Different in the same way?

Accommodating language, culture and disability in refugee assessment procedures and humanitarian assistance

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Camp, Turkey, near Syrian border 2014
Photo: University of Sydney/Mary Crock

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- Fieldwork in Malaysia, Indonesia, Pakistan, Uganda, Jordan, Turkey 2012-2014

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- Evaluating the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD)

Refugee settlement, Uganda, 2013
Photo: University of Sydney/Mary Crock

Turkish-Syrian border, southern Turkey. Photo: University of Sydney/Mary Crock

Refugee Convention article 1A(2) - a refugee is someone who:

*owing to **well-founded fear** of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country*

Under international law, refugees should have access to a range of human rights.

Understandings of difference

"the concept of "culture" within multiculturalism has taken on an objective, essential and ahistorical status. Rather than understanding that culture is a negotiated process that occurs within and between social groups, within a multicultural framework, culture has instead been treated like an independent variable with differences between groups defined in terms of their adherence to or deviations from social, political and economic norms. One of the key factors in this conceptualization is that culturally "different" groups are always understood in terms of their non-normativity"

Hester 2012, p. 284 (cultural competence in medicine)

Understandings of difference

- "Categorizing the defendant as a cultural other… prompts the defense attorney to invoke <u>specialist knowledge</u> about the defendant <u>which is not accessible to the defendant him/herself</u>

……

these attorney-initiated culturalizations mobilize common-sense understandings of 'culture' (which lack a clearly defined legal status..), without posing a threat to the judiciary's self-representation as 'empty'"

D'hondt 2009, p. 817 (culture as a defence in criminal trials)

Credibility assessment in Australian asylum procedures

- Institutional culture and public suspicion of refugees → rigorous assessment procedures to identify "genuine" refugees (Eades 2005)

- Lack of documentary evidence → creating a **credible** refugee narrative is key, and decision-makers must test applicants' credibility (Pöllabauer 2004)

- **But are these tests fair and what are the understandings that influence how they are designed and implemented?**

Australian asylum application process

- **Boat arrivals:** Barred from entry.

- **Onshore arrivals (those arriving with another visa):**

1. Written application, then interview with official from Immigration Department

2. Merits review – written form/submission and hearing at the Administrative Appeals Tribunal (AAT) (reassessment of claims)

3. Judicial review in Federal Court (limited – cannot consider merits, only questions of law)

Research corpus: existing interdisciplinary literature, AAT policy, 30 published merits review decisions.

How do policy and published decisions represent the various actors involved in asylum procedures? What are the ideologies that underpin these representations? (Van Leeuwen 1996)

Credibility assessment in the literature

- Likelihood of success varies greatly based on the individual decision-maker/ jurisdiction (Byrne 2007, Durst 2000)

- Australian Merits Review success rates:

Current government	Previous government
2015-2016: 18%	2012-2013: 38%
2014-2015: 23%	2011-2012: 48%
2013-2014: 23%	**2010-2011: 54%**

- Decision-makers use "objective" credibility indicators to measure and test the refugee narrative: plausibility, consistency, coherence and demeanour. (Coffey 2003, Luker 2013 – Australia, Sweeney 2009, Thomas 2011 - UK)

- Official narrative = number of written texts (submissions, forms, statements) and interactional communication (interviews and hearings). Power asymmetries → the asylum-seeker's narrative is actually co-constructed (Inghilleri 2003, Jacquemet 2009, Maryns 2013).

Ideology 1: Applicants are diverse and need accommodating

AAT credibility assessment guidelines

- **A third of all paragraphs are dedicated to outlining applicant/witness subjectivity**

*22. Members need to be mindful that a person may be anxious or nervous due to the environment of a hearing and the significance of the outcome. A person from a **different social and cultural environment** may experience bewilderment and anxiety. **The educational, social and cultural background of a person may affect the manner in which a person provides his or her evidence and the depth of understanding of particular concepts**. A person may have had **traumatic experiences or be suffering from a disorder** or illness which **may affect his or her ability to give evidence**, his or her memory or ability to observe and recall specific events or details. There may also be a mistrust in speaking freely to people in positions of authority.*

AAT credibility assessment guidelines

Ideology 2: Decision-makers are neutral and capable of objectivity

- *9. What is capable of being believed is not to be determined according to the Member's **subjective belief or gut feeling***

