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## Re-Victimization and the Asylum Process: *Jimenez Ferreira v. Lynch*: Re-Assessing the Weight Placed on Credible Fear Interviews in Determining Credibility

Alana Mosley†

### Introduction

On July 12, 2016, the United States Court of Appeals for the Seventh Circuit held in *Jimenez Ferreira v. Lynch* that notes from a credible fear interview may be an unreliable basis for an adverse credibility finding.<sup>1</sup> The court also found in this case that both the Board of Immigration Appeals (BIA) and the immigration judge improperly overlooked material evidence that corroborated the testimony of Ana Veronica Jimenez Ferreira (“Ms. Jimenez”).<sup>2</sup> Ms. Jimenez fled the Dominican Republic, seeking asylum in the United States from her common-law husband, who had repeatedly beaten, raped, stalked, and threatened to kill her and her two children.<sup>3</sup> The immigration judge had found her testimony incredible due to her failure to note the precise time and location of the attacks.<sup>4</sup>

Ms. Jimenez’s story illustrates the struggle many asylees experience as they maneuver through the asylum process. They must process their trauma and adequately articulate the nature and context of the traumatic event, or events, in a linear narrative that an immigration judge will find credible.<sup>5</sup> While telling one’s story of trauma may often help the healing process, in the asylum context, survivors are faced with the possibility of being found incredible and being sent back to the country they fled.

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†. J.D. Candidate 2018, University of Minnesota Law School. I would like to thank my parents, Tony and Sylvia Mosley, for their constant encouragement and support of my dreams and ambitions. I would also like to thank the staff and editors of *Law & Inequality: A Journal of Theory and Practice* for their help preparing this Article for publication. Last, but not least, I must thank my friends, Priscilla Willmott and Katelyn Nieman, for always being the support system I can count on throughout my journey as a survivor.

1. 831 F.3d 803, 809 (7th Cir. 2016).

2. *Id.* at 810.

3. *Id.* at 805.

4. *Id.* at 808.

5. Immigration and Nationality Act of 1952 § 208(b)(1)(B)(ii–iii), 8 U.S.C. § 1158(b)(1)(B)(ii–iii) (2012).

This Article will provide an overview of *Jimenez Ferreira v. Lynch*. Part I outlines the background of *Jimenez Ferreira v. Lynch*. Part II discusses the process of affirmative asylum. Part III provides insight into the concept of re-victimization and the impact that past trauma can have on a survivor's memory. Next, Part IV addresses the nature of credible fear interviews and the training provided to the officers who conduct them. Part V focuses on the approaches utilized by different circuits for determining the weight given to credible fear interviews. Finally, Part VI calls for more circuits to follow the approach utilized by the Seventh Circuit in *Jimenez Ferreira v. Lynch*.

### I. Background

Ms. Jimenez, a citizen of the Dominican Republic, applied for asylum and withholding of removal in the United States based on her particular social group membership, which was described as "Dominican women in relationships they cannot leave."<sup>6</sup> Ms. Jimenez fled to the United States to escape her abusive common-law husband, Ramon Holguin ("Mr. Holguin").<sup>7</sup> Her story of persecution began in 2007—when she returned home along with her children after attending a Christmas party, Mr. Holguin beat, choked, and raped her in their bedroom.<sup>8</sup> She tried to escape physical harm by staying at a friend's house and filing a complaint with the police in the Dominican Republic.<sup>9</sup> Mr. Holguin was arrested, but released from jail four days later.<sup>10</sup> He began stalking Ms. Jimenez at her workplace and threatened to kill her if she and her children did not come back to live with him.<sup>11</sup>

Out of fear for both her and her children's lives, she quit her job and moved approximately fifty miles away to her hometown of Bonao to stay with her mother.<sup>12</sup> In 2009, Mr. Holguin managed to find her and break into her mother's home, where he beat and threatened Ms. Jimenez until her mother called for the aid of neighbors.<sup>13</sup> Two months later, Mr. Holguin returned, kidnapped

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6. See *Jimenez Ferreira*, 831 F.3d at 805.

7. *Id.* at 806.

8. *Id.*

9. *Id.*

10. *Id.* ("There is no indication in the record that he was ever prosecuted for the incident.").

11. *Id.*

12. *Id.*

13. *Id.* at 806–07.

Ms. Jimenez by forcing her into his car, and raped her in the woods.<sup>14</sup> After this assault, Mr. Holguin continued to harass her by sending letters threatening to kill her and the children if she did not return to him.<sup>15</sup> Out of fear that Mr. Holguin would kill her, Ms. Jimenez fled to the United States to seek asylum with the hope of being able to bring her children to the United States if her asylum was granted.<sup>16</sup>

Ms. Jimenez entered the United States in Texas and was immediately detained by United States Border Patrol.<sup>17</sup> Three weeks later, she told an asylum officer that she was fleeing from her common-law husband.<sup>18</sup> The credible fear interview took place over the telephone while Ms. Jimenez was in detention. Since Ms. Jimenez only speaks Spanish, an interpreter had to relay the information to the asylum officer.<sup>19</sup> The asylum officer found that “[t]here [was] a significant possibility that the assertions underlying [Ms. Jimenez’s] claim could be found credible in a full asylum or withholding of removal hearing.”<sup>20</sup> However, the immigration judge held that Ms. Jimenez was ineligible for asylum and withholding of removal on the basis that Ms. Jimenez was not credible due to “glaring inconsistencies,” and because Ms. Jimenez lacked evidence to support her testimony.<sup>21</sup>

The “glaring inconsistencies” that bothered the immigration judge the most related to the 2007 attack.<sup>22</sup> The police complaint and the notes from Ms. Jimenez’s credible fear interview gave the impression that Mr. Holguin attacked her before she and her children left for the Christmas party, but at her 2013 removal

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14. *Id.* at 807.

