 1951 Convention, asylees at times do not, or cannot, really narrate their own story. The question is: is this *untruthful*?

McKinley's experience as a law student working with clients seeking political asylum in the U. S. produces a reflexive account of an ›ineluctably coercive‹ legal context.<sup>61</sup> The process, she claims, of »translating personal experience into a linguistic framework intelligible for judges and practitioners presents insuperable barriers in accommodating the ›truth‹ of narratives with the demands of the legal process«. <sup>62</sup> By the end of the testimony preparation of one Zimbabwean client, McKinley says:

59 Sweeney, *Credibility*, p. 700.

60 *Ibid.*, p. 726.

61 Michelle McKinley, *Life Stories, Disclosure and the Law*, in: *Political and Legal Anthropology Review* 20 (1997), pp. 70–82, here: p. 70.

62 *Ibid.*, p. 72.



*»I do not know whether the final version was a result of consensual negotiations of truth and representation, or whether the asymmetries of the situation caused the client to accept their ›expert‹ version – but [...] her narrative was not the least bit like what it was before. It became transformed into an ego-centered, plaintive and apolitical testimonial which blamed her parents, professed a material love she decidedly repudiated and personalized the experience of marital rape, bride-price and ›child‹ marriage – all practices to which she had formerly referred in the third person. It was an effective appropriation of voice – indeed, she would most likely not have been granted political asylum on the basis of her original narrative. But the point is, whose narrative was it?«<sup>63</sup>*

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Gendered practices like FGC have a particular traction in the Western imaginary given their historical employment as pretexts for colonial intervention – white men saving brown women from brown men, as Spivak famously put it.<sup>64</sup> Similarly, fear of practices such as witchcraft, cannibalism, and ritual sacrifice rehearse the ›standardized nightmares‹ of the modern state.<sup>65</sup> What I am suggesting here is that, within contemporary protection regimes, our reliance on unwieldy notions such as fear and credibility and the extension of sanctuary for certain intolerable cultural practices but not others, may in fact work to prompt the narration of *our* standardised nightmares rather than the subjectively ›real‹ but impossible to prove or legally unrecognisable fear of the applicant.

Throughout my fieldwork, stories circulated in hostels and other asylee accommodation centres concerning the perceived ›bogusness‹ of certain narratives as well as the success rate of others. Beyond the widespread belief of arbitrary decision-making by ORAC, there are pragmatic reasons why asylees might de-centre parts of their own narrative of trauma in favour of one which will be more persuasive for a Western audience and thus have a more secure success rate. This is not by any means intended as an apology for so-called ›bogus‹ asylees. It is a call for a more complicated understanding of the politics of ›bogusness‹ (or illegality) itself.<sup>66</sup> Why at this particular moment do so many asylees fail to convince adjudicators of their personal credibility and the merits of their claim? Or, put another way, given the protocols through which truth is read, how do we expect asylees to convince caseworkers that they are credible?

### **Capricious Affect: Compassionate Humanitarianism v. Presumptive Scepticism**

The task of political recognition is one of those exquisite bureaucratic moments when the State's power to control its sovereign borders confronts the regulatory power of humanitarian discourse (on suffering, on rights). This confrontation is negotiated in the figure and decision-making power of relatively low-level civil servants. During my tour of ORAC's

63 Ibid., p. 75.

64 Gayatri Spivak, Can the Subaltern Speak?, in: Cary Nelson/Lawrence Grossberg (eds.), *Marxism and the Interpretation of Culture*, University of Illinois, Urbana 1988.

65 Monica Wilson, Witch Beliefs and Social Structure, in: *American Journal of Sociology* 56 (1951), p. 307–313; Jean Comaroff/John Comaroff (eds.), *Law and Disorder in the Postcolony*, Chicago 2006.

