

## EVIDENCE, STANDARDS AND BURDENS OF PROOF IN THE EUROPEAN ASYLUM SYSTEM: A NEW FIELD FOR EVIDENCE SCHOLARS?

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**ABSTRACT:** This article presents the main evidential features implied in the European Union directives and case law regarding the recognition of refugee status. It focuses, first, on the challenges posed to judicial decision making by the absence of a unitarian European proof system, by the significant lack of evidence in the relevant judgments, and by the conflicting interests at stake. The text highlights, then, the «subjective» connotation of international protection evidence and inserts it into the debate on the standards of proof which characterizes the reflections of some legal philosophers.

**KEYWORDS:** evidence; asylum; standard of proof; CEAS; UNHCR.

**SUMMARY:** 1. INTRODUCTION.— 2. THE NOTION OF EVIDENCE.— 3. THE *THEMA PROBANDUM*: 3.1. Evaluation of evidence. 3.2. Burdens of proof. 3.3. The standards of proof. 3.4. On the objectivity. 3.5. Standards as tools of evidential policy.— 4. THE CREDIBILITY OF THE APPLICANT AND THE RELIABILITY OF THE APPLICATION: 4.1. Credibility indicators. 4.2. Credibility: special cases.— 5. CONCLUSIONS.— BIBLIOGRAPHY

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## 1. INTRODUCTION

One of the contexts to which legal epistemologist and evidence experts seem to have still paid little attention is that concerning the study of the evidential activities involved in the procedure for the attribution of refugee *status*.

There are four orders of reasons that make the study of the probative issues in this area particularly stimulating and make this assessment remarkably complex: 1) the plurality of the regulatory levels involved (European legislation and national systems; administrative and judicial jurisdiction)<sup>1</sup>; 2) the peculiar condition of evidence scarcity on the basis of which judicial bodies have to decide in this sector, 3) the subjective characterization of evidence and probative instruments; 4) the humanitarian and political reasons that inform such practices.

Given the purposes of this work, I will be able to concentrate only on the third of these reasons, leaving the others to subsequent works. First, I will attempt to provide a synthetic picture of European secondary law and literature produced by the European Asylum Support Office (EASO) and the United Nations High Commissioner for Refugees (UNHCR) and, subsequently, I will focus on one of the debates that, in recent years, has gained great fortune among legal philosophers and which concerns the preferability, possibility and necessity to conceive the evidential activity in more objective terms in order to allow a better *ex post* control of decisions. The field seems relevant not only for the importance of the epistemological, political and legal challenges posed by the context of analysis to the European Union and to the evidence scholars, but also because it can offer new tools for the reflection of the legal philosophers engaged in the growing disagreement regarding which conception of evidence and proof is more suitable for the legal domain, and regarding the formulation of standards of proof.

## 2. THE NOTION OF EVIDENCE

There is no general or unambiguous definition of *evidence* in EU law. Article 4 of the 2011 Qualification Directive, entitled Assessment of Facts and Circumstances,

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<sup>1</sup> In Italy, for example, there is a two-level system: the first is of an administrative nature and the second of a judicial nature. In the first level, the examination of the applications is carried out by the so-called Territorial Commissions. They are made up of a college of four members (the president of the Commission, a commissioner designated by UNHCR and two officials from the Ministry of the Interior one of whom is the person conducting the interview). The second level, on the other hand, has a judicial nature and is the remedy granted by our legal system against the decisions of the Territorial Commission. The appeal can be proposed before the specialized Section of the Court of Appeal. Depending on the case, the appeal must be lodged within thirty or fifteen days of the Commission's decision. The procedure is handled by the college in the council chamber.

however, deals with the «necessary elements» for the assessment of an international protection application<sup>2</sup> which, according to §2, consist of «declarations [...] and in all the documentation in the possession of the applicant». Thus, it would seem that the term *elements* includes already proven facts and<sup>3</sup> those facts useful for proving a given hypothesis.

A systematic reading of the Qualification Directive and European Court of Justice (henceforth CJEU) case law, however, suggests a broader notion of *evidence* capable of including more than the simple statements and documentation provided by the applicant. In *A, B and C v. Staatssecretaris* case, in fact, the CJEU (§54) speaks of «assessing statements and documentary or *other evidence*»,<sup>4</sup> that is, of a broader notion, consistent with the international sources solid orientation, which consider evidence «whatever asserts, confirms, supports, refutes or in any case refers to the relevant facts in question». <sup>5</sup> The jurisprudence of the CJEU has very rarely dealt with evidential issues, so these issues remain largely unexplored fields for the legal theorist.

### 3. THE *THEMA PROBANDUM*

The assessment concerning the determination of refugee *status* has its «key element» in establishing the «well-founded fear of being persecuted» for reasons relating<sup>6</sup> to «race», «religion», «nationality», «membership of a social group» or «political opinion».

In this sentence, present in art. 1(A) of the Refugee Convention, there are two fundamental elements: one objective (the substantiation) and one subjective (the «fear») and both must be proven through a joint assessment, functional to establish the general reliability (the fear), and both of the application and to grant, therefore, protection.<sup>7</sup> This definition replaces and expands the previous approach that defined refugees only on the basis of the fact that they do not enjoy the protection of their own country and therefore through a purely external and objective criterion<sup>8</sup> that was considered insufficient and inadequate for the particular condition of the applicants. This new definition, on the other hand, makes the subjective element a constitutive criterion of refugee *status* to be placed side by side, however, always with the objective one.<sup>9</sup>

<sup>2</sup> Directive 2011/95/EU: Art. 4, §1; see EASO 2018, 17.

<sup>3</sup> See EASO 2018, 18

<sup>4</sup> CJEU, judgment of 2 December 2014, joined cases C-148/13 to C-150/13, *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, EU: C: 2014: 2406. Italics mine.

<sup>5</sup> UNHCR 2013, 28; see EASO 2018, 18

<sup>6</sup> UNHCR 2019, p. 19, §37.

<sup>7</sup> See UNHCR 1998, p. 3, §13.

<sup>8</sup> See UNHCR 1998, p. 4, §15.

<sup>9</sup> UNHCR 2019, p. 19, §37.

In practice, however, it seems that the justifying function of the objective dimension in this definition is inhibited or at least strongly hindered by international guidelines and practices which, as we shall see, favour a *discovery* and probative activity mostly in subjective terms, i.e. referring mainly to judge's mental states and to the applicant's ones.

In fact, UNHCR itself seems to have progressively changed its orientation in 2019, when it highlighted that:

Since fear is subjective, the definition [of refugee] involves [the recognition of] a subjective element in the subject requesting recognition as a refugee. The determination of refugee *status* will therefore mainly require an assessment of the applicant's statements rather than a judgment on the situation prevailing in his country of origin.<sup>10</sup>

In this passage, UNHCR seems to subtract probative value from the «objective» evidence in favour of the «subjective» ones in a sort of *favour* towards the applicant.

For example, «fear» is interpreted by UNHCR as a «state of mind» and a «subjective condition»<sup>11</sup> which is expressed through the applicant's «belief» or «prediction» that he is «subject to persecution». It seems interesting to note that this aspect is generally established on the basis of *what the person manifests as his state of mind at the time of departure* from his country and that, according to the UNHCR, such statements should be *considered in themselves as proof of the existence of fear* as long as there are no elements giving rise to serious doubts with respect to the credibility of the reporting subject.

However, this orientation seems to be in contrast with contemporary EU policies which, on the other hand, tend to increasingly restrict the mesh of reception, in contrast to the massive migratory phenomena of the last decades.<sup>12</sup>

### 3.1. Evaluation of evidence

The 1998 *Note on Burden and Standard of Proof* is the first UNHCR document addressing evidential issues related to the refugee *status* determination and aims to present a general overview of the nature and peculiarities of the application process of international protection.