- *32. The tribunal may doubt…evidence if a person's testimony is incoherent or vague or lacks the detail or knowledge **where greater detail or knowledge might be expected of a person in the person's claimed position** or from the person's social or cultural background…[it] is entitled to have regard to an applicant's level of knowledge of **matters about which the applicant would be reasonably expected to know if his or her claims were truthful***

Ideology 2: Decision-makers are neutral and capable of objectivity

"First, they are factually wrong. Diversity is a feature of all human societies and to the extent that it is possible to speak of 'diverse individuals' or 'diverse groups' everyone is equally 'diverse'. Second, exempting socially dominant groups from being considered diverse – both internally and vis-à-vis people from other groups – contributes to the reproduction of the inequality between groups who are seen as 'default' and those who are seen as 'diverse'" (Piller 2016, p. 21).

Ideology 2: Decision-makers are neutral and capable of objectivity

AAT credibility assessment guidelines

- Decision-maker referred to as "member" 10 times – gives sense of belonging to the institution – a legitimate insider (cf applicant's outsider status)

- Decision-maker referred to as "the tribunal" 75 times

- eg. The tribunal "may doubt", "may have regard", "should clearly explain"

="spacialization" (following Van Leeuwen 1996). The decision-maker **is** the institution.

Reflects legal linguistic conventions, promoting the objectivity of legal decision-makers. Legitimacy of the process rests on this objectivity (Tiersma 1999).

Ideology 2: Decision-makers are neutral and capable of objectivity

Published merits review decisions

10% success rate (3/30 decisions). 20 different decision-makers. 29 individual decisions, one joint decision (2 decision-makers).

Neutrality reinforced by structure and language of decisions:

- Common headings, verbatim phrases (eg explaining the law and its application)

- 16 out of 20 decision-makers refer to themselves as "the Tribunal".

Published merits review decisions

Ideology 2: Decision-makers are neutral and capable of objectivity

Assessments of subjective applicants where the role of the decision-maker's own subjectivity is not acknowledged or explained.

*The Tribunal is of the view that **the applicant's responses appeared to be scripted** and did not answer the question... The Tribunal notes that despite an opportunity to clarify and explain, his **responses were vague, incoherent and lacked details**, raising doubts about the veracity of his claims... The Tribunal is not convinced by his comments that he was nervous; **he did not give the appearance of nervousness.***

(0801041 [2008], para 75)

Ideology 3: The narrative is the applicant's alone

Published merits review decisions

Challenges to institutional culture are not rewarded

The applicant stated that the mistake had been made by the translator. The Tribunal indicated that the inconsistency could raise doubts about the veracity of his claims and his credibility generally...The Tribunal invited him to comment or respond. The applicant said if there is any doubt he is regretful." 0801041 [2008]

The Tribunal noted its concern that his accounts of what happened in respect of who attacked his brothers did not appear to have been consistent. The applicant responded that it was possible the Department officer did not ask the question in the same way as was asked by the Tribunal." 1102389 [2011]

Ideology 4: Those who respect the system are credible

Those who have the sociolinguistic resources to navigate the system within institutional expectations have greater chance of success:

- **Explaining delayed evidence:**

…he was told that he needed supporting evidence if he was making any claims and that was the reason why he had not referred initially to those other arrests.

- **Explaining inconsistency:** applicant claimed that he'd been tortured many times during imprisonment, and later mentioned one beating.

"The applicant responded by referring to being chained while he was detained and he believed that constituted mistreatment"

1406144 [2015]

Applicants are regarded as subjective (but only in standard/expected ways), decision-makers are neutral and objective

Institutional expectations of how these diverse applicants should behave influences whether or not they will be successful in convincing decision-makers of their credibility. Only those who are able to align with these expectations are likely to be successful.

Institutional denial of the culture and subjectivity of the institution and its decision-makers undermines the accuracy and legitimacy of these assessments and creates only a façade of fairness.

"Unfortunately, the ubiquity of the cultural competency framework leaves us believing that we are addressing the problem of … inequities. This belief convinces us that we should do more of the same, when what we should be doing is interrogating and reconstructing the foundations of the model itself." (Hester, 2012, pp. 280-1)

Disability in forced migration

- Sydney Law School – Professors Mary Crock, Ben Saul and Ron McCallum

- Fieldwork: Malaysia, Indonesia, Pakistan, Uganda, Jordan, Turkey

- How well is international law (CRPD) implemented in practice?