66 De Genova, Migrant ›Illegality‹.

offices Tomás told me that many of them were ex-teachers or ex-Gardaí (police officers), community-oriented people who had *elected* to work on refugee matters within the civil service. The implication here, as I understood it, was that these self-selected caseworkers were sympathetic to the plight of asylees. Or, more accurately, they *had* been before they began working as claims adjudicators. However, the shift from relatively high to low recognition rates and an overwhelming discourse of ›bogusness‹ emanating from ORAC officials, like Justice Minister McDowell, suggests that throughout the course of their job originally sympathetic bureaucrats experienced an affective shift. This was, in turn, experienced as scepticism and hostility on the part of interviewees. Sometimes this demeanour of presumptive scepticism is so pronounced that applicants, like Maqsood above, experienced an almost phenomenological sense of doom during their asylum interviews: »I could see it on him, I could smell him.«<sup>67</sup>

### ›Bogus‹ Asylee Claims and Well-Founded Fear

*»Let us remember that a bogus asylum seeker is not equivalent to a criminal and that an unsuccessful asylum application is not equivalent to a bogus one« Kofi Annan (Stockholm, 29 Jan 2001).«*

The spectacle of asylum seekers queuing overnight and civil servants being forced to go on strike in order to ensure their safety prompted a complete overhaul of ORAC's claims-processing. The DOJ implemented new efficiency measures (e.g., automatic Accelerated Procedures for large source countries), hired more staff and moved ORAC to larger premises. As Ireland's refugee recognition rates plummeted from what they had been in the mid-1990s, it became clear that ORAC's approach to the provision of political protection had shifted discernibly in the intervening years. In May 2005, its embattled head, Minister Michael McDowell, appeared on national television to defend his department's reputation. He argued that ORAC's high rate of refusal was the result of a large number of bogus asylum claims – or, ›cock and bull stories‹ as he expressed it – that his staff had to adjudicate. In addition to stating that over 90 percent of asylee claimants in Ireland had no well-founded fear of persecution, the Minister took the unusual step of publishing a document entitled: *Statement by the Minister Regarding the Real Facts about the Asylum and Deportation Systems*.<sup>68</sup> This statement, which was designed to persuade Irish citizens of the ›nonsense‹ being filed as legitimate asylum claims, highlights the peculiar role of fear in asylum regimes. The document included a taxonomy of fears that the DOJ and its caseworkers considered to be ›bogus‹: fear of persecution from a secret cult; fear of local tribal customs as the first born son of a royal family; fear of village elders; fear of being made successor to be king; fear of being treated as servant by mother's friends; fear concerning sacrifice of first born children's; fear of persecution as result of money lost which belonged to boss; fear that a former employer may kill him/her and place body parts around house; fear of persecution for failing to bring home bodies of deceased family members killed in fire; fear that male members of tribe will carry out ritual sacrifices of children.

<sup>67</sup> Interview with Maqsood, June 2008.

<sup>68</sup> <http://www.inis.gov.ie/en/INIS/pages/PB07000133> (Date accessed December 21, 2009).

Though attempts have been made to update the spirit of the 1951 Convention and its 1967 Protocols, the legal focus of these instruments has remained on the kinds of fears which plagued a Post-World War II Europe. With few exceptions – including Pamela Izevbekhai's FGC case – those fears do not overlap with the issues propelling contemporary African asylum seekers to leave their homes. Thus, the 1996 Irish Refugee Act<sup>69</sup> (which is closely modelled on the 1951 Convention) continues to define a refugee as: »a person who, owing to a 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 or her nationality«.

However, the minister's list of »bogus« fears prompts the question: why is fear of a practice like female genital cutting considered an acceptable ground for asylum whereas »fear of local tribal customs as the first-born son of a royal family«, for example, is not? What does it mean that because of particular humanitarian campaigns – FGC eradication campaigns for example – states privilege certain kinds of fear and suffering but not others, which are subsequently defamed as merely »bogus«?

The Irish government's approach to the issue of FGC has been contradictory, to say the least. While it spends millions of Euros (via IrishAid, UNICEF, Amnesty International, etc.) on eradication campaigns in Africa, it has stalled repeatedly on Irish-African NGO attempts to put in place firm domestic legislation<sup>70</sup> which would securely protect the daughters of migrants from being forcibly subjected to the practice.<sup>71</sup>

Other Western governments have made domestic provisions against FGC but, with the exception of the US, all have been careful to ensure that this legislation is not interpreted as situating FGC as an automatic ground for asylum for fear that it would open the »flood-gates« to so-called economic migrants. In France, the US, the UK and Sweden, legislation prohibiting FGC has been passed and some European Union member states have gone as far as applying an extraterritorial law designed to prevent parents taking their daughters outside the EU for the procedure. The Federal Female Genital Mutilation Bill, passed in the US in 1996, is unique in that it offers asylum to any woman forced to undergo FGM or

69 Refugee status is granted if an applicant meets the requirements set out in the above definition. If granted, this status provides protection against return to the person's country of origin or residence, and includes the right to family reunification of immediate family members. A recognised refugee is entitled to work or operate a business and have access to medical, social welfare and education services on the same basis as Irish citizens. They are also provided with a residence permit by the Immigration authorities and may apply for a 1951 Convention Travel Document.« <http://www.orac.ie/pages/Blue/Criteria.htm> (Date accessed March 13, 2008). For a complete overview of Irish asylum law see Dug Cubie/Fergus Ryan, *Immigration, Refugee and Citizenship Law in Ireland*, Dublin 2004.

