

# INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES



## ***A Structured Approach to the Decision Making Process in Refugee and other International Protection Claims***

***Including:***

- ***A Flowchart using Established Judicial Criteria and Guidance***
- ***The IARLJ International Judicial Guidance for the Assessment of Credibility***
- ***The IARLJ Judicial Checklist for Country of Origin Information (COI)***

Prepared by Allan Mackey, Martin Treadwell, Bridget Dingle and Bruce Burson for the International Association of Refugee Law Judges (IARLJ), 2015/17

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## CONTENTS

<b>Part I – INTRODUCTION</b>	<b>3</b>
<b>Part II - A FLOWCHART USING INTERNATIONAL JUDICIAL CRITERIA AND GUIDANCE</b>	<b>7</b>
<b>Part III - INTERNATIONAL JUDICIAL GUIDANCE FOR THE ASSESSMENT OF CREDIBILITY</b>	<b>10</b>
• Basic Criteria and Standards of Good Practice	10
• Basic criteria applicable for credibility assessment of claimants	12
• International Judicial Guidance on Best Practice in Credibility Assessments	14
(A) Treatment of Substantive Evidence	15
(B) Procedural Standards	25
(C) Treatment of Vulnerable Claimants	27
(D) Residual doubts and the “benefit of the doubt” principle	30
<b>Part IV - THE COI JUDICIAL CHECKLIST</b>	<b>33</b>
• Explanatory Memorandum	34
• The Checklist	38

## A STRUCTURED APPROACH TO THE DECISION-MAKING PROCESS IN REFUGEE AND OTHER INTERNATIONAL PROTECTION CLAIMS

Noting the “protection obligations” which states have entered into, pursuant to international law, and recognising the gravity of the predicament that may face claimants who are in need of international surrogate protection from serious harm, judges (and other decision makers) must approach all claims with an outlook that gives claimants full individual personal respect and recognises the seriousness of the task being undertaken. In the simplest of terms the task is to make a soundly reasoned, objective assessment of all the material evidence from which, noting the accepted characteristics of the claimant and relevant COI, the question whether there is a real risk of the claimant being persecuted or suffering other qualifying serious harm on return must be determined.

### Part I

#### INTRODUCTION

1. This paper, whilst directed to judges considering refugee and other protection cases, also aims to be instructive and relevant to all decision-makers, counsel and claimants in this unique field of law.
2. It provides guidance to judges hearing appeals from first-instance decisions made in claims for refugee and/or protection status at international law. The guidance is for judges determining both “full merits reviews”, and error of law appeals or judicial review only. The paper can also provide assistance to government first-instance decision-makers, claimants, counsel, the UNHCR, academics and NGOs working with refugee/protection claimants.
3. The need for a structured, or step by step, approach to the decision making process (often referred to as refugee status determination, or ‘RSD’) first arose in the extensive preparation of the IARLJ’s Credo paper Assessment of Credibility in Refugee and Subsidiary Protection Claims Under the EU Qualification Directive - Judicial Criteria and Standards (2013) as part of the EU sponsored “Credo Project”. Much useful feedback on the IARLJ Credo paper has come from IARLJ members, engaged in the many teaching/professional development projects since undertaken, and from other judges and UNHCR trainers, both within the EU and internationally. In particular, the practical usefulness of the Summary Chart and explanation, set out in the Credo paper, is noted with high approval. The IARLJ was thus urged to prepare and publish an updated ‘international’ version of the “Structured Approach Chart” and to make it available through the many professional development workshops and training programmes which IARLJ members are asked to facilitate.
4. This paper and chart was thus developed. We are much indebted to the many judges, UNHCR staff and first-instance decision-makers who have contributed so many helpful suggestions and improvements.
5. **The suggested structure is a guidance tool only, mainly designed for judges and others who are new to, or infrequently involved in, this unique jurisdiction.** When

applied together with sound international human rights law, principles and procedures, it will provide a sound, principled approach to both appeals on “full merits” (*ex nunc, de novo*) and error of law only appeals or judicial reviews. It will be also of considerable assistance to primary decision makers. Experienced judges and decision makers may of course, on a case by case basis, make valid decisions using other approaches, provided their assessments are made and reasoned on the totality of the accepted evidence and the application of the essential principles of international refugee and protection law. This important proviso or warning was eloquently given by Sir Stephen Sedley in *Karanakaran v Secretary of State for the Home Department* [2000] (UKCA):

“While, for reasons considered earlier, it may well be necessary to approach the Convention questions themselves in discrete order, how they are approached and evaluated should henceforward be regarded not as an assault course on which hurdles of varying heights are encountered by the asylum seeker with the decision-maker acting as umpire, nor as a forum in which the improbable is magically endowed with the status of certainty, but as a unitary process of evaluation of evidential material of many kinds and qualities against the Convention’s criteria of eligibility for asylum.”<sup>1</sup>