15. *Id.*

16. *Id.* Despite Ms. Jimenez’s flight to the United States, Mr. Holguin continued to send letters to her mother threatening “to kill them all.” Ms. Jimenez’s mother reported the letters to police, but police in the Dominican Republic, Ms. Jimenez alleges, “don’t help the women” and “don’t do anything.” *Id.*

17. *Id.* at 806. When she was first detained, an immigration officer asked her if she feared returning to the Dominican Republic and Ms. Jimenez stated that she did not. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 807–08; *see also* 8 U.S.C. § 1158(b)(1)(B)(ii) (2012) (“Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided . . .”).

22. *See Jimenez Ferreira v. Lynch*, 831 F.3d 809, 808 (7th Cir. 2016). Other inconsistencies between Ms. Jimenez’s testimony in court and her credible fear interview were the date she was last raped, where she was last raped, and whether Mr. Holguin had hit her son. *Id.*

hearing, Ms. Jimenez stated that the violence happened when she returned home from the party.<sup>23</sup> The immigration judge overlooked the medical report which noted the injuries that Ms. Jimenez suffered due to this attack.<sup>24</sup> On appeal, the BIA upheld the immigration judge's decision.<sup>25</sup> On further appeal, the Seventh Circuit found that Ms. Jimenez had consistently maintained that Mr. Holguin raped her on Christmas Eve and that the medical report strongly supported her claim.<sup>26</sup> Thus, the precise time of day that the violence occurred was found to be a trivial discrepancy that the immigration judge should not use as the basis for an adverse credibility finding.<sup>27</sup>

## II. The Process of Affirmative Asylum

Applying for asylum is a process by which an immigrant may seek protection in the United States based on past persecution they have suffered or based on a well-founded fear of future persecution, due to their race, religion, nationality, membership in a particular social group, or political opinion.<sup>28</sup> The purpose of asylum law is to provide a safe haven to those who meet these statutory requirements.<sup>29</sup> To be found eligible, an immigrant must be physically present in the United States or seeking entry into the United States at a port of entry and must file an affirmative asylum claim within one year of their arrival.<sup>30</sup> Some asylum seekers may be excluded on the grounds that they can relocate to another area of their home country safely or had previously resettled safely in a third country prior to coming to the United States.<sup>31</sup>

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23. *Id.*

24. *Id.* at 807 (“[B]ruises and scratches on [Ms.] Jimenez’s body, as well as ‘visible signs and marks of a strangulation attempt’ and a ‘torn inner and outer labia of the vagina, evidencing penetration by force or with resistance on the part of the victim.’”).

25. *Id.* at 808.

26. *Id.* at 811.

27. *Id.*; *see also* *Tawuo v. Lynch*, 799 F.3d 725, 727 (7th Cir. 2015) (holding that inconsistencies cited by immigration judges “should not be trivial”).

28. 8 U.S.C. § 1158(b)(1)(B)(i) (2012); *see also* *Asylum*, USCIS, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum> (last updated May 12, 2017).

29. § 1159(b).

30. § 1158(a)(2)(B); *The Affirmative Asylum Process*, USCIS (Feb. 23, 2016), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process>.

31. § 1158(a)(2)(A).

With affirmative asylum, the applicant will file their asylum application, Form I-589, with the United States Citizenship and Immigration Services (USCIS).<sup>32</sup> In this situation, the applicant is present within the United States, but is not in removal proceedings. Next, the USCIS will have the applicant come in for an initial background check and get the applicant's fingerprints.<sup>33</sup> Then, the USCIS will schedule an asylum interview, also known as a credible fear interview, between the applicant and an asylum officer.<sup>34</sup> In this interview, the asylum officer will determine whether the applicant is eligible for asylum and whether the applicant is credible.<sup>35</sup> Within weeks, a credibility determination is rendered, and one of five possible decisions will be given:

[A] grant of asylum; referral to an immigration court; recommended approval; notice of intent to deny; or denial of asylum . . . . A decision to refer the applicant to an immigration court usually occurs if the applicant is not in valid status at the time of the asylum interview and USCIS was unable to grant asylum during the initial proceedings.<sup>36</sup>

Separately, in defensive asylum, the applicant is already in removal proceedings and is claiming asylum as a defense to removal.<sup>37</sup> This process happens in immigration court as a trial and, thus, is more adversarial.

While it may be relatively simple to define many of the protected grounds, such as race and nationality, there has been more debate surrounding the definition of particular social groups.<sup>38</sup> The United States and other common law countries tend to follow the "protected characteristic" approach.<sup>39</sup> Under this

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32. *The Affirmative Asylum Process*, *supra* note 30.

33. *Id.*

34. *Id.*

35. See *Preparing for Your Asylum Interview: What to Expect on the Day of Your Interview*, USCIS (May 12, 2017), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/preparing-your-asylum-interview>.

36. Maureen E. Cummins, *Post-Traumatic Stress Disorder and Asylum: Why Procedural Safeguards Are Necessary*, 29 J. CONTEMP. HEALTH L. & POL'Y 283, 302 (2013).

37. *Id.* at 296.

38. See generally Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a Particular Social Group and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47 (2008) (highlighting the evolution of the definition of "particular social group" since *In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985)).