70 In March 2009, in response to inquiries from the media, a government spokesman said legal advice obtained by the Government in 2004 indicated that the practice was *de facto* addressed by the *Non-Fatal Offences Against the Person Act 1997*, a piece of legislation which anti-FGC groups in Ireland consider entirely inappropriate.

71 The government estimates that approximately 2.585 migrant women now living in Ireland have likely undergone the procedure. This estimate is statistically insecure, I believe. It was extrapolated from 2006 census data which notes the origin of migrant/asylee women aged between 15 and 44 and then correlated with global preference data from World Health Organization. If the women originated in a country which currently practices FGC, they were considered to have undergone it (Ireland's National Plan of Action 2008, p. 9). No consideration is given to individual variability or choice-making concerning this bodily practice.

any woman fleeing from fear of forced circumcision. The Council of Europe, in contrast, has only qualified the threat of genital mutilation as a factor that *must be considered* in asylum applications.<sup>72</sup> In a similar vein, UNHCR has been slow to provide firm guidelines on adjudicating FGC cases. The increase in the number of asylee claims being made on this ground, and the enormous amount of political and humanitarian energy devoted to the topic of FGC, appears to have prompted the publication of a Note on the issue in May 2009. However, this Note is not legally binding upon nation-states and only suggests that FGC *can* be a ground for asylum in its own right.<sup>73</sup> For now, although Irish asylum adjudicators in theory consider FGC to be torture and thus a form of persecution, it remains difficult in practice for asylees to *prove* a fear of FGC. This renders the UNHCR guideline that FGC is in an »acceptable ground« for the State to extend its protection rather toothless, even if the Irish Government had not continued to stipulate that other requirements of the Convention must *also* be met in order for the FGC-related grounds to be considered.<sup>74</sup>

### Liberal Compassion: Discretion, Lies, and the Duty of States ...

As the above suggests, there has been intensive public engagement with the issue of FGC in general and with Izevbekhai's case in particular. Izevbekhai's campaign »Let Them Stay« has been well organized, attracting the support of famous Irish authors like Roddy Doyle, as well as senior figures in the Irish and Nigerian governments. In November 2008, the former President of Ireland (1990–1997) and United Nations High Commissioner for Human Rights (1997–2002), Dr. Mary Robinson, spoke publicly about the Izevbekhai situation urging a »*sympathetic response*« in a case which, she said, »raised issues for the immigration authorities.«<sup>75</sup> Colm O'Gorman, director of *Amnesty International Ireland*, told the media: »It seems very clear to us the Government cannot be credible on gender-based violence if it fails to recognize this case and if the Minister for Justice doesn't *use discretion* to allow Pamela to stay here.«<sup>76</sup> Allan Shatter, a prominent member of one of the largest political parties in Ireland, *Fine Gael*, suggested a few weeks later that the Izevbekhai claim should be treated as a »special case« because of her »genuine fears for her daughters.« The case should be *taken out of the courts*, he said, and a »*humanitarian approach*« adopted instead.<sup>77</sup> Both the Irish and Nigerian governments have denied Pamela's claim that FGC remains a relatively common practice in Nigeria and that her daughters would be at risk if they were deported.

72 IRIN Humanitarian News and Analysis (UN Office for Humanitarian Affairs), *Razor's Edge – The Controversy of Female Genital Mutilation*, <http://www.irinnews.org/InDepthMain.aspx?InDepthId=15&ReportId=62463> (Date accessed March 15, 2010); emphasis added.

73 UNHCR Guidance Note on Refugee Claims Relating to Female Genital Mutilation, May 2009; emphasis added.

74 Moreover, the government's 2008 Plan of Action on FGM acknowledges that there are currently no publicly available gender guidelines in use by the Office of the Refugee Applications Commissioner in relation to how to process FGC claims from women applicants.