The document highlights that the heart of the evaluation I am dealing with concerns the fear «foundress» and that, although it is in part an evaluation of an «intrinsically speculative» nature, it is not, by that very fact, «pure conjecture».<sup>13</sup> The text underlines how, because of this, in this area there will be no «rigorous juridical inferences» and the decision will be based mainly on the «probability» or «possibility»

<sup>10</sup> UNHCR 2019, p. 19, §37.

<sup>11</sup> UNHCR 2019, p. 19, §38.

<sup>12</sup> Commission, 23 September 2020, COM (2020) 611 final.

<sup>13</sup> UNHCR 1998, p. 5, §21; UNHCR 1998, p. 4, §18.

that the feared event will happen.<sup>14</sup> The arguments involved will occupy an intermediate place between rigorous inferences and mere conjectures, and will have to be supported by valid reasons.<sup>15</sup>

Thus, recognizing that the inferences that will characterize this kind of evaluation will be predominantly of a non-deductive type,<sup>16</sup> the *Note* also states that *the* discrimination with respect to their goodness or usability is the solidity of the justifications placed at their basis and not their certainty or conclusiveness. The document underlines, however, that these reflections will in any case be balanced with the fact that, unlike what happens in other types of proceedings (for example, in civil or criminal ones), the assessment involved in this area has eminently a humanitarian aim and that this element profoundly shapes the evidentiary activities employed in this area. In fact, they are mainly aimed at the protection of the subjects and not at the search for certainty or truth.<sup>17</sup>

According to the CJEU, the process of evaluating applications for international protection has «two distinct phases»: the first regards the «ascertainment of the factual circumstances that may constitute evidence in support of the application» while the second «the legal evaluation of such elements, which consists in deciding whether, in the light of the facts characterizing a particular case, the requirements [...] for the recognition of international protection are met».<sup>18</sup>

The first is of a purely epistemic nature and will concern the collection, examination of the genuineness and information value (and therefore of the relevance) of ascertained facts<sup>19</sup>, while the second has a normative-evaluative nature and consists in making a choice on the legal «legitimacy» of the taken evidence and on the overcoming of the required standard of proof for the assignment of refugee *status*. The two phases are distinguished for reasons of conceptual clarity but, obviously, they manifest themselves in a highly interrelated manner.

The jurisprudence of the CJEU also seems to point to this line, stressing that the procedure for assessing applications should never be reduced to a purely mechanistic activity. According to the Court, in fact, the determining authority will have to «modify its methods of evaluating declarations and other evidence [...] taking into account the specific characteristics of each category of asylum request, in compliance

<sup>14</sup> UNHCR 1998, p. 5, §21.

<sup>15</sup> UNHCR 1998, p. 5, §21.

<sup>16</sup> Specifically abductive and inductive: TUZET, 2006; TUZET, 2016; CANALE & TUZET, 2020.

<sup>17</sup> UNHCR 1998, p. 1, §2: «In examining refugee claims, the particular situation of asylum-seekers should be kept in mind and consideration given to the fact that the ultimate objective of refugee status determination is humanitarian. On this basis, the determination of refugee status does not purport to identify refugees as a matter of certainty, but as a matter of likelihood».

<sup>18</sup> CJEU, Judgment of 22 November 2012, case C-277/11, *MM v. Minister for Justice, Equality and Law Reform, Ireland*, Attorney General, §64 et seq.

<sup>19</sup> See EASO 2018, p.19 which also includes in the first phase an evaluation of the legitimacy of the evidence collected with respect to material facts.

with the rights guaranteed by Charter [of fundamental rights]»<sup>20</sup> required by the examination of individual circumstances required by art. 4 §3 of the Qualification Directive 2011/95/EU. This disposition provides for the assessment of:

- a) All relevant facts concerning the country of origin at the time of the decision on the application, including the laws and regulations of the country of origin and the relative methods of application;
- b) the relevant declarations and documentation submitted by the applicant who must also disclose whether he has already suffered or is likely to suffer persecution or serious harm;
- c) the individual situation and personal circumstances of the applicant, in particular background, sex and age, in order to assess whether, based on the applicant's personal circumstances, the acts to which he has been or could be exposed constitute persecution or serious harm;
- d) whether the activities carried out by the applicant after leaving the country of origin have aimed exclusively or mainly at creating the conditions necessary for the presentation of an application for international protection, in order to establish whether these activities expose the applicant to persecution or to serious damage in case of return to the country;
- e) the possibility that the applicant can reasonably be expected to seek the protection of another country of which he could declare himself a citizen.

### 3.2. Burdens of proof

EU secondary law does not prescribe a particular procedural form for ascertaining refugee *status* and it is difficult to rigidly frame the nature of this procedure in one of the classic procedural categories (administrative or judicial; inquisitorial or *adversary*).<sup>21</sup> The main characteristics will then be outlined, starting with the distribution of the probative burdens.

The duty to prove the facts on which the request is based rests primarily with the applicant but in a way that can be defined as «attenuated» compared to what happens in the Italian civil process where the *principio dispositivo* is in force (art. 2697 cc and 115 co.1 c.p.c.) according to which parties —and in particular those who assert a right— must indicate the necessary evidence to support the facts attached to the court. Here, indeed, the decision maker has powers of inquiry only in specific cases and is in force the principle of correspondence between requested and pronounced (pursuant to art. 112 c.p.c.) according to which the judge will have to «pronounce on the entire request and not beyond its limits», not being able to decide on aspects not proposed by the parties. In the criminal field, on the contrary, the burden falls entirely on the accusation in compliance with the principle of presumption of innocence (art. 27 co. 2 of the Constitution) which, in principle, would allow the accused to even remain inert.

<sup>20</sup> CJEU, Judgment of 2 December 2014, Cases joined by C - 148/13 to C - 150/13, *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, §54. See also: EASO 2018, p. 19.

<sup>21</sup> See also: EASO 2018a, p. 29. UNHCR 1998, p. 1, §2.

Thus, in the context of a procedure for the recognition of international protection it is generally the applicant who has the burden of demonstrating his right to benefit from the protection, but given the difficulties (or impossibility) that usually affect the applicant's probative activity, this obligation can be shared with the ascertaining authority. Thus, generally, while the burden of proof rests with the applicant, the duty to establish the relevant facts is shared between the applicant and the person in charge of examining the application in a sort of «ascertainment cooperation» aimed at assessing the relevant facts.<sup>22</sup>

Therefore, the examiner therefore has the right to use any means at his disposal to produce, through an *ex officio* investigation, the evidence necessary to support the application. This task has special practical relevance given that, as previously mentioned, in these procedures it is very common that the *evidence* is particularly incomplete or completely absent.

Usually, in fact, the investigation activity of the proceeding authority has greater possibilities and resources to reach information that is more difficult to find by the applicant.

Those that, in general, may present the greatest difficulties in finding the applicant—but which at the same time are among the most relevant for the purposes of the assessment—concern the situation in his country of origin<sup>23</sup> and pertain to the «objective» sphere of evidence of fear.

The judge will therefore have both a duty to ascertain and evaluate the general plausibility of the request (aimed at assessing the foundness of the fear), and the duty to assess the general legitimacy of the request with respect to the regulations in force.

The assessment of the credibility of the applicant's statements is part of the assessment of the plausibility of the application, which has recently become a central point in the evidentiary debate on asylum issues. As I will show shortly with «credibility», in this context, we should not mean «sincerity» but «overall reliability» of the statements in support of an application.<sup>24</sup>

This division of the burden of proof can be justified, however, not only by virtue of the humanitarian purpose but also in recognition of the probative asymmetry that, indeed, exists between the applicant and the authorities in the ability to present

<sup>22</sup> UNHCR 1998, p. 2: In the process of evaluating applications for international protection, the judge is called to *cooperate* with the applicant «in the duty to ascertain and evaluate all the relevant facts». UNHCR 2013 p. 35, 87-88; 104 et seq.; EASO 2018, pp. 28 and ff.

<sup>23</sup> The aforementioned COI (Country Origin Information).