39. *Id.* at 48. "Australia, on the other hand, has emphasized [sic] social perceptions, while also taking immutable characteristics into account." *Id.* at 49. The social perceptions approach focuses more on common traits shared by a group, and whether "the group is set apart from other members of society." *Id.* at 58. The

approach, a particular social group is found where “members have a ‘common immutable characteristic’ that they ‘either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.’”<sup>40</sup> The BIA expanded this approach when it introduced the “social visibility” test.<sup>41</sup> This test requires that individual group members, not simply the group itself, be recognizable to the public—a standard which may be problematic in asylum claims based on gender-based harm such as domestic violence, since victims may hide their situation from others.<sup>42</sup> This silence could be due to shame, fear, social tolerance towards domestic violence, financial dependence on their abuser, or other reasons.<sup>43</sup>

The BIA spoke to this issue in 2014 when it issued its decision in *In re A-R-C-G-* that seemed to better recognize gender-based harm claims in asylum adjudication.<sup>44</sup> The BIA’s new test requires that a social group be “(1) composed of members who share a common immutable characteristic, (2) defined with ‘particularity,’ and (3) socially distinct within the society in question.”<sup>45</sup> In its decision, the BIA recognized “married women in Guatemala who are unable to leave their relationship” as a particular social group that met each of the three prongs (i.e., immutability, particularity, and social distinction).<sup>46</sup> Despite this precedent, victims of domestic violence still face obstacles in establishing the nexus between the protected ground and past persecution<sup>47</sup> in proving that their government is either unable or unwilling to help them,<sup>48</sup> and in being found credible.

Applicants’ asylum claims often come down to whether, or not, an immigration judge finds them to be credible.<sup>49</sup> The credibility

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group does not have to be recognized by society, instead it must only be distinguishable from society. *Id.*

40. *Id.* at 51–52 (quoting *In re Acosta*, 19 I. & N. Dec. at 233).

41. *Id.* at 63.

42. *Id.* at 95.

43. *Id.*

44. *In re A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014) (finding “married women in Guatemala who are unable to leave their relationship” to be an acceptable particular social group).

45. Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT’L L. 1, 6 (2016).

46. *In re A-R-C-G-*, 26 I. & N. Dec. at 388.

47. Bookey, *supra* note 45, at 16.

48. *Id.* at 17.

49. See 8 U.S.C. § 1158(b)(1)(B)(ii) (2012) (“The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the

determination may be based on “the totality of the circumstances,” including:

the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements . . . the internal consistency of each such statement, the consistency of such statements with other evidence of record . . . and any inaccuracies or falsehoods in such statements . . .<sup>50</sup>

The asylum process can be very emotional for survivors of persecution due to the reality that their eligibility for asylum will require that they share very detailed information about the type of persecution suffered and about their persecutor. Moreover, due to the nature of the immigration process, their narrative will not simply be accepted as truth, but instead will be doubted and combed for inconsistencies. The experience of “reliving” persecution while being judged for credibility may cause asylum seekers to be re-victimized.

### III. Re-victimization and the Impact of Past Trauma

The impact of past trauma can affect a survivor’s conduct and memory.<sup>51</sup> Symptoms of trauma may be categorized into three types: hyperarousal, intrusion, and constriction.<sup>52</sup> Hyperarousal symptoms may cause one to be easily startled, go into permanent states of alert, or struggle to sleep;<sup>53</sup> intrusion symptoms may cause survivors to have flashbacks or to “relive” both the traumatic event and the emotional intensity of that event, over and over again;<sup>54</sup> constriction symptoms may cause survivors to respond or behave with emotional detachment or indifference, and they may be so numb to reality that events may be altered to seem as if they happened to someone else.<sup>55</sup> A critical piece of the healing process

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applicant satisfies the trier of fact that the applicant’s testimony is credible . . .”); see also Margaret Graham Tebo, *Asylum Ordeals*, ABA J. (Nov. 2006), [http://www.abajournal.com/magazine/article/asylum\\_ordeals](http://www.abajournal.com/magazine/article/asylum_ordeals) (“[O]ften documents are unavailable and so proofs rest on the credibility of the petitioner’s and witnesses’ testimony . . .”)

50. § 1158(b)(1)(B)(iii).

51. Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 484 (2016).

52. *Id.* at 485–86.

53. *Id.* at 486.

54. *Id.*

55. *Id.*



for many survivors of past trauma is the act of repeatedly telling their story.<sup>56</sup> The ability to describe a traumatic event often relies on memories of specific sensations and images, so it can be difficult to describe the event in a linear narrative or with everyday descriptors.<sup>57</sup> Due to this difficulty of (1) reconciling the event for themselves and (2) conveying this trauma to someone who may have never experienced something similar, a survivor's story may tend to shift or be revised with each narration as they attempt to compile all of the images and sensations into their own linear narrative of the event.<sup>58</sup>

This shifting narrative can be problematic in the asylum context since an immigration judge will likely be focused on determining whether the asylum seeker is credible.<sup>59</sup> Thus, any inconsistencies between the narrative told during the credible fear interview and the court hearing could pose a threat to the asylum seeker's claim. This idea of re-victimization, or re-traumatization, is based on the reality that asylum applicants are faced both with the uncertainty of whether they will be believed by others and the fear for their future due to the possibility of being forced to return to the persecution in their homeland.

#### IV. Credible Fear Interviews

In respect to affirmative asylum claims,<sup>60</sup> credible fear interviews are intended to be non-adversarial in nature, and "asylum officers have an affirmative duty to elicit all information relevant to the legal determination."<sup>61</sup> Moreover, "[t]he applicant must use as many details as possible to establish his [or her] well-founded fear of persecution in order to qualify as a refugee."<sup>62</sup> Factors that may influence an asylum officer's determination are: the credibility of the applicant, home country conditions, current United States asylum law, and international human rights law.<sup>63</sup> "[I]f the officer determines that an [applicant] does not have a

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56. *Id.* at 490.

57. *Id.* at 488.

58. *Id.* at 488–89.

59. 8 U.S.C. § 1158(b)(1)(B)(ii) (2012).

60. See Cummins, *supra* note 36, at 301 (noting that those making defensive asylum claims "must undergo a trial proceeding instead of an interview").