75 Robinson fears on deportation threat to family, in: *Irish Examiner*, Nov 18, 2008, <http://archives.tcm.ie/irishexaminer/2008/11/18/story77732.asp> (Date accessed December 21, 2009); emphasis added.

76 *Ibid.*

77 FG backs Family in Deportation Case, in: *Irish Independent*, December 18, 2008, <http://www.independent.ie/national-news/fg-backs-family-in-deportation-case-1578889.html> (Date accessed December 21, 2009); emphasis added.

In fact, the Nigerian ambassador to Ireland, Ms. Kefamo Chikwe, publicly chastised her for »selfishly disparaging Nigeria« with stories about FGC. Appearing on RTÉ's *Would You Believe?* programme, the ambassador claimed that the practice of FGC was »an issue of no significance« in Nigeria: »[Pamela Izevbekhai] has dented the image of the country and made it look like a barbaric country. FGM happens to be an ancient practice that is no longer in the consciousness of Nigerians. It is something that is completely insignificant in the present Nigerian culture.«<sup>78</sup> When confronted with a report submitted to the UN by the Nigerian government that claimed up to 40 percent of women in Nigeria had been subjected to the practice, Ms. Chikwe responded: »[W]hoever wrote that report is lying about Nigeria and is not patriotic. They are doing it for a purpose. I can assure you whoever wrote this report thought that *it would be a way of attracting UN funds and that is the truth*«.<sup>79</sup> Ambassador Chikwe was herself publicly contradicted by Irish missionaries working in Nigeria who wrote to highlight the fact that the state's own human rights abuse research (i.e., research funded by the Irish Dept. of Foreign Affairs) had found conclusive proof that FGC is still prevalent in the State of Eboyni in Eastern Nigeria, close to where Pamela lived.<sup>80</sup> *Amnesty International's* executive director Colm O'Gorman also intervened. He dismissed Ambassador Chikwe's claims as »bizarre and not credible«:

*»Frankly, it is staggering. It is extraordinary that Nigeria can say one thing to the UN and then completely dismiss it. If we are to take what she is saying at face value, she is saying that an attempt was made by Nigeria to fraudulently obtain money from the UN. Nigeria has said before the UN in 2006 that up to one-third of all women and girls in Nigeria – that is about 27 million women and girls – have been subjected to FGM. The figures show that it is in no way restricted to the traditional communities or on the fringes. In some parts of Nigeria it is as low as 2 per cent but in other areas it is as high as 65 per cent. It is a problem that seems to be very significant and it is something Amnesty is working at on a global level.«<sup>81</sup>*

The Irish state had denied Pamela Izevbekhai's asylum claim on the grounds that her fear of FGC was not well-founded because the government believed that FGC had been eradicated in Nigeria. It took this legal position despite evidence from its own researchers in Nigeria that this was not the case and evidence submitted to the UN by the Nigerian government itself. Someone was lying, but who?

78 Quote in: Ken Whelan, Missionaries Contradict Nigerian FGM Claims, in: Irish Catholic, <http://www.irishcatholic.ie/d5/content/missionaries-contradict-nigerian-fgm-claims> (Date accessed December 21, 2009).

79 Quote in: John Mooney, Nigeria ready to take stand over genital mutilation claim ..., in: Times Online, The Sunday Times, March 2009, <http://www.timesonline.co.uk/tol/news/world/ireland/article5950490.ece> (Date accessed March 19, 2010); emphasis added.

80 Ken Whelan, Missionaries Contradict Nigerian FGM Claims, in: Irish Catholic, <http://www.irishcatholic.ie/d5/content/missionaries-contradict-nigerian-fgm-claims> (Date accessed December 21, 2009).

81 Ibid.

## The Case of Pamela Izevbekhai – Sequel

Less than a week after the exchange between Amnesty and the Nigerian Ambassador, the *Irish Independent* newspaper ran an exclusive: »*Deportation case mother had fake baby death papers, inquiry told.*«<sup>82</sup> The Irish government had taken the expensive and unusual step of sending two investigators to Lagos to examine details of the Izevbekhai case. They contacted the obstetrician who was alleged to have provided expert evidence in her asylum case and the latter claimed that the affidavit was a forgery. He also told police that he could confirm that no baby called Elizabeth Izevbekhai had ever been delivered at Isioma Hospital in Lagos and offered to confirm other details of the case but asked for payment (5,000 Euros supposedly) before doing so.