<sup>24</sup> EASO 2018 p. 81, UNHCR 2013, p. 49, UNHCR 2019, p. 44, MINNITI, 2020, §2.2. and ff. but also: ECtHR: *JK and others / Sweden*, question 59166/12, note 20; judgment of 10 September 2015, *RH v Sweden*, application n. 4601/14, paragraph 58; judgment of 20 July 2010, *N / Sweden*, application no. 23505/09, paragraph 53; judgment of 9 March 2010, *RC v Sweden*, application no. 41827/07, paragraph 50. See art. 4 of the 2011 Qualification Directive at §1.

evidence. Thus, this distribution rule is also understandable in the light of a criterion of «proximity to the source of evidence».<sup>25</sup>

In recent decades, this rule on the distribution of the burdens of proof among the parties is also significantly orienting Italian jurisprudence in those «areas where the protection of [...] protected rights [...] finds an obstacle in the profound inequality/ asymmetry, even —but not only— information, constituting a serious obstacle to the demonstration and therefore to the protection of the right».<sup>26</sup> The Cassazione Civile, Section VI, sent. n. 17923 of 12 September 2016, denying, in the present case, the possibility of applying the principle of proximity of evidence, however, specified that it cannot simply follow a disparity of «strength» of the parties in the process, but requires that the necessary «proof» is not symmetrically acquirable by one of the parties, given an impossibility or strong disparity of acquisition and access to it. That is, very frequently, what happens to applicants for international protection, too.

### 3.3. The standards of proof

Given that the activity of ascertaining and judging international protection applications often takes place on very limited epistemic elements, one of the crucial issues become the establishment of a probability threshold that is adequate for the attribution of refugee *status*, as not every risk of persecution or damage can give rise to international protection and because there are many and relevant opposing interests that weigh on this evaluation.<sup>27</sup>

Already in 1998, UNHCR promoted the use of standards of proof, emphasizing their importance especially in relation to those *civil law* systems where, historically, doctrine and jurisprudence had preferred to focus on burdens of proof and intimate judicial conviction.<sup>28</sup> Even today, however, the regulatory instruments of the CEAS do not provide any information on the degree of evidential sufficiency to be achieved in order to consider an application as generally plausible or reliable (and therefore acceptable).<sup>29</sup>

<sup>25</sup> MINNITI, 2020, §4.1.

<sup>26</sup> MINNITI, 2020, §4.1. See Cass. Civ., N. 24051 of 26 September 2019 and SS.UU. n. 13533 of 30/10/2001.

<sup>27</sup> There are conflicts concerning the relationship between States and the EU (those relating mainly to the quantity of hospitality to be granted) but also conflicts between national States (regarding the distribution of reception loads), then there are conflicts between subjective interests and humanitarian interests of the individual and economic interests of the States.

<sup>28</sup> UNHCR 1998, p. 2, §III. FERRER & TUZET, 2018, p. 458, also attribute to the discipline of burdens of proof the function, typical of the standards, of distributing the risk of error. On the standards of proof see also: LAUDAN, 2006.

<sup>29</sup> EASO 2018b, p. 87 and EASO 2018a, p. 82.



By the term *standard of proof*, however, UNHCR means the threshold «which must be reached by the applicant in *persuading* the judge of the truth of his allegations». <sup>30</sup> The dimension of «conviction» is then further specified by UNHCR and EASO <sup>31</sup> through an analysis that national Member States jurisprudence differentiated on the basis of the legal system type (*common law* or *civil law*).

In general, it is noted that, in both cases, the standard commonly used in terms of international protection is closer to a civil standard of proof (i.e. a «probability balance») rather than a criminal one, since, for the granting of international protection, a conviction «beyond a reasonable doubt» or a state of certainty of the decision maker is not necessary. <sup>32</sup>

Indeed, according to these sources, in fact, in the international protection field, the standard should only serve to place the decision maker in a position to affirm that, given the evidence provided, «it is probable that the applicant's request is *credible*». <sup>33</sup> Thus, the fear will be considered «well founded» if the applicant can «demonstrate, to a *reasonable extent*», that the stay in his own country has become *intolerable*. <sup>34</sup> As it is easy to notice, the terms *intolerable*, *fear*, *persuasion*, *belief* and *conviction* are all related to emotional or mental states which, from a purely epistemological point of view, clearly poses a series of relevant questions about the difficulty of their proof and justifiability in decision making.

By analysing more specifically the standards of proof used in the individual European *civil law* systems, EASO highlights the principle —developed by German jurisprudence— according to which in cases where a certain degree of probability is already present in substantive law (as it would be in the case of international protection with the terms *well-founded fear*, *effective risk of serious damage*), the deciding authority will have to operate taking into account this degree of probability as part of the same rules that bind its decision-making activity. <sup>35</sup> For this reason, both for the attribution of refugee *status* and for the granting of subsidiary protection, <sup>36</sup> the validity of the fear must be established by ascertaining the presence of a «substantial

<sup>30</sup> UNHCR 1998, p. 2, §III. Italics mine. Concordantly, EASO 2018a p. 83, states: «judge must be *convinced* that the applicant actually meets the criteria for the recognition of refugee *status or for being entitled to benefit from subsidiary protection*». Italics mine.

<sup>31</sup> UNHCR 2013; EASO 2018a.

<sup>32</sup> UNHCR 1998, p. 2, §III.

<sup>33</sup> UNHCR 1998, p. 2, §8.

<sup>34</sup> UNHCR 2019, p. 20. Italics mine.

<sup>35</sup> This principle is interesting as it seems to have the purpose of justifying the presence of imprecise formulations.

<sup>36</sup> EASO 2018a, p. 84. See Federal Administrative Court (Germany), judgment of 10 June 2011, BVerwG 10 C 25.10, BVerwG: 2011: 010611U10C25.10.0, §22, available in English on the website: [www.bverwg.de](http://www.bverwg.de).

probability»: a probability that is not merely theoretical, but not necessarily higher than 50%.<sup>37</sup>

As for the European *common law* systems, on the other hand, EASO analyzes the standard used by the Irish *High Court* and the British House of Lords. The former recognizes as adequate the balance of probabilities combined, in cases where it is necessary, with the benefit of the doubt,<sup>38</sup> while the latter considers it sufficient to ascertain a level of «reasonable possibility».<sup>39</sup> This level is described as «a real possibility», «well-founded reasons for believing» or a «reasonable possibility» of suffering persecution, a level which in any case may remain lower than that of the simple balance of probabilities.<sup>40</sup>

Similarly, the ECtHR in the *Saadi v. Italy*, argued that the applicant is not obliged to «[demonstrate] that submission to ill-treatment is “more likely than unlikely”»<sup>41</sup> while in *Y and Z*,<sup>42</sup> the CJEU clarified that when the competent authorities assess the foundness of the fear, they «are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution».<sup>43</sup>

The CJEU then specified: in the *Abdulla* judgment that, in the field of asylum, the «assessment of the extent of the risk must, in all cases, be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and

<sup>37</sup> EASO 2018, p. 84. This guidance is developed by the Federal Administrative Court (Germany), judgment of 7 February 2008, BVerwG 10 C 33.07, BVerwG: 2008: 070208B10C33.07.0, §37, available in English at: [www.bverwg.de](http://www.bverwg.de). See also Supreme Court (Spain), judgment of 9 December 2015, question n. 1699/2015, ECLI: ES: TS: 2015: 5211, p. 9.

<sup>38</sup> High Court (Ireland), Judgment of 17 January 2017, *ON v. Refugee Appeals Tribunal et al*, 2017, JEHC 13, §63: Cf. EASO 2018a, p. 84. The principle of the «benefit of the doubt» will be dealt with in §3.6.

<sup>39</sup> This way also UNHCR 2019, p. 20, §42.

<sup>40</sup> House of Lords (United Kingdom), judgment of 16 December 1987, *R v. Secretary of State for the Home Department*, Ex parte Sivakumaran, 1988, AC 958.EASO 2018, p. 84.

<sup>41</sup> ECtHR, judgment of 28 February 2008, Grand Chamber, *Saadi v. Italy*, appeal n. 37201/06, §140.