61. USCIS, LESSON PLAN OVERVIEW: CREDIBLE FEAR, ASYLUM DIVISION OFFICER TRAINING COURSE 12 (Feb. 28, 2014).

62. Cummins, *supra* note 36, at 300.

63. *Id.* at 299.

credible fear of persecution, the officer shall order the [applicant] removed from the United States without further hearing or review.”<sup>64</sup> After an adverse credibility determination by an asylum officer, the applicant will be placed in “mandatory detention until he [or she] is removed from the United States.”<sup>65</sup>

The USCIS, as an agency of the Department of Homeland Security (DHS),<sup>66</sup> employs and trains asylum officers.<sup>67</sup> Few officers are lawyers, but officers do receive training as to relevant immigration and asylum law.<sup>68</sup> As for training, the USCIS requires that all asylum officers complete the Asylum Officer Basic Training Course, which is a five-week course where asylum officers are trained on subjects such as international refugee law, United States asylum law, interviewing techniques, decision-making, and writing.<sup>69</sup> Additionally, “[a]ll asylum office staff are . . . required to attend USCIS trainings . . . offered through the USCIS Academy.”<sup>70</sup> Separate trainings are offered to provide insight into interviewing survivors of torture, in particular, how to identify victims of trafficking, and issues specific to women.<sup>71</sup> Asylum interviews are not recorded, so the only record will be the officer’s written or typed notes.<sup>72</sup> “In 2014, asylum officers granted 47% of the 27,006 claims they adjudicated, while 50% of [claims] were referred to immigration courts and 3% were denied.”<sup>73</sup>

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64. Immigration and Nationality Act of 1952 § 235(b)(1)(B)(iii)(I), 8 U.S.C. § 1225(b)(1)(B)(iii)(I); *but see* Cummins, *supra* note 36, at 299 (stating that immigration judges will give “prompt review” to an applicant’s case before the actual removal is executed).

65. Cummins, *supra* note 36, at 299.

66. *See generally Our History*, USCIS (May 25, 2011), <https://www.uscis.gov/about-us/our-history> (stating that there are three components within DHS: USCIS, Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP)).

67. *See Asylum Division Training Programs*, USCIS <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-division-training-programs> (last updated Dec. 19, 2016).

68. *See* Paskey, *supra* note 51, at 468.

69. *Asylum Division Training Programs*, *supra* note 67.

70. *Id.*

71. *Id.*

72. *See* Paskey, *supra* note 51, at 468.

73. *Id.* at 470; *see also* USCIS, AFFIRMATIVE ASYLUM APPLICATION STATISTICS AND DECISIONS ANNUAL REPORT 3 (June 20, 2016).

## V. Approaches for Determining the Weight Given to Credible Fear Interviews

### A. Assessing the Quality of the Interview and Notes

*Jimenez* was decided in the wake of *Moab v. Gonzales*, in which the Seventh Circuit held that too much weight was placed on the credible fear interview in making a credibility determination involving an applicant who did not mention his sexual orientation during the credible fear interview because he was afraid that he would be further persecuted on that basis.<sup>74</sup> Similarly, the Seventh Circuit held in *Dong v. Gonzales* that airport interviews “are not always reliable indicators of credibility.”<sup>75</sup> The Seventh Circuit adopted the Second Circuit’s “list of nonexclusive factors” for “determining the reliability of an asylum applicant’s preliminary interview.”<sup>76</sup> To determine whether the notes from a credible fear interview are reliable, the Third Circuit looks at (1) whether the record of the interview is a verbatim transcript of the conversation, or simply a summary; (2) whether follow-up questions were asked in order to get more details relating to the asylum claim; (3) whether the applicant is reluctant to talk to government officials due to negative past experiences with government officials in their home country; and (4) whether the applicant’s answers sound as though they understood the questions being asked of them.<sup>77</sup> Conversely, the Second Circuit finds an inherent difference in the nature of asylum interviews and airport interviews, thus it treats them differently and does not see the same need to assess the reliability of asylum interviews.<sup>78</sup>

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74. *Moab v. Gonzales*, 500 F.3d 656, 660–61 (7th Cir. 2007).

75. 421 F.3d 573, 579 (7th Cir. 2005).

76. *Moab*, 500 F.3d at 661. See generally *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179–80 (2d Cir. 2004) (noting that the Second Circuit, likewise, adopted the Third Circuit’s list of factors to determine whether notes from an airport interview could be considered reliable).

77. *Ramsameachire*, 357 F.3d at 180.

78. See S. KATHLEEN PEPPER & FATIMAH A. MATEEN, ASYLUM CREDIBILITY AND CORROBORATING EVIDENCE IN THE FEDERAL COURTS OF APPEALS AND IN THE BOARD OF IMMIGRATION APPEALS OUTLINE 31 (2006), <https://pdfs.semanticscholar.org/cba6/68cac2622b7d2831e4d8b8fe5bb2aee04e17.pdf> (last updated Mar. 2011); cf. *id.* at 53 (stating that the Third Circuit views the context and flaws of an asylum interview and airport interview as similar).

### B. Judicial Discretion

The Eleventh Circuit has chosen not to take the approach utilized by the Seventh and Second Circuits.<sup>79</sup> Rather, the Eleventh Circuit gives full discretion to immigration judges to determine whether notes from credible fear interviews are sufficient and reliable.<sup>80</sup> Likewise, Congress, through the REAL ID Act,<sup>81</sup> gives immigration judges substantial discretion,<sup>82</sup> both in making credibility determinations and in choosing the factors on which they base these determinations.<sup>83</sup> However, the Eleventh Circuit does utilize the specific, cogent reason standard.<sup>84</sup> When a judge bases an adverse credibility finding on inconsistencies between the notes from the credible fear interview and the asylum seeker's personal testimony or asylum application, the Eleventh Circuit has held that the immigration judge's finding will only be upheld if it was supported by specific, cogent reasons.<sup>85</sup>

While the specific, cogent reason standard does help to avoid adverse credibility findings based on immaterial inconsistencies, it does not push immigration judges to further question applicants and attempt to reconcile material inconsistencies that may have valid explanations.<sup>86</sup> This makes it especially important that asylum seekers strive to convey a linear narrative that outsiders can follow, because a shifting narrative could be viewed as a specific, cogent reason for an adverse credibility finding.