Once the news broke in the Irish media, Tony Izevbekhai confessed to his wife that he had been unable to obtain authentic documents because the doctors in question demanded huge payments in return. He claimed he was forced to turn to forgeries in order to send the appropriate documents to support Pamela's court case in Ireland. Pamela claimed that she had not known the documents were fake and continued to insist that her eldest daughter Elizabeth had died as a result of a botched FGM procedure. Solicitors for the State claimed that her case had proceeded on »a lie so fundamental that it should be struck out« and her own solicitor, Gabriel Toolan, filed an application to cease acting on her behalf.<sup>83</sup> Irish blogs, news shows and other media outlets were outraged by the possibility that Pamela Izevbekhai had been lying all along and one blogger located the problem squarely at the door of the liberal sensibilities of the current government:

*»Now I know we have all come to expect gullibility of the most incredible kind from the Leinster House liberals since the onset of large-scale illegal-immigration to this Republic since the mid-1990's. In apparent amnesia of their primary responsibility to the people to whom they owe their political-careers in elective office, the Leinster House set [Irish parliament] have seen fit at almost every opportunity [...] to support and believe – or at least pretend to believe – the excuses and half-truths of those who wish to abuse our asylum-system for a purpose it was never purported to be designed to serve – namely economic-migration.«<sup>84</sup>*

## Conclusion

Pamela is currently pursuing her case in the European Court of Human Rights (ECHR). Over the course of 23 separate court appearances Pamela, Naomi and Jemima Izevbekhai captured the attention of the Irish public, generating a spectrum of affect ranging from

82 Tom Brady, March 27, 2009, <http://www.independent.ie/national-news/deportation-case-mother-had-fake-baby-death-papers-inquiry-told-1688446.html> (Date accessed December 21, 2009).

83 Dearbhail McDonald, Pam gets two weeks to prove she's not lying, in: *Irish Independent*, April 4, 2009, <http://www.independent.ie/national-news/courts/pamela-gets-two-weeks-to-prove-she-has-not-lied-1698068.html?> (Date accessed March 15, 2010).

84 The Spire, *The Irish Politics Blog*, March 27, 2009. <http://greatdearleader.blogspot.com/2009/03/pamela-izevbekhai-asylum-cheat-mirror.html> (Date accessed March 15, 2010).



unquestioning support through complete disbelief to outright hostility. Their story is now the subject of an award-winning documentary, *No Way Home*.<sup>85</sup> The Irish government's role in all of this has been ambivalent at best, presumptively sceptical – even hostile – at worst. Although it had never relied upon the post-mortem evidence concerning Elizabeth's death – always insisting that Pamela's case was rejected because she failed to demonstrate a well-founded *future* fear for her other daughters – it nevertheless now capitalized upon the political moment by insisting that the forgeries proved that the low recognition rates and scepticism of ORAC's caseworkers had been vindicated. ORAC had refused Pamela Izevbekhai and the forgeries demonstrated that the decision-makers had been right, regardless of the unrelated reasons for their original refusal. In more general terms, the state translated its legal evaluation of her narrative and other evidence as insufficiently credible into a moral evaluation of Pamela herself as a discredited subject<sup>86</sup>. This trope of asylees as perpetually discreditable has been rhetorically deployed to justify the government's stringent approach to evidentiary concerns. Rather than sharing the burden of proof, as UNHCR suggests, ORAC puts those asylees who are subject to accelerated procedures in the even more difficult position of having to rebut the presumption that they are already suspected to be lying.

The government's contradictory approach to the question of FGC can arguably be read as a reluctance to solidify its apparent moral certitude that FGC infringes a woman's human rights, and it is a legislative inconsistency that signals, I suggest, a European-wide retreat from the ethico-political project of protection begun in 1951. The complicated issue of tolerance for certain cultural practices versus intolerance for others represents a significant legislative challenge for liberal governments. But rather than engaging this challenge through debate, review, and an enhancement of rights-based protections, the Irish asylum system has embraced procedures which are primarily aimed at the prevention of abuse by so-called ›bogus‹ claimants.<sup>87</sup> The weakening of rights-based protection legislation is furthered by the continued reliance on outdated, Eurocentric fears that reflect our own ›standardized nightmares‹ and the history of our imperialist past.<sup>88</sup> The requirement to script persuasive legal appeals which fall within the narrow parameters laid out by the 1951 Convention has been shown to be ›ineluctably coercive‹<sup>89</sup> and highly unaccommodating of the truth.