<sup>42</sup> CJEU, judgment of 5 September 2012, Grand Chamber, joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, EU: C: 2012: 518 §76. In that judgment, the CJEU, at §80, takes up this formulation and states that: «the applicant’s fear of being persecuted is well founded when the competent authorities [...] consider it reasonable to believe that [...] he will carry out acts [...] which will expose him to a real risk of persecution». EASO 2018b, p. 87 and EASO 2018a, p. 82.

<sup>43</sup> CJEU, judgment of 5 September 2012, Grand Chamber, joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, EU: C: 2012: 518. See also CJEU, judgment of 2 March 2010, Grand Chamber, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla and others v. Bundesrepublik Deutschland*, EU: C: 2010: 105, §89; CJEU, judgment of 7 November 2013, joined cases from C-199/12 to C-201/12, *X, Y, and Z v. Minister voor Immigratie en Asiel*, EU: C: 2013: 720, §72.

to individual liberties, issues which relate to the fundamental values of the Union». <sup>44</sup> The jurisprudence of the ECtHR refers to careful scrutiny and rigorous evaluation. <sup>45</sup>

It can be noted that all the standards just mentioned are united by at least two characteristics: 1) they present terms such as *reasonableness* or *probability* (words that seem to provide with objective criteria); 2), they also refer to the judge's or applicant (persuasion, belief, conviction, etc.).

These points allow us to make some reflections on the margins of a debate which, starting precisely from specific criticisms regarding the use and formulation of standards of proof, has also been strengthened on elements of a more general nature, which concern the correct shape of a proof conception. <sup>46</sup>

The just mentioned points 1) and 2) show profiles of theoretical interest as they highlight a very close link between the applicant's mental states (fear, intolerability), probative standards of proof and mental states of the decision maker (beliefs, persuasion, conviction). This aspect could give arguments to those who, in literature, believe that Jordi Ferrer's standards of proof aren't able to account for the reality of the judicial decision and legal evidentiary reasoning and are, therefore, inadequate just as his rational conception of legal evidence and proof. One of the problems would also be the lack of harmonization between the subjective and objective spheres of reasoning on evidence and judicial decision. <sup>47</sup>

Furthermore, according to Gama, the works of those who adhere to the rationalist approach to legal evidence and proof would discount the distortions of an excessively analytical methodology which, by atomistically splitting the phase of gathering, evaluating and deciding on evidence, would offer a misleading account of the procedural practices <sup>48</sup> together with giving a too essential (or wrong) reading of the historically developed concept of proof. <sup>49</sup>

<sup>44</sup> CJEU, judgment of 2 March 2010, Grand Chamber, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla and others v. Bundesrepublik Deutschland*, EU: C: 2010: 105, paragraph 90.

<sup>45</sup> ECtHR, judgment of 12 April 2005, *Shamayev and others v. Georgia and Russia*, question no. 36378/02, paragraph 448 and ECtHR, JK and others v. Sweden, cit., Footnote 20, paragraph 77. ECtHR, judgment of 17 July 2008, NA v. United Kingdom, application no. 25904/07, paragraph 111. See EASO 2018a, p. 71.

<sup>46</sup> The term obviously recalls the work of Jordi FERRER BELTRÁN (see for example: 2005, 2007, 2019, 2021) who, over the years, has developed in a systematic and original way many of the insights present in the works of FERRAJOLI, 1989; GASCÓN, 1999 and TARUFFO (among many: 1979, 1982, 2009) on proof and evidential systems. His work on the «rational» way of conceiving proof and evidence system has inspired the reflections of a large number of authors such as Perfecto Andrés IBÁÑEZ, GONZALEZ LAGIER, BAYON, TUZET, DEI VECCHI. It is beyond the scope of this paper to present a detailed reconstruction of how attention to evidential issues was born and established itself in recent years. I will cite among many the reconstructions made by RICAURTE, 2019 and ACCATINO, 2019.

<sup>47</sup> GAMA, 2021, pp. 13 and 17.

<sup>48</sup> See TWINING, 2020; GAMA 2020 16-17.

<sup>49</sup> GAMA, 2020, pp. 7 and ff.

Points 1) and 2), however, may also give rise to considerations in the opposite sense. The standards present in this area, although cloaked in terminology with a neutral and objective reference (reasonableness, probability), would however be resolved in a merely subjective decision criterion (belief, conviction, certainty) since there is no specific literature that exemplify or interpret these terms and they are not, in fact, subject to specific control.

Nevertheless, the presence of these terms suggests that, in such a complex area of assessment there is a certain urgent need to stem and justify the simple judicial conviction. From this point of view then (and in the current state of affairs), such words would seem to operate as simple warnings or generic references to the prudence of the judge.

A further consideration pertains to the weight that these formulations have on the effectiveness of the «objective» dimension of the proof required by the refugee definition. Do these standards really allow for compliance with this justification requirement? What kind of rational elements can an applicant appeal to against the denial of protection when, as is very frequent in the immediacy of his arrival and in situations of severe discomfort, he is unable to convey the right emotional state to exceed the standard?<sup>50</sup> Many are the reasons why providing the validity of the fear for the applicant can be very difficult, including evidential asymmetry, cultural, linguistic, emotional, psychological reasons.<sup>51</sup> These aspects also significantly affect the credibility assessment.

It is therefore reasonable to ask whether 1) the formulation of these standards is adequate (as Ferrer's critics would seem to suggest) or 2) there is a need to reformulate these decision rules. I will try to answer these questions in the following section.

In the meantime, however, it seems relevant to consider how the national jurisprudential results return a bad image in terms of transparency, access to protection and worsening of conflicts of interest in relations between European Member States and between them and the Union. Moreover, this situation seems to have been worsened by the variegated mosaic of national evidential systems which does not seem to guarantee equal access to the same level of rights for all applicants in the various European States.

For this reason, I believe that an in-depth study of the evidentiary issues in this area would be useful and fruitful both at the judicial level, but already in the ad-

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<sup>50</sup> It is very frequent that applicants fail to communicate in a resilient manner in the first contact with authorities. In this crucial moment, in fact, applicants are requested to provide all the elements necessary for the judgment in a very short time and paper space. There are also a series of other dynamics which affect the applicant's ability to express his fear and which usually generate in the subjects a closed and hostile attitude towards the authorities: v. EASO 2018a, pp. 176 and following; BLACK, 1994.

<sup>51</sup> See UNHCR 2013, pp. 53-75; pp. EASO 2018a, pp. 33 and ff. but also: HERLIHY & TURNER, 2009.

ministrative one (Commissione Territoriale) where problems of transparency and justification arise with negative effects of even greater vehemence.

### 3.4. On the objectivity

As already said, Ferrer's version of the rationalist approach to legal evidence and proof is the one that in recent years has obtained the greatest consensus in Europe and Latin America. I believe that *mutatis mutandis*, most of his reflections are, by reason of their generality, widely applicable also to the context that belongs to us.

Ferrer's position, however, has recently been criticized in a more systematic way both with reference to some of his basic theoretical assumptions and in relation to the proposed construction of «precise and objective» standards, that is, less vague and free of references to psychological states.<sup>52</sup> I will concentrate especially on examining the first of these two criticisms (that of assumptions and objectivity) leaving those concerning the question of the «precision» of standards to another work.

As for the theoretical assumptions, the critique of the characterization of the rational conception proposed by Ferrer in opposition to the so-called «persuasive conception» of proof stands out due to its importance.<sup>53</sup> It has rightly been pointed out that persuasion and judicial conviction, in contemporary legal systems, are in fact always linked also to elements of an epistemic nature and that, therefore, it would be wrong to equate a system of evidentiary activities and instruments that aim to produce judicial conviction to a totally irrational system.<sup>54</sup> In my opinion, this criticism presents two problems.