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79. See *Yan Jin Zao v. U.S. Attorney Gen.*, 192 F. App'x 825, 827 (11th Cir. 2006) (stating that the court had "never held that it is reversible error for an [immigration judge] to fail to evaluate an airport statement using these factors").

80. *Id.* But see *Pepper & Mateen*, *supra* note 78, at 158–159 (“[A]irport statements should not form the exclusive basis of an adverse credibility finding.”).

81. Pub. L. No. 109-13, 119 Stat. 231 (2005).

82. *But cf.* *Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) (“Deference is earned; it is not a birthright.”).

83. See 8 U.S.C. § 1158(b)(1)(B)(ii) (2012); *accord id* at (iii).

84. See *Pepper*, *supra* note 78, at 152 (“An Immigration Judge’s adverse credibility finding must be supported by ‘specific, cogent reasons.’”).

85. See *Chen v. U.S. Attorney Gen.*, 463 F.3d 1228, 1231 (11th Cir. 2006) (citing *Forgue v. U.S. Attorney Gen.*, 401 F.3d 1282, 1287 (11th Cir. 2005)).

86. See *generally* *Aden v. Ashcroft*, 396 F.3d 966, 968–69 (8th Cir. 2005). Concurring Judge Heaney agreed that the immigration judge found specific, cogent reasons to find the applicant’s testimony incredible, but stated that “[i]t would have been very helpful had the [immigration judge] taken the time . . . to attempt to resolve the inconsistencies.” This was especially so since the applicant would have been qualified for relief had she been able to reconcile her story. *Id.*

## VI. Analysis of the *Jimenez Ferreira v. Lynch* Decision

Asylum seekers often arrive with little to no corroborating evidence to support their asylum petition.<sup>87</sup> Therefore, their narrative of the traumatic event, or events, is often their main evidence of the past persecution that they have suffered. However, in Ms. Jimenez's case, she provided "over 400 pages of documentary evidence" with her petition for asylum, including the police complaint from her 2007 sexual assault, a doctor's report, and a psychologist's report.<sup>88</sup> The doctor's report stated that Ms. Jimenez had "visible signs and marks of a strangulation attempt' and a 'torn inner and outer labia of the vagina, evidencing penetration by force or with resistance on the part of the victim.'"<sup>89</sup> Similarly, the psychologist's report mentioned that she showed "signs and symptoms of tension, worry, fear for her life and the lives of her family[.]" and recommended that Ms. Jimenez "be referred immediately to group therapy' to 'help her overcome the trauma.'"<sup>90</sup> Despite having material evidence that corroborated her story, Ms. Jimenez's testimony was still not accepted as credible. This is a reality that many asylum seekers face. Despite their best efforts, their traumatic experiences "may not be accurately legitimated and accepted by outsiders," such as asylum officers or immigration judges.<sup>91</sup>

One must consider whether it is possible to effectively judge the credibility of a person coping with trauma within an adversarial system. Judges use factors such as demeanor, candor, and the internal consistency of each statement to determine an applicant's credibility.<sup>92</sup> However, these factors can be poor gauges when considering the difficulty many survivors of abuse or persecution have in articulating a linear narrative that effectively summarizes their experiences.<sup>93</sup> Similarly, the applicant may feel shame or

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87. See USCIS, INTERVIEWING SURVIVORS OF TORTURE AND OTHER SEVERE TRAUMA: TRAINING MODULE 25 subd. 10.2 (Oct. 11, 2012), available at <https://refugeerights.org/wp-content/uploads/2018/02/Interviewing-Survivors-of-Torture-2015.pdf>.

88. *Jimenez Ferreira v. Lynch*, 831 F.3d 803, 807 (7th Cir. 2016).

89. *Id.*

90. *Id.*

91. See Erin Rider, *Asylum Seekers' Credibility Burden: Managing Trauma in the Asylum Process Without Collective Support*, 2 J. OF SOC. & SOC. WORK 263, 269 (2014).

92. 8 U.S.C. § 1158(b)(1)(B)(iii) (2012).

93. This is especially so when language is an additional barrier to the process. In Ms. Jimenez's case, her credible fear interview was conducted while in detention

embarrassment in disclosing the abuse they suffered.<sup>94</sup> Ms. Jimenez personally felt this: she testified “that she was ashamed and ‘embarrassed’ to discuss Holguin’s abuse.”<sup>95</sup> Similarly, a shifting narrative may very well be an applicant’s attempt to grapple with the extent of the trauma they have suffered, and thus, they may still be trying to reconcile their situation for themselves. In addition to having to accept the facts of their claim for themselves, applicants must also persuade outsiders that they can, and should, be believed.