As the experience of Maqsood indicates, the oscillation of contradictory affect (compassion, disbelief, skepticism, hostility, fear and anxiety) experienced by caseworkers themselves plays an under-examined role in the consistently high refusal rates and pervasive discourse of bogusness emerging in Ireland, the EU, Australia and, most recently, Canada. Among the Irish public, Pamela's case generated a range of contradictory imaginaries: she was at once an object of compassion (fearful mother/victim of a repugnant cultural practice) *and* a figure of disgust (liar/Nigerian asylee suspected of economic motives). As the Izevbekhai case underwent appeal after appeal, many in the human rights community in Ireland called for the government to take the case out of the courts and use compassion, sympathy and discretion to simply grant her the right to remain in Ireland. This logic of affect – or politics of sentiment – while well-intentioned (and often the only remedy available to certain asylees),

85 <http://www.youtube.com/watch?v=2EHLzxwM-Dg> (Date accessed March 15, 2010).

86 See Sweeney, *Credibility*.

87 See Mullally, *Too Fast to be Safe?*

88 See Wilson, *Witch Beliefs*.

89 McKinley, *Life Stories*, p. 70.

is dangerously fickle, as the scapegoating of asylum seekers during every economic downturn demonstrates. Ultimately, the turn to humanitarianism disguises the shortcomings of Ireland's increasingly securitized border regime. It displaces critical attention from the systemic procedural hazards and impossibilities of the adjudicative process. It also contributes to the complacent belief that if asylees do not succeed in convincing adjudicators concerning their claims, they are *de facto* bogus claimants. Invoking compassion also gives the government license to claim that it *is* compassionate – a generous donor of aid to human rights causes abroad – even as it continues to interpret the 1951 Convention and its own Refugee Act (1996) in the most restrictive sense. It can claim to be compassionate even though it continually refused to publish statistics on asylum appeals decisions or to make these decisions and their rationales available to the public – a concern which had to be challenged in court by a member of the appeals boards who had grown concerned about the discrepancies in decision-making between fellow judges.<sup>90</sup> This lack of transparency contributes to the sense of arbitrary decision-making that is so keenly experienced by asylum seekers and their supporters. As one NGO worker commented to me: »I've seen cases which shouldn't have had a prayer be successful, and others which seem clear cut, get refused. No-one understands why.«<sup>91</sup> The sense that two cases with identical criteria cannot be assured of identical outcomes foments a kind of quiet desperation among asylees and this in turn creates affective difficulties in their credibility-related interviews. More broadly however, a turn to the logic of humanitarianism also distracts from the persistent question of whether the contradictions within liberal approaches undermine the very systems that were designed to protect asylum seekers in the first place.<sup>92</sup> Moreover, we are distracted from the role being played by the law in *constituting* asylees as (un)worthy political subjects and (im)moral beings, not meriting inclusion in the social contract.

The reality of being a country of destination which must maintain its sovereign borders in new ways suggests that liberal governments may have to »open [themselves] to the fact that under conditions of ongoing violence people will take recourse to many ways of escaping that violence« and that »their methods of escape might not be »legal«, at least as the immigration authorities or even psychiatrists define legality.«<sup>93</sup> This need not require that we be agnostic about the issue of truthful testimony. However, contemporary political realities demand that we acknowledge the fact that many asylees are forced to »convert the psychic trauma of impoverishment and hopelessness into a performed psychic trauma of formulaic political [or, cultural] violence.«<sup>94</sup> They are forced by our outdated legal definitions, our piecemeal and half-hearted attempts to update them, and our lack of real political will to address the dynamics of global movement between the so-called ›first‹ and ›third‹ worlds. A rethinking of European border regimes is long overdue. Yet, periodic retreats to a politics of sentiment will never achieve this. In the interim these retreats will serve to foreclose the possibility that subjects like Pamela Izevbekhai and her daughters can cross borders and be considered rightful political subjects within their host community.

90 Lentin/McVeigh (eds.), *Racism and Anti-racism in Ireland*, p. 45.

91 Interview June 2008.

92 See Coutin, *The Oppressed*, p. 64.

93 Veena Das, *Trauma and Testimony: Between Law and Discipline*, in: *Ethos* 35 (2007) 3, pp. 330–335, here p. 334.

94 Malkki, *The Politics of Trauma and Asylum*, p. 341.