The first is that these theses seem to presuppose the opposition to the «persuasive conception» as an identity trait of the rational conception of proof while I believe that a charitable reading of Ferrer's texts does not allow this conclusion or even the identification between «persuasive» and «irrational» *tout court* by the author. Ferrer's words cannot be interpreted correctly without referring them to the central purpose of his conception (which, instead, is a strongly identifying element), namely that of expanding the possibilities of an *ex post* control over decisions.

The connection between persuasive and irrational used by Ferrer is therefore evidently to be understood in a consequentialist sense, as having to do with the demo-

<sup>52</sup> DEI VECCHI, 2016; GAMA, 2020. See also FERRER, 2019, p. 257.

<sup>53</sup> DEI VECCHI, 2016; SUCAR & CERDIO, 2017; GAMA, 2020; relating to the conceptualization of intimate conviction: TUZET 2020 pp. 101-102. *Intimate conviction, conviction, certainty, doubt* and other such phrases have all been linked in a more or less direct way to the persuasive conception I will discuss shortly.

<sup>54</sup> TUZET, 2020, p. 100; DEI VECCHI, 2016, p. 278 et seq.; GAMA, 2020, p. 8, the author attributes this thesis to Ferrer, but it is doubtful that Ferrer would ever accept this.

cratic effects of the lack of possibility of accounting (even by the judges themselves) of subjective mental states.

Indeed, to date, in fact, the only means to jointly account for the subjective and objective sphere of decision and evaluation of the evidence, in more or less controllable terms, would be to provide the judge with joint support from neuroscientists, forensic psychologists and sociologists at the moment, say, of the drafting of the sentence. However, such supports would not seem so accessible and it is not certain that the effective yield of the use of such supports (in terms of efficiency and transparency) is greater than the system devised by Ferrer.

The second problem with such criticisms is that of conceiving Ferrer's position in a descriptive rather than a prescriptive sense. It seems to me that there is a clear difference in scientific intent here (for example, between Gama and Ferrer) which makes the two positions complementary and not necessarily in conflict. Ferrer's proposal should be accepted for what it is: a prescriptive proposal for the construction of a more controllable and more empowering evidential system for decision makers, not a realistic description of procedural practices.

If this is the case, then, Gama should make an effort to clarify and concretely specify which real contributions would provide to Ferrer's normative proposal a greater reference to the history of evidential thought<sup>55</sup> and a greater harmonization of the «descriptive» and «subjective» sphere.<sup>56</sup>

Moreover, if it is true that after years of studies on these issues, the reference to a persuasive conception *tout court* borrowed from Taruffo, may now turn out to be a bit naive, it is also true that this reference, for Ferrer, does not constitute the founding axiom of his theory. Instead, it seems to be only functional to the explanation of the effects that his conception aims to avoid, just as it happens with reference to an elementary paradigm or model whose distorting effects are to be avoided.<sup>57</sup> Simplicity is precisely the element that allows the quality and harmfulness of the effects to be highlighted with particular clarity in relation to some variables that have been considered relevant. Obviously, a margin of error must be considered also in this case.

Something similar normally occurs also in other scientific fields: think, for example, of economic models, constructs that are always associated with an economic doctrine, used to «simplify» reality and to highlight some aspects (e.g. cause and effect between two or more economic variables).

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<sup>55</sup> GAMA, 2020, spec. pp. 6-7, where we read: «The theorists of proof have placed emphasis on the assumptions of a rational study of proof, but they have not paid sufficient attention to evidence studies in our tradition from an historiographical point of view».

<sup>56</sup> GAMA, 2020, pp. 9 and ff.

<sup>57</sup> Which, it should be remembered, are well known since procedural systems of this type really existed. Think for example of ordeals.

The fact, then, that in real legal systems the irrational effects always appear with different intensity and complexity, does not necessarily invalidate the usability or effectiveness of the model, given that the gap between reality and the margin of error are natural variables of every intellectual processes. For this reason, the criticisms on this point seem to me not so crucial for Ferrer's position.

All this does not mean that Ferrer's model cannot be enriched or improved, but that critics should make a more concrete positive effort in suggesting which benefits would be introduced through their suggestions, not forgetting the aims of the concept they are analysing.

The «objectivity» pursued by Ferrer and achieved through the choice of the acceptance lexicon<sup>58</sup> seems to me, therefore, a quality element of his conception, although it is certainly possible to continue to work to make this proposal more refined or more «inclusive» towards other perspectives and problems that systematically afflict decision makers such as, for example, systematic cognitive biases.

Having considered this, I believe that formulating standards that tend to be devoided of references to mental states is desirable not only to guarantee a more equal *treatment* to refugee but also, as a consequence, to gain equality weights of hospitality between states.

UNHCR gives an interesting example about Netherlands. Here legislation and jurisprudence until 2015, adopted two different standards for establishing credibility: normally the applicant's statements must merely be «plausible» but in cases of simple inconsistency, ambiguity or gaps in the narrative, there was a presumption of fraudulent conduct and an extremely higher standard had to be satisfied. The applicant's statements, indeed, had to be evaluated as «positively persuasive»<sup>59</sup> but this, in most cases, led to a denial of protection and to the practical impossibility for the applicants to oppose it, given the subjective nature of this standard.<sup>60</sup>

The case is interesting because the Netherlands choose to move from a subjective standard of proof to a *methodological criteria* of evaluation of proof, the so called «integral credibility assessment» closer to the indications of the international literature.<sup>61</sup> This method has a holistic nature because only through the application of a

<sup>58</sup> FERRER, 2021, pp.198-200, 2006 pp. 303-305; 2005 pp. 35 ff.

<sup>59</sup> Known as the standard of «positive conviction». IND Working Instruction 2010/14, §4 and Art. 31 (2) (a) to (f), Aliens Act of 2000; see UNHCR 2013, pp. 238-239; METSELAAR 2017, pp. 74-89.

<sup>60</sup> METSELAAR, 2017, p. 74; see also: BALDINGER, 2015, p. 40.

<sup>61</sup> WBV 2014/36, Stcrt. 36910, 24 December 2014; Explanatory memorandum of the amendment to the Aliens Act (memorie van toelichting), Kamerstukken II, 2015, 34088, 3, p. 16; IND, Werkinstructie 2014/10, para. 1, available at <https://ind.nl/over-ind/Cijferspublicaties/Paginas/Werkinstructies.aspx> [accessed 6 January 2017]; A.A.M.J. Smulders, 'De POK is dood, lang leve de integrale geloofwaardigheidsbeoordeling', *Journaal Vreemdelingenrecht* (2015) v8, p. 1.

series of credibility criteria, the applicant's credibility can actually arise and a correct weight can be given to gaps or inconsistencies in the applicant's storytelling.<sup>62</sup>

What is relevant about this case to me is that the political choice was to leave a subjective standard precisely because of its epistemological and justice inefficiencies. Indeed, in characterizing this new method and its objective nature Metselaar highlights:

The «integral credibility assessment» must be objective, structured and transparent, by using objective sources and transparently motivating how the balancing has taken place. The objectiveness refers to the requirement that the IND<sup>63</sup> should refrain from any subjective notions when assessing the credibility [...] under the doctrine of «positive persuasion» too many different situations required the same burden of proof and motivation<sup>64</sup>. In the «integral credibility assessment» all the arguments should be addressed in the motivation, but also the weight given to statements that influence the credibility of a material fact are motivated more transparently.<sup>65</sup>

This example gives us reasons to reflect on the adequacy of a more objective characterization of the evaluation tools and on the fact that Member States are concretely beginning to feel this need as a necessary (although not sufficient) basis for a greater correctness of international protection decisions.

### 3.5. Standards of proof as tools of evidential policy

Another variable to consider is a sometimes neglected feature of the standards of proof: that they are, essentially, instruments of evidential policy rather than instruments with an epistemic function (i.e. rules on how to know the facts or on the formation of the evidentiary *corpus*).