As previously mentioned, the impact of past trauma can affect a survivor’s conduct and memory.<sup>96</sup> While in detention, Ms. Jimenez did not immediately disclose to her detaining officers that she feared having to return to the Dominican Republic, “because she was nervous, afraid and ashamed to tell the male officer conducting the interview about her ex-husband’s abuse.”<sup>97</sup> Upon expressing her fear of returning, she was given a credible fear interview.<sup>98</sup> “Ms. Jimenez was confused and nervous during her credible fear interview, and embarrassed to be telling the intimate details of her relationship with Holguin to a complete stranger and an unknown telephonic interpreter.”<sup>99</sup> However, despite these barriers, the asylum officer found Ms. Jimenez to have a credible fear of persecution and, thus, she was released.<sup>100</sup> In contrast, the immigration judge was not similarly persuaded and found Ms. Jimenez incredible based on “glaring inconsistencies.”<sup>101</sup>

The issue with the current state of determining credibility within the immigration court setting is that the focus is not actually on the facts of the case, but instead the applicant’s unwavering

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with an asylum officer and a telephonic interpreter. *See Jimenez Ferreira*, 831 F.3d at 806. Some of the inconsistencies that the immigration judge noted were due to breakdowns in translation during the credible fear interview. *See* Brief for Petitioner at 21–28, *Jimenez Ferreira v. Lynch*, 831 F.3d 803 (7th Cir. 2016) (No. 15-2603); *accord Jimenez Ferreira*, 831 F.3d at 807–08.

94. *See generally* Brief for Petitioner, *supra* note 93, at 30 (“Ms. Jimenez testified that Holguin’s physical and sexual abuse had a significant impact on her emotional and mental well-being, to the extent that her family insisted she see a therapist, but that it is still extremely difficult for her to discuss the physical and sexual abuse to this day.”).

95. *Id.*

96. *See* Paskey, *supra* note 51, at 484.

97. *See* Brief for Petitioner, *supra* note 93, at 8.

98. *Id.* at 9.

99. *Id.* at 17.

100. *Id.* at 9.

101. *Jimenez Ferreira v. Lynch*, 831 F.3d 803, 807 (7th Cir. 2016).

consistency in relaying traumatic details.<sup>102</sup> Note that in *Jimenez*, the immigration judge overlooked the medical report, which noted the injuries Ms. Jimenez suffered due to the 2007 Christmas Eve attack<sup>103</sup> and instead focused on her timeline of those events—i.e., whether Mr. Holguin beat and raped her before or after the party on Christmas Eve.<sup>104</sup> Thus, the immigration judge placed the emphasis on the time of the attack, rather than the actual attack. The persecution suffered was the attack itself, which could be corroborated with the medical report, psychologist's report, and police complaint. The technical issues should not be completely ignored, because finding *material* inconsistencies may be a sign of a fraudulent asylum claim. At the same time, minor technical issues should not be the basis of an immigration judge's determination, especially where corroborating evidence exists.

The Fifth Amendment guarantees asylum seekers, and more generally “person[s],”<sup>105</sup> a due process “right to have a claim heard by a neutral, impartial arbiter.”<sup>106</sup> The importance of impartiality is reaffirmed in the *Ethics and Professionalism Guide for Immigration Judges*, which states that judges should perform their responsibilities without showing prejudice.<sup>107</sup> However, an asylum seeker's fate will be greatly impacted by which judge presides over his or her case, as well as the region of the United States where the case is heard.<sup>108</sup> While the national average asylum grant rate was 48% in 2015, many regions had much lower grant rates: Atlanta, Georgia (2%), Las Vegas, Nevada (7%), Dallas, Texas (9%), Houston, Texas (9%), Charlotte, North Carolina (13%), and Detroit, Michigan (14%).<sup>109</sup> Similarly, the United States Government Accountability Office (GAO) noted significant variations in asylum outcomes

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102. See Graham Tebo, *supra* note 49 (stating that the “credibility determination is where some immigration judges seem to go off the rails, according to circuit court opinions”).

103. *Jimenez Ferreira*, 831 F.3d at 807–08.

104. *Id.* at 808.

105. U.S. CONST. amend. V.

106. James L. Buchwalter, *Existence and Effect of Bias by Immigration Judge*, 45 A.L.R. FED. 2D 219 § 2.

107. See EXEC. OFF. FOR IMMIGR. REV., ETHICS AND PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES IX (2011).

108. *Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States*, AM. IMMIGR. LAWYERS ASS'N at 22 (June 16, 2016).

109. *Id.* Cf. Paskey, *supra* note 51, at 509 (“At the opposite end of the spectrum, judges in New York City granted 84% of the claims they adjudicated. The grant rate was also higher than average in Arlington, Virginia (71%); Honolulu (74%); Philadelphia (59%); and San Francisco (59%).”).

depending on the court's region and the judge hearing the case.<sup>110</sup> For instance, "affirmative applicants in San Francisco were . . . 12 times more likely than those in Atlanta to be granted asylum."<sup>111</sup> Some blame judicial bias and the role of politics in appointing immigration judges;<sup>112</sup> others blame a backlogged and broken system.<sup>113</sup> "Weighed down by a backlog of more than 520,000 cases, the United States immigration courts are foundering, increasingly failing to deliver timely, fair decisions to people fighting deportation or asking for refuge . . ."<sup>114</sup> This overwhelming case load also undermines the gravity of the decisions that immigration judges are being asked to make.<sup>115</sup> The years of waiting injure asylum seekers because they face the reality that their evidence may become stale and their memory of past events will decay. For Ms. Jimenez, her hearing occurred in 2013, but many of the relevant events that she was expected to relay in detail occurred between 2007 and 2009.<sup>116</sup> There was an expectation that Ms. Jimenez be able to remember and articulate, in a linear narrative, specific details of events that had happened nearly four to six years prior.<sup>117</sup> In her case, the immigration judge was concerned about discrepancies as to details,

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110. *U.S. Asylum System: Significant Variation Existed in Asylum Outcomes Across Immigration Courts and Judges*, U.S. GOV'T ACCOUNTABILITY OFF. (Sept. 2008), <http://www.gao.gov/assets/290/281817.pdf> (highlighting findings of the GAO-08-940 Report, which found that nine factors greatly affected the variability in asylum outcomes, one such factor being the gender of the immigration judge).