- **How do understandings of disability impact the effectiveness of registration and resettlement mechanisms, and does practice align with discourse?**

Disability and the CRPD in forced migration

- The UN Convention on the Rights of Persons with Disabilities (CRPD) symbolises a significant conceptual shift
- CRPD has implications for the way the UN and government authorities respond to disability in refugee populations

Disability and the CRPD in forced migration

"The medical model views disabled people as dependent upon professionals, not only to validate their condition via a diagnosis, but also to determine and provide the best treatment or prosthetics needed to be cured or rehabilitated, to decide on relevant social benefits, and to certify any entitlement to exemptions (e.g., work), as long as individuals agree to receive the prescribed treatment."

Artiles 2013, p. 335

CRPD

- **CPRD article 1:**

- *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which <u>in interaction with various barriers</u> may hinder their full and effective participation in society on an equal basis with others*

- **Persons with disabilities (including non-citizens) have the same basic rights as all people. The CRPD emphasises the need for positive action to ensure equal access to rights and participation in society**

Post-CRPD UNHCR initiatives

- UNHCR Executive Committee Conclusion 2010 – echoing CRPD
- Need to Know Guidance 2011 – key considerations and action points

Subcategory	Description	Code
Visual impairment (including blindness)	Person who has a visual limitation from birth or resulting from illness, infection, injury or old age, which impacts daily life, may restrict independent movement, or require on-going treatment, special education or regular monitoring.	DS-BD
Hearing impairment (including deafness)	Person who has a hearing limitation from birth or resulting from illness, infection, injury or old age, which impacts daily life, and may require regular treatment, special education, monitoring or maintenance of artificial hearing device. The person may be able to communicate through sign language.	DS-DF
Physical disability – moderate	Person who has a physical impairment from birth or resulting from illness, injury, trauma or old age, which does not significantly limit the ability to function independently. This category may include mine victims and persons who lost fingers or limbs, which may be corrected with a prosthetic device.	DS-PM
Physical disability – severe	Person who has a physical impairment from birth or resulting from illness, injury, trauma or old age, which severely restricts movement, significantly limits the ability to function independently or pursue an occupation, and/or requires assistance from a caregiver.	DS-PS
Mental disability - moderate	Person who has a mental or intellectual impairment from birth or resulting from illness, injury, trauma or old age, which does not significantly limit the ability to function independently and interact, but may require special education, some monitoring and modest medication.	DS-MM
Mental disability - severe	Person who has a mental or intellectual impairment from birth or resulting from illness, injury, trauma or old age, which significantly limits the ability to function independently or to pursue an occupation. It requires assistance from a caregiver, and may require medication and/or medical treatment.	DS-MS
Speech impairment / disability	Person who is unable to speak clearly from birth or resulting from illness, injury, trauma or old age, which restricts or limits the ability to function independently, and may require speech therapy or medical intervention. The person may be able to communicate through sign language.	DS-SD
Mental Illness	NB: Falls within the 'Serious medical condition' category (rather than the Disability category) and captures persons with a 'mental or psychological condition which impacts on daily functioning'.	SM-MI

Categorisation of disability

But coding and consistency issues. How to take into account contextual differences? Eg.

Physical disability – moderate	**Person who has a physical impairment from birth or resulting from illness, injury, trauma or old age, which does not significantly limit the ability to function independently. This category may include mine victims and persons who lost fingers or limbs, which may be corrected with a prosthetic device.**	**DS-PM**
Physical disability – severe	Person who has a physical impairment from birth or resulting from illness, injury, trauma or old age, which severely restricts movement, significantly limits the ability to function independently or pursue an occupation, and/or requires assistance from a caregiver.	DS-PS

If someone does not have access to a prosthetic device and lives in a restrictive built and physical environment, which category applies?

If someone has both a visual impairment and a hearing impairment, are both coded or only one?

Are invisible disabilities overlooked in favour of more visible/obvious impairments?

Conflicting realities

Ongoing use of the medical approach

No reference to contextual factors

→ Revision of disability categorisation in registration underway

Identification and data

- Paucity of data on disability in displacement, people with disabilities remain under-identified (HelpAge International & Handicap International 2014; Women's Refugee Commission 2008)

- Malaysia UNHCR 0.2% disability prevalence vs. 15% WHO (2011) estimates

Identification and data

- No disability questions at registration
  - Resource constraints
  - Expertise requirements
  - Unrealistic expectations

Identification and data

Jordan Vulnerability Assessment Framework – a move towards more holistic understandings

- More sophisticated needs assessment tool

- Repeated house-to-house survey, rather than applied ad-hoc.