The setting of a proof standard is a political and functional choice for political purposes that mainly concern the allocation or «distribution of the risk of error».<sup>66</sup> They are adopted on the basis of a balance of the values at stake (in our case: human rights, ECHR fundamental rights, impact of the decision on the applicant's life, the applicant's limited probative capacity, etc.) and the objectives pursued by the State (needs budget, reception capacity, strategic purposes, etc.).<sup>67</sup>

In our field of interest, the standard of proof involves a choice on the acceptable proportions of protection of individuals who do not need it and of non-protection

<sup>62</sup> Werkinstructie 2014/10, para. 3.2.1.1e 3.2.1.2 available at: <https://ind.nl/over-ind/Cijferspublicaties/Paginas/Werkinstructies.aspx>; see also METSELAAR 2017, p. 76.

<sup>63</sup> Immigration and Naturalization Service, Minister of Justice and Security.

<sup>64</sup> This is an argument used also by Ferrer. He has frequently criticized the formulation of a «single standard» for each disciplinary sector: e.g. FERRER & TUZET, 2018, p. 6.

<sup>65</sup> METSELAAR, 2017, p. 78. See: Werkinstructie 2014/10, §3.2., available at <https://ind.nl/over-ind/Cijfers-publicaties/Paginas/Werkinstructies.aspx>; see also: Notes on the report (Nota naar aanleiding van het verslag), Kamerstukken I, 2015, 34088, E, p. 8.

<sup>66</sup> FERRER, 2021, p. 115-138; FERRER & TUZET, 2018, p. 458.

<sup>67</sup> In the case that interests us, of course, these ultimate values will be human rights and fundamental rights recognized by the ECHR.



of those who are entitled to it. By means of a standard, the ordering also expresses «the degree of probability from which [is] willing to take the hypothesis as proven» and that is «what degree of support [...] seems sufficient to accept as the factual hypothesis in question is true».<sup>68</sup> The lower the standard of proof, the more applicants we protect (assuming, as we said, the responsibility and costs of protecting even subjects who are not in real danger), the higher the standard —and therefore difficult to meet—, the fewer individuals we protect, assuming the risk of endangering a greater number of subjects who, while expressing a well-founded fear, have not reached the established threshold. In this second case, therefore, far fewer subjects will be protected who, however, will find themselves in situations of more glaring or exceptionally serious danger (as in the extreme case of Belgium until 2015).

Gama's proposals (especially those relating to a greater harmonization of the subjective and objective sphere) seem to me to go in the direction of not adequately considering this characteristic of the standards. By placing standards of proof as an essential element of what appears to be his (descriptive) proposal for a conception of proof,<sup>69</sup> he also seems to take for granted a certain role and weight of the standards in defining the conception of proof itself without, however, giving reasons. This is a point on which it seems to me that too little thought has still been given and which deserves more attention.

Having said that, I think we must continue to reflect on the issue of the «precision» of standards. Gama criticizes Ferrer's position by highlighting that the inductive nature of the assessment as well as the irrepressible vagueness of the language would make it impossible to create standards that set a sufficient evidential threshold to satisfy the precision criteria required by Ferrer.<sup>70</sup> Evidence would therefore be incompatible with this level of precision.<sup>71</sup> This seems to me to be a strong criticism that will have to be taken seriously by Ferrer at least as regards a greater clarification of the natural gradualness that the requirement of precision proposed by him presupposes. I believe, indeed, that even if absolute precision cannot be expected, one can continue to defend the need for an effort to seek a greater degree of precision compatible with probabilistic and inductive reality. This last theme is certainly relevant for this research area, but it would require an in-depth study that is not possible here, so I will leave it to future work. Now I will try to answer the questions that closed paragraph 3.3.

In questions 1) and 2) I asked whether the standards generally used by national jurisprudence on international protection are adequate or whether there is a need to modify or reformulate these decision rules.

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<sup>68</sup> FERRER & TUZET, 2018, p. 457.

<sup>69</sup> GAMA, 2020, p. 17.

<sup>70</sup> GAMA, 2020, pp. 12-13. See DEI VECCHI, 2016 pp. 286-287.

<sup>71</sup> GAMA, 2020, p. 15; cf. FERRER, 2019, pp. 255-256 ff.

This sphere is certainly a *sui generis* field because, as I have said, it is characterized on the one hand by a peculiar lack of information and, on the other, it is marked by principles absent in canonical trial. If this suggests that the particularly low threshold envisaged by these standards is adequate, it is not sufficient to accept some actual inefficiencies of these standards: the case of Belgium mentioned above is a clear example of this.

The problems with these standards are two: the first in terms of the effective possibility of recourse by the applicants and the second in political terms. Actually, on one hand, they do not allow a distribution of the risk of error consistent with the principles that should govern such proceedings and, on the other hand, they also enter into conflict with current European law and supranational bodies guidelines.

This all generates, as I already said, a general worsening of conflicts of interest, differentiated levels of protection, the spread<sup>72</sup> of abusive practices at the individual and national level and discredit to the whole European asylum system. Having said this, it does not seem, and harmful nor dangerous to investigate standards that can provide greater democratic guarantees to applicants for international protection, and I believe this can also be pursued through standards free from terms for which a very limited justification can be given. The provision of standards that enhance the dimension of «acceptance» would therefore be desirable not only at the judicial level but also (and above all) at a first decision level.

In any case, the evidential issues (including those involving the formulation and application of standards) implied in the *evaluation* of international protection application have not yet been resolved by the European Court of Justice and this makes these issues still more interesting and open to discussion by the Justice, and this philosophers of law. Other issues that seem relevant to me and on which I would like to reflect more are: 1) whether the proof of «well-founded fear» referred to in Article 2, letter d), Directive 2011/95 diverges from the «proof of actual risk» referred to in Article 2, letter f), Directive 2011/95; 2) whether the approach to the evaluation of evidence diverges according to the different phraseology used by the *common* and *civil law* systems; 3) whether the creation of a single system of proof for the recognition of international protection can guarantee an equal level of protection throughout the Union and acceptable transparency of decisions. In this sense, the Union itself seems to be moving, working to transform all the directives that currently regulate this area into regulation.

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<sup>72</sup> BLOMMAERT, 2001.

#### 4. THE CREDIBILITY OF THE APPLICANT AND THE RELIABILITY OF THE APPLICATION

The art. 4, §5, lett. e) of the Qualification Directive 2011/95/EU mentions the verification of the general reliability of the *applicant* as one of the necessary conditions for the application of the so-called benefit of the doubt, the rule according to which «when certain aspects of the applicant's declarations are not supported by documentary or other evidence, their confirmation is not [...] necessary».<sup>73</sup> This wording echoes the one expressed by UNHCR in its *Handbook* that the benefit of the doubt should be granted when «the applicant's statements [are] consistent and plausible and not [...] contrary to generally known facts», i.e. when the examiner is *convinced* of the «overall credibility of the applicant».<sup>74</sup>

The case law of the Member States, for its part, does not consider credibility as referring to the sincerity of the applicants, but to the overall reliability of their *report*, that is, to the statements and other evidence produced in support of an application.<sup>75</sup>

It seems, therefore, that the sources examined lack of clarity, confusing the reliability of the applicant, of the information material provided by him and that of the overall application for protection, which is the reason why it seems desirable to try to draw a distinction between «reliability» and «credibility». In this regard, a unitary evidential system should not be afraid of conceiving the evaluation of the application in two distinct moments: one relating to the judgment of the applicant's overall credibility and one (conclusive) on the general reliability of the application which would include the first.

The assessment of credibility should refer to the assessment of the reliability of the applicant's statements, while the second should be understood as a subsequent

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<sup>73</sup> Art. 4 §5 of the Qualification Directive of 2011/95: the conditions necessary for the application of the benefit of the doubt (which presents itself as a relative legal presumption or a closing rule) are: a) that the applicant must have made «sincere efforts» to substantiate the request; b) that it has produced all the relevant elements in its possession and satisfactorily justified any lack of other significant elements; c) who has submitted the application as soon as possible or adequately justified not having done so; d) the decision maker will be able to apply this rule only when he is generally convinced of the consistency and plausibility of the applicant's statements (which must not contradict the general and specific information produced) and e) is therefore satisfied that the applicant is generally reliable. The benefit of the doubt raises a number of issues on which the CJEU has not yet provided guidance, including: 1) whether state decision-making bodies should (or should not) apply the benefit of the doubt as a rule or principle; 2) whether it can really be extrapolated from the provisions of Article 4, paragraph 5, of the Qualification Directive 2011/95; 3) whether it is a mere decision-making practice or whether it derives, as a consequence, from the application of a standard of evidence. See EASO 2018, p. 81. In the Italian legal system, this provision is present in art. 3 paragraph 5 of Legislative Decree 2007 n. 251: where it is stated that, in the absence of evidence, such statements «are considered true».