111. *Id.*

112. See, e.g., Elise Foley, *Here's Why Atlanta Is One of The Worst Places To Be An Undocumented Immigrant*, HUFFINGTON POST (May 25, 2016), [http://www.huffingtonpost.com/entry/deportation-raids-immigration-courts\\_us\\_574378d9e4b0613b512b0f37](http://www.huffingtonpost.com/entry/deportation-raids-immigration-courts_us_574378d9e4b0613b512b0f37) ("The process is supposed to be apolitical, but it hasn't always been—President George W. Bush's administration for years asked certain immigration judges about their political views. Those vetted judges . . . were more likely than others to deny asylum."); Julia Preston, *Deluged Immigration Courts, Where Cases Stall for Years, Begin to Buckle*, N.Y. TIMES (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html> (noting that immigration courts tend to be affected more by federal political changes because they fall under the Department of Justice, whereas other federal courts fall under the judiciary).

113. See Preston, *supra* note 112, at 2 ("With too few judges, overworked clerks and an antiquated docket based on stacks of paper files, many of the 56 courts nationwide have become crippled by delays and bureaucratic breakdowns.").

114. *Id.*

115. See Stuart L. Lustig, et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMM. L.J. 57, 73 ("This job is supposed to be about doing justice. The conditions under which we work make it more and more challenging to ensure that justice is done.").

116. *Jimenez Ferreira v. Lynch*, 831 F.3d 803, 806 (7th Cir. 2016).

117. *Id.*



such as what time of day she was raped on Christmas Eve in 2007, the exact date she was last raped, the location she was last raped, and whether Mr. Holguin had hit her son.<sup>118</sup> There are general issues confronting a survivor's ability to articulate a linear narrative regarding traumatic events, but these issues may also be compounded by the long length of time it takes to get a hearing.

Aside from the problems created by the backlog of cases, there are also disparities in denial rates within jurisdictions that make judicial bias, political sway, and general inexperience more likely culprits. For instance, in July 2006, Transactional Records Access Clearinghouse, a research organization associated with Syracuse University, released a study stating that Chinese immigrants make up almost twenty-two percent of asylum seekers in the United States.<sup>119</sup> The study found that in New York there was a grave disparity in the grant rates for Chinese asylees represented by lawyers—one judge denied almost seven percent of petitions, while another denied ninety-four percent.<sup>120</sup> Circuit courts have questioned the skill and temperament of some immigration judges, mainly those who have been repeatedly appealed.<sup>121</sup> Note that “[a]bout half of the judges appointed in [the] 2004-2007 period had no experience with immigration law.”<sup>122</sup>

The purpose of the credible fear interview is to “identify potentially meritorious claims to protection.”<sup>123</sup> Similarly, USCIS training materials describe the credible fear interview as simply a “screening process,”<sup>124</sup> yet in Ms. Jimenez’s case, the notes from her credible fear interview held substantial weight before the immigration judge.<sup>125</sup> The inconsistencies between these notes and

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118. *Id.* at 807–08.

119. See Graham Tebo, *supra* note 49.

120. *Id.*

121. *Id.*

122. Foley, *supra* note 112.

123. USCIS, ASYLUM DIVISION OFFICER TRAINING COURSE: CREDIBLE FEAR 11 (Feb. 28, 2014), <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf>.

124. See *id.* at 17.

125. *Jimenez Ferreira v. Lynch*, 831 F.3d 803, 807–08 (7th Cir. 2016) (“The [immigration judge] was especially troubled by the fact that ‘[b]oth the police complaint and her credible-fear interview indicate that [Ms. Jimenez] was not attacked by Holguin after she returned from the dinner party on Christmas Eve, as she testified at her hearing, but that the violence occurred before she was able to go to the party . . . .’”); see also Brief for Petitioner, *supra* note 93, at 10 (“The [immigration judge]’s decision rests primarily on perceived inconsistencies between the summary translation of Ms. Jimenez’s credible fear interview and her testimony at her hearing and her documentary evidence.”).

the applicant's testimony often serve as the basis for adverse credibility findings without much concern about the reliability of those notes.<sup>126</sup> In *Jimenez*, the Seventh Circuit found that Ms. Jimenez had consistently maintained that Mr. Holguin raped her on Christmas Eve and that the medical report corroborated her claim.<sup>127</sup> Thus, the possible discrepancies—regarding the precise time of day that the violence occurred—between the interview notes and Ms. Jimenez's testimony, asylum application, and corroborating evidence was found to be a trivial discrepancy for the immigration judge to use as the basis for an adverse credibility finding.<sup>128</sup> More than that, the Seventh Circuit was concerned by how much weight was placed on Ms. Jimenez's credible fear interview, since it was not a verbatim transcript, and because it should not have been given more weight than all of the supporting evidence she provided.<sup>129</sup>

Courts should question the reliability of credible fear interview notes due to the nature of those interviews.<sup>130</sup> The asylum officer's notes are the only record of the interview.<sup>131</sup> A verbatim transcript would provide a judge with more insight into the nature of the questions and answers, rather than a simple summary of the dialogue.<sup>132</sup> Similarly, a verbatim transcript would allow the judge to see whether the asylum officer asked relevant follow-up questions to seek more details and information from the applicant.<sup>133</sup> For instance, Ms. Jimenez's responses to some of the asylum officer's questions give the impression that she either "did not understand [the] question[] . . . or that the interpretation was unclear to her."<sup>134</sup> If the notes are only a summary, then the judge

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126. Cf. Brief for Petitioner, *supra* note 93, at 10–11 (stating that the immigration judge's "decision ignored or discounted Ms. Jimenez's consistent and compelling testimony, both at the hearing and in her original asylum application and accompanying affidavit, and the substance of the corroborating evidence she submitted to the [immigration judge].").

127. *Jimenez Ferreira*, 831 F.3d at 811.