- Covers a wide variety of potential vulnerability indicators – eg family support, income, location, health, disability etc.

- Questions are designed depending on service providers' focus.

Identification and data

Medical approach remains: disability to be assessed by medical experts, most likely to be recorded when linked with available services.

Is disability a priority? Competing needs in humanitarian settings.

Resettlement and disability: (r)evolution?

- Resettlement: the transfer of a refugee from country of asylum (when deemed unsafe or untenable for ongoing residence) to a safe third country for permanent resettlement.

UNHCR Resettlement Categories

- Legal and/or Physical Protection Needs
- Survivors of Violence and/or Torture
- Medical Needs
- Women at Risk
- Family Reunification
- Children and Adolescents at Risk
- Lack of Foreseeable Alternative Durable Solutions

Resettlement and disability: (r)evolution?

UNHCR Resettlement Handbook 2004, Ch. 4.4.4

(guidance on Medical category)

Disabled refugees who are well-adjusted to their disability and are functioning at a satisfactory level <u>are generally not to be considered for resettlement.</u> For example, deaf and mute refugees who have learned sign language and who are able to exercise a profession, or who can benefit from training in the country of refuge, would not need resettlement. Conditions which can be properly addressed through the provision of such things as hearing aids or prosthetics should be treated in the country of refuge whenever possible. <u>Only when such disabilities are untreatable locally, and when they seriously threaten the person's safety or quality of life, should resettlement be explored.</u>

Disability = medical condition -> is the condition bad enough to merit resettlement?

Resettlement and disability: (r)evolution?

UNHCR Resettlement Handbook 2011 Ch. 5.2.4

Refugees with disabilities

- Includes CRPD definition, explanation and excerpts from the 2010 ExCom Conclusion

"A disability is only one aspect of the attributes of any human being, and persons with disabilities should be considered for resettlement on an equal footing with other refugees. In those instances where their disabilities have led to increased protection risks, resettlement as a tool of protection may also be the most appropriate solution."

Resettlement and disability: (r)evolution?

UNHCR Resettlement Assessment Tool: Refugees with Disabilities 2013

User Guide + Tool

"The Convention also recognizes that "disability" is an evolving concept, and stresses that a disability results from the interaction between persons with impairments and attitudinal and environmental barriers to their full participation in society. Persons with disabilities are not a homogenous group; they have different capacities and needs, and contribute in different ways to their communities. They may experience difficulty in moving, hearing, seeing, communicating or learning. These factors, which may be compounded by social, cultural, physical, economic and political discrimination, can hinder their participation in society." p. 2

"Persons with disabilities may have their case submitted under any of the resettlement submission categories." p.4

Resettlement and disability: (r)evolution?

- Practical implementation
  - Unaddressed barriers to accessing procedures
  - Refugees with disabilities excluded (attitudinal barriers)

Resettlement and disability: (r)evolution?

Resettlement state policies

Health assessments – excluding people found likely to create "undue costs" or "prejudice access" to Australian services or resources.

→Impacts on whether UNHCR can identify people with disabilities as candidates for resettlement

→May lead to the non-disclosure of disability due to fear of exclusion

→May create inclusion-issues during/after resettlement

Difference in discourse, difference in practice?
Discourse values diversity, accommodation vs conflicting ideologies and practical shortcomings.

Australian credibility assessment: claimed value of diversity and inclusion – denial of decision-maker/applicant hierarchy and socio-linguistic/structural issues.

UNHCR policy - political will/international influence. Clashes with existing operational guidelines and institutional culture and disconnect with implementation practices.

Refugee camp, Jordan. Photo: University of Sydney/Mary Crock

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Other online resources

Convention on the Rights of Persons with Disabilities:
http://www.un.org/disabilities/convention/conventionfull.shtml

Convention relating to the Status of Refugees and related documents:
http://www.unhcr.org/pages/49da0e466.html

Published merits review decisions from the Administrative Appeals Tribunal and (formerly) the Refugee Review Tribunal can be found via the Australian Legal Information Institute: http://www.austlii.edu.au/

Statistics on decision outcomes can be found via the Department of Immigration and Border Protection:
https://www.border.gov.au/

For more on these and related research projects, visit http://blogs.usyd.edu.au/refugees-disabilities/
http://www.languageonthemove.com/author/laura/ and https://www.researchgate.net/profile/Laura_Smith-Khan