<sup>74</sup> UNHCR 2019, p. 44, §204. Italics mine.

<sup>75</sup> See EASO 2018a, p. 80.

and broader judgment (to which the assessment of credibility is functional) through which the overall assessment of the fulfilment of the criteria for the protection is carried out. Determining the general reliability of the application will therefore be the epistemic aim of the decision maker of an application for international protection.

Moving away from the overlapping use that courts, EU law and international sources make of these terms (distinguishing between credibility referring to the epistemic material provided by the subject and reliability of the question as a whole), would allow to recognize a specific decision-making relevance to both evaluation moments and to provide more publicity to the reasons underlying the decision.

Despite the terminology and conceptual confusion over the concepts of trustworthiness and credibility, the International Association of Refugee Law Judges (IARLJ), UNHCR and the European Asylum Support Office (EASO) are promoting increasingly in-depth studies that certainly support the clarifying efforts made by scholars and operators in the sector.

With reference to credibility, for example, three indicators have been developed: «coherence, «plausibility» and «sufficient detail».<sup>76</sup> Specifically, they facilitate the decision on the acceptability of facts<sup>77</sup> but they cannot be understood as necessary or sufficient conditions for the assessment of applications for international protection<sup>78</sup> or as binding or decisive elements.

The examining authority is therefore strongly invited to submit these indicators to a holistic judgment since none of them, in isolation, is considered decisive in establishing the general reliability of the application for protection. As part of this assessment, they will therefore be subjected to a double «balancing»: a) one between the indicators themselves (for example, between a plausibility judgment and one of insufficient details), and then b) between indicators and the so-called «specific circumstances of the applicant» (for example, between the judgment of inconsistency and the weight that elements like age, education, culture, religion, sex, sexual orientation, health, and vulnerability, have had on his report).<sup>79</sup>

#### 4.1. Credibility indicators<sup>80</sup>

Generally, the consistency judgment on the evidence provided by the applicant is divided into two: internal consistency and external consistency. By «internal consist-

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<sup>76</sup> The assessment of the credibility of the applicant is considered by EASO and UNHCR one of the most important problems related to international protection application. See IARLJ 2013; IARLJ 2016; UNHCR 2013; UNHCR 2014; Hungarian Helsinki Committee 2013 and 2015.

<sup>77</sup> EASO 2018a, p. 88.

<sup>78</sup> EASO 2018a, p. 88.

<sup>79</sup> EASO 2018a, p. 88.

<sup>80</sup> EASO 2018a, p. 87.

ency» we basically mean the non-contradictory nature of the evidence (statements, documents and other) provided by the applicant. The sources recommend that operators should evaluate this indicator with extreme caution because, even in cases where the applicant tries to provide the best possible support to his application, it is rare that he is able to provide an absolutely coherent, detailed and precise report.<sup>81</sup> This is because the precarious condition in which those seeking international protection usually find themselves can often hinder assertiveness, narration and memory, influencing the accuracy, completeness or relevance of what is transmitted. There are many factors that can affect the quality of the evidence provided by the applicant: think of the incidence of factors such as: 1) excessive emotionality, trauma, cultural and linguistic differences<sup>82</sup> but also 2) the methods of enforcement and verbalization<sup>83</sup> and 3) the conditions of manifest and hidden vulnerability (cases of cognitive disability or immaturity, think of minors).

This does not mean that fraudulent or dishonest conduct cannot be revealed,<sup>84</sup> but only that internal consistency is not necessarily an index of credibility<sup>85</sup> because, often, a negative assessment of credibility can also be due to factors external to the applicant (think of the case of a *biased* or simply not properly trained examiner).<sup>86</sup>

By «external coherence», on the other hand, we generally mean the non-conflict of all the information provided by the applicant (in the interview and at other times) with the *body* of information already ascertained in the procedure (COI<sup>87</sup>, appraisals, travel itineraries, particular events, etc.) and those generally known through maxims of experience<sup>88</sup> and covering scientific laws (scientific laws concerning human biology, the onset of pathologies, etc.).<sup>89</sup> Also, with regard to this indicator, the impact of the personal and contextual circumstances mentioned above must be taken into account. Thus, a negative assessment of the coherence of the evidence adduced by the applicant cannot justify the refusal to grant protection unless these inconsistencies are of such importance as to significantly affect the judgment of the overall reliability of the application.

<sup>81</sup> EASO 2018a, p. 89. UNHCR 2013, chapt. 2 and 3.

<sup>82</sup> EASO 2018a, pp. 176-190. See HERLIHY & TURNER, 2009.

<sup>83</sup> Usually in the interview at the Territorial Commission the narrated is recorded but not transcribed. On the other hand, it is very rare that the interview is videotaped.

<sup>84</sup> EASO 2018a, pp. 89-90. On the contrast between applicants considered «deserving» and «abusive» underlying the legislation on special needs, see: COSTELLO & HANCOX 2016, p. 376.

<sup>85</sup> In the same way the applicant's demeanor (or attitude) during the examination is not.

<sup>86</sup> JANSEN & SPIJKERBOER 2011.

<sup>87</sup> EASO 2018a, p. 90.

<sup>88</sup> On the concept of experience maxim: CANALE & TUZET, 2019, pp. 46, 56; TUZET, 2016, pp. 181-193 and 174-179 but already: CALAMANDREI, 1965, p. 51, note 106: «they consist of definitions or hypothetical judgments of general content obtained from the experience of the facts but independent of the individual cases from whose experience they are drawn, and outside of which they claim to be valid also for further cases». My translation.

<sup>89</sup> EASO 2018a, p.100 et seq.; 107 and ff.

Article 4, §5, letter c) of the 2011 Qualification Directive juxtaposes the concept of external consistency with that of plausibility, conveying a certain overlap between the two concepts.<sup>90</sup> The CJEU, despite having cited the concept of plausibility,<sup>91</sup> has not clarified whether in the lexicon of the Directive it has a distinct space that the law does not value or whether the term «plausibility» is used in a purely rhetorical-reinforcing sense. Despite the lack of clarity of the European legislator wording, «plausibility» and «coherence» should not be overlapped since the latter would seem to have a narrower extension than the former: a report may, in fact, not be credible even if it is plausible.<sup>92</sup> For its part, UNHCR has instead stated that plausibility refers to «reasonableness» or «possibility» that is, how likely a hypothesis is in relation to common sense.<sup>93</sup>

Although the use of maxims of experience is valuable in any evidential context and even more in a context in which the examining authority is called to decide on the basis of a small or even non-existent set of evidence, it should be pointed out that here the use of such means can be riskier than in other procedural contexts.

This occurs essentially for two reasons: 1) the scarcity of evidence in these procedures and 2) the highly cultural connotation of the maxims of experience. The scarcity of the evidence is an additional risk factor to the use of the maxims (which, in themselves, already discount the typical difficulties of inductive laws) because they cannot be «supported» or «contradicted» by other data and will be used as a means to make up for this lack of information.

The second reason, on the other hand, relates to the fact that most of the maxims of experience develop (and represent) typical regularities of a determined and specific socio-cultural context and can, therefore, have little heuristic value (if not misleading) when applied to events that occurred in other contexts.

Consider, for example, a «intra-family punitive reaction [...] disproportionate according to our canons» but perfectly common in a certain cultural context or the «brutal reaction» of a social group due to the «transgression of religious rules»<sup>94</sup> that, in our context, would make such a reaction unlikely. In both cases, the risk is to use maxims developed—for example—in the current European cultural context to find an incorrect judgment of implausibility.