128. *Id.*

129. *Id.* at 810.

130. Recall that Ms. Jimenez's credible fear interview took place in detention with an asylum officer and a telephonic translator. *See id.* at 806.

131. *See* Brief for Petitioner, *supra* note 93, at 15 n.3 (arguing that the Government offered no further evidence "to bolster or supplement the notes").

132. Cf. *id.* at 14–15 (stating that the asylum officer's summary notes from Ms. Jimenez's credible fear interview were "incomplete" and "often incoherent . . . as evidenced by numerous grammatical and syntactical lapses.").

133. *Id.* at 15.

134. *Id.*

has no way of knowing whether the applicant's answers were evasive and vague, or whether the asylum officer failed to ask the appropriate follow-up questions to gain more insight into, and details from, the applicant's story.<sup>135</sup> Moreover, a verbatim record would allow the judge to interpret the nature of the interaction between the officer and the applicant. For example, the applicant may indicate reluctance in terms of talking to government officials based on negative experiences in his or her homeland. In Ms. Jimenez's case, she had filed a complaint with the police in the Dominican Republic, and based on this, Mr. Holguin was arrested—but he was released from jail four days later.<sup>136</sup> Ms. Jimenez had voiced a distrust of law enforcement in the Dominican Republic.<sup>137</sup> Thus, it would not be difficult to understand that she may similarly have been reluctant to speak to the United States asylum officer regarding a topic as sensitive as past physical and sexual abuse.<sup>138</sup> In general, these factors come down to verifying that the asylum officer's notes serve as a reliable record of the credible fear interview and, thus, a reliable tool to use in determining an applicant's overall credibility. This approach seems to look at decisions based primarily on credible fear interview notes as being a red flag, therefore, the Seventh Circuit stresses the importance of assessing the reliability of these notes before using them as the basis for an adverse credibility determination.<sup>139</sup>

## Conclusion

Reforming the immigration system has been a topic of discussion for some time.<sup>140</sup> Yet, little change has been made to

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135. *Id.* (“The [asylum] officer never follows-up to clarify if ‘Sanchez and Ysavelita’ is the name of a town, neighborhood, [] apartment complex or the location of the friend’s home where she initially fled after Holguin beat and raped her.”).

136. *Jimenez Ferreira v. Lynch*, 831 F.3d 803, 806 (7th Cir. 2016).

137. *Id.* at 807; *accord* Brief for Petitioner, *supra* note 93, at 3 (“The Dominican police provided essentially no protection to Ms. Jimenez, despite the complaint she filed with them following the first instance of abuse, and the many complaints Ms. Jimenez’s mother filed after Holguin sent her threatening letters.”).

138. *See* Reply Brief for Petitioner at 3, *Jimenez Ferreira v. Lynch*, 831 F.3d 803 (7th Cir. 2016) (No. 15-2603) (“Ms. Jimenez was expected to disclose intimate details of abuse—including rape—to government agents when her prior experience with police in the Dominican Republic was negative and would likely have engendered mistrust of the authorities.”).

139. *See Jimenez Ferreira*, 831 F.3d at 809.

140. *See, e.g.*, ABA COMM’N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010); Paskey, *supra* note 51, at 507–508; Lustig, *supra* note 115, at 81–82.

correct the backlogged and politically shifting nature of the immigration system.<sup>141</sup> Within the context of the current system, circuit courts should follow the approach utilized by the Seventh Circuit in *Jimenez Ferreira v. Lynch* and assess the quality of asylum interviews and the notes from said interviews in order to decide the level of weight and credence the notes ought to be given in determining the applicant's credibility. This could be accomplished by circuits establishing their own factors to consider in assessing the quality of the interview and notes, or by adopting the four nonexclusive factors utilized by the Third Circuit and adopted by the Seventh Circuit: (1) whether the record of the interview is a verbatim transcript of the conversation, or simply a summary; (2) whether follow-up questions were asked in order to get more details relating to the asylum claim; (3) whether the applicant is reluctant to talk to government officials due to negative past experiences with government officials in their home country; and (4) whether the applicant's answers sound as though they understood the questions being asked of them.<sup>142</sup>

The benefit of utilizing the aforementioned factors is that it first requires the immigration judge to determine whether it would be fair to base an adverse credibility finding on inconsistencies in the asylum officer's notes, or between the notes and the applicant's testimony. If the notes are simply a summary of a more detailed conversation, or if the asylum officer failed to ask relevant follow-up questions, these flaws should not be held against the applicant as a blemish on his or her character or credibility. Utilizing these factors will better aid judges in making credibility determinations based on the applicant's own inconsistencies and discrepancies, rather than inconsistencies due to flaws in the process.

Additional measures should be taken to train judges on the effects that coping with trauma may have on an applicant's ability to provide a linear narrative. Asylum is different from many other claims because the applicants often have no corroborating evidence and no documents proving persecution. Thus, their claim comes down to their testimony. Moreover, the applicant has much—such as their life and future—riding on the immigration judge's decision.

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141. Some scholars advocate for asylum claims to be handled in a non-adversarial system by expanding the current asylum offices and adjudicating the claims in a less confrontational hearing. Others prefer the idea of categorizing the immigration court system as an Article III court, which would lessen the effects of federal political shifts. Another option would be to create a specialty court specifically for asylum claims. Paskey, *supra* note 51, at 514–515.

142. See *Moab v. Gonzales*, 500 F.3d 656, 661 (7th Cir. 2007) (quoting *Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004)).

Measures like training immigration judges on the ways in which survivors cope with trauma and the impacts this may have on their testimony, training immigration judges and asylum officers on implicit bias, and funding additional judicial clerks may help address the issues raised in this note. In such high stakes cases, it is extremely important that immigration judges are given the necessary tools to most effectively perform the duties of their position.