Two other possibly misleading «maxims» are those of «rarity» and that of «similarity». The first is based on the fact that if a phenomenon is attested by the sources as «very rare» (for example, the practice of female genital mutilation in those countries where this generally does not happen) then it must be considered implausible. The second

<sup>90</sup> MINNITI, 2020, §4.3.1., speaks of it in terms of «likelihood» or «logical likelihood».

<sup>91</sup> CJEU, judgment of 26 February 2015, case C-472/13, *Andre Lawrence Shepherd v. Bundesrepublik Deutschland*, EU: C: 2015: 117, §43.

<sup>92</sup> EASO 2018a, p. 92.

<sup>93</sup> See UNHCR 2013, pp. 176-177.

<sup>94</sup> MINNITI, 2020, §4.1.

requires considering implausible —and therefore lacking in authenticity— an evidential set considered stereotyped or too similar to other stories already heard.<sup>95</sup> These examples show that in contexts where the evidence is particularly incomplete, the use of maximum of experience is useful but at the same time requires higher standards of motivation, capable of counteracting the risks inherent in such generalizations.<sup>96</sup>

The third indicator concerns the «sufficiency of details». The lack of «relevant» or significant elements —pursuant to art. 4, §5, lett. b)— could be considered as a «surprising» element, if referred to the narration of a lived event. However, as previously mentioned, given the particular condition of the applicant, this event is frequent and should be assessed «in a balanced and objective way».<sup>97</sup> Moreover, an interesting question, but for now unanswered by jurisprudence and EU law, concerns the threshold relating to how many details can reasonably be expected from a subject who finds himself proposing an international protection application based on an experience referred as personal and authentic.<sup>98</sup> Also in this case, the indicator is highly sensitive to personal experiences and to the examination methods. For this reason, an adequate evaluation will have to carry out a judgment that concretely takes into account the impact of these variables.<sup>99</sup>

The goodness of the evaluation of these indicators will therefore also be a function of how well trained and competent of the authorities involved, which should guarantee high standards of flexibility to cultural diversity and the ability to build, with the applicant, a trusting relationship on the basis of which a serene and complete presentation of the relevant information may take place.<sup>100</sup>

#### 4.2. Credibility: special cases

As I have just mentioned, a relevant variable in the evaluation of applications for international protection is the negative impact that the individual and contextual

<sup>95</sup> UNHCR points out that this way of reasoning is very risky given the repetitiveness with which decision makers are subjected to examining and evaluating very similar causes: UNHCR 2013, pp. 79-80; EASO 2018a, p. 35. See also: Cass. Civ. Sez. VI-1 sent. 2014 n ° 22111, this is now generally recognized also by legal psychology.

<sup>96</sup> EASO 2018a, p. 93.

<sup>97</sup> EASO 2018a, p. 91.

<sup>98</sup> EASO 2018a, p. 91. See also the judgment of 27 May 2014 of the Administrative and Labor Court of Szeged (Hungary), 7.K.27.145/2014/9.

<sup>99</sup> Thus, an applicant will be able to provide vague answers, while reporting a true report and the lack of details must be considered «in broad terms», not as a decisive factor of non-credibility: EASO 2018a, p. 92. United Kingdom Immigration and Asylum Court, judgment of 12 June 2003, JB (Democratic Republic of the Congo), 2003, UKIAT 00012.

<sup>100</sup> This becomes essential especially on those occasions in which the applicant has been the victim of painful and traumatic experiences. EASO underlines that among the most damaging attitudes to the collection of evidence are attitudes of skepticism or frequent interruptions during the interview: EASO 2018a, p. 91.

circumstances of the applicant can have on the credibility and, consequently, on the general reliability of the application. Consider, for example, how much post-traumatic *stress* can influence the ability to remember events or the behaviour of the applicant during the interview, a moment which is, notoriously, the most delicate and decisive in the evaluation of the application for protection.<sup>101</sup> These difficulties have led to problematic enforcement scenarios in which applicants were subjected to inappropriate questioning or felt obliged to submit sensitive material to «prove» crucial elements of their application for protection (e.g. their sexual orientation).<sup>102</sup>

For example, cases of persecution linked to gender and sexual orientation, those involving victims of trafficking or at risk of being trafficked,<sup>103</sup> or disabled and minors, are particularly complex and harbingers of procedural challenges.<sup>104</sup> In the specific case of minors,<sup>105</sup> it is said that they must benefit of specific procedural and evidential precautions to guarantee the correctness and non-injurious nature of the decisions<sup>106</sup> because a stronger presumption of vulnerability applies to them.<sup>107</sup>

If they are accompanied by subjects (such as, for example, the family or others) who already integrate the protection conditions, the assessment is relatively simple as the fear is generally considered «founded» by presumption. Instead, in cases in which they are alone, the assessment must be carried out by experts and in compliance with the international legislation in force in their favour. However, the assessment of the validity of their fear must be calibrated according to the stage of psycho-cognitive development they have reached.<sup>108</sup>

The epistemological pitfall hidden in the evaluation of the fear of minors (as well as of subjects suffering from psychiatric pathologies) therefore lies in the fact that their perception of danger could, at times, not accurately reflect the reality of the facts.<sup>109</sup> Reflecting on these cases highlights in a particular way the problems inherent in an assessment system that conceives evidence in predominantly subjective terms.

<sup>101</sup> UNHCR 2013; EASO 2018. See BLACK, 1994.

<sup>102</sup> The practice has now been recognized as contrary to the fundamental right to private and family life and incompatible with human dignity under EU law. CJEU, judgment of 2 December 2014, joined cases C-148/13 to C-150/13, *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, EU: C: 2014: 2406.

<sup>103</sup> UNHCR 2002, UNHCR 2012, UNHCR 2006.

<sup>104</sup> UNHCR 2009; EASO 2018a, p. 130 and ff. see also §29 of the Preamble of the Asylum Procedures Directive 2013/32/EU.

<sup>105</sup> UNHCR 2009, § 13.

<sup>106</sup> UNHCR 2009, § 65.

<sup>107</sup> Minors looking for international protection are considered vulnerable as they are particularly subject to being harmed by reason of their age. The presumed vulnerability increases if they are not «accompanied» by family or guardians.

<sup>108</sup> I am especially referring to the Convention on the Rights of the Child and its Protocols. See GAUDIO & BACCHIO, 2019.

<sup>109</sup> However, this problem would seem balanced by the standard of proof and by the humanitarian purpose which, in any case, tend to provide broad protection in this assessment procedure.



## 5. CONCLUSIONS

In the present article, I have analysed the main characteristics of the evidential assessment concerning the assignment of refugee *status*, underlining the complexity of this research area and its peculiarity with respect to the civil and criminal trial.

It has been noted how, in the European context, a unitary evidential system is lacking and how this constitutes a not negligible lacuna. Indeed, it removes effectiveness to the Common European Asylum System exposing applicants to differentiated and inadequate treatments and the States to a tightening of conflicts of interest with other Member States, with the Union and with individuals.

It has also been said that the contribution offered in evidential matters by bodies such as UNHCR, EASO and IARLJ, while relevant, is not enough to create a real culture of proof in this sector and a real harmonization of practices in European Union.

Subsequently, I have focused, more specifically, on some issues concerning the peculiar «subjectivity» that characterizes the proof required in this area and the probative standards. This reflection was, then, inserted into the debate that is touching the rationalist conception of legal proof promoted by Jordi Ferrer. It concluded by hoping for a more objective reformulation of the standards and a reflection on a unitary evidential asylum system.

Finally, some issues related to the evaluation of the applicant's storytelling were considered. Consideration was given, in particular, to the assessment of credibility and reliability, highlighting a certain confusion on this issue in international sources and in secondary EU law.

I hope that this text, with its merits and demerits, will bring scholars to this evidence area and offer them new tools for reflection.

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