6. **The following flow chart sets out all of the steps and issues involved, with brief explanations of tasks to be completed at each stage.** This full assessment should take place in the deliberations of the judge to ensure sound outcomes to each appeal. However, this certainly does not mean that every piece of evidence and reasoning and the assessment of every step in the chart should be recorded in the final written, published judgement.<sup>2</sup> As is well understood by experienced judges, sound, succinct communication by a judge to the various audiences involved, of their decisions or judgements should record the core issues and reasoning on a case specific basis. A good organised judgement will state the issues and then address them, using the relevant evidence, law and reasoning, to determine the outcome of each individual appeal. Such judgements in refugee and protection cases must of course also show that a full consideration of the totality of the evidence has taken place and the *correct* ‘core issues’ have been addressed and determined by the judge.

7. It is strongly recommended, however, that first instance decision makers, recognising they are the primary fact finders, follow through every step in the flowchart. They should ideally then go on to record their reasoning and findings on the material evidence more fully and transparently than is usually necessary at the appeal stage. **It is also essential for all judges and other decision makers to recognise the unique character of decision-making in refugee and other international protection claims; we set out below, before undertaking any assessment.**

8. **Refugee and complementary protection law is markedly different from almost all other areas of the domestic law** so familiar to lawyers and judges in their respective jurisdictions.<sup>3</sup> Because so much of this extensive and specialised field of law has only

<sup>1</sup> In approaching the analysis in this manner, it remains necessary to bear firmly in mind the eloquent and salient warning of Sedley LJ in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 (UKCA) at 479-480.

<sup>2</sup> See for example : *The Method: Organising A Judgement In Five Easy Steps* at p26 of “ Writing For The Court” James C. Raymond – Carswell (2010)

<sup>3</sup> A paper: “Asylum: Can the Judiciary Maintain its Independence?” by Sir Stephen Sedley, Former Lord Justice of Appeal, England and Wales; which was delivered at the IARLJ Conference 2002, Wellington, New Zealand (see the IARLJ website) illustrated the differences well, where he stated: “Yet this is still not the high point of the problem. I have not reached the critical function of first-

developed in the last 25 years, many lawyers and judges will have had little or no formal training in it and thus will understandably seek first to rely on traditional principles of domestic administrative law. It is important therefore to set out the differences and explain the specific character of refugee and protection law. Unless these, and the combined effects of several of them, are understood the risk of flawed decision-making is highly elevated.

**9. Eleven differential factors must be noted:**

- a) One party is a non-national individual claimant while the other is a state;
- b) The factual substance of every claim will be difficult to check and thus reference to country information about the country of origin will be needed;
- c) The focus of the case is significantly on the future, not the past.
- d) The core treaties, such as the Refugee Convention, the ICCPR, and the ICESCR are living instruments;
- e) Refugee and protection decision-making is international rights-based, not domestic privilege (ie, immigration) -based;
- f) The surrogate nature of protection obligations arises from international treaty obligations;
- g) The act of recognition, made by domestic assessors and/or judges, in their determination of claims for refugee and/or international complementary protection status, is declaratory in nature and not constitutive. Thus fundamentally different decision-making principles and processes are applicable, in assessing refugee/international protection claims, from those applied in immigration applications or appeals;
- h) Judicial independence and impartiality can be put under pressure from anti-refugee/migrant or societal pressures;
- i) Many claimants will have vulnerabilities inherent in their situation, thus the psychological and trauma affecting them must be considered;
- j) Claimants will often have difficulties in presenting corroborative evidence and careful attention will be needed, both as to the use and abuse of "supporting" documentation, including web-sourced material; and
- k) Cross-cultural awareness and challenges and working through interpreters are the norm.

10. It is instructive to show how the "structured approach" works in practice, by considering as examples two New Zealand cases, noting particularly the helpful headings as signposts in the decisions (shown in bold below) and noting the paragraphs in the

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instance asylum judges in the majority of the world's developed jurisdictions: the function of fact-finding.... I have described this function elsewhere as 'not a conventional lawyer's exercise of applying a legal litmus test to ascertained facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.' The latter part of this quote is from a UK High Court first instance decision of Sir Stephen that was later approved on appeal in *Shah and Islam v Secretary of State for the Home Department* [1999] 2 AC 629.

decisions bracketed thus [ ] and how these sections of the decision mesh into the various boxes/steps set out in the Flow Chart below.

**NOTE:** Full copies of both of these decisions are available at:

<https://forms.justice.govt.nz/search/IPT/RefugeeProtection>

First, in a relatively simple case such as:

***Refugee Appeal No 76199 (11 November 2008)***

**Introduction** [1]-[2]

**The Appellant's case** [3]-[21]

**The Issues** [22]-[23]

**Assessment of the Appellant's Case**

- **Credibility assessment** [24]-[44] - "the credibility box"
- **COI** [46]-[58] – "the "harm box"
- **Risk assessment- Real chance applied** [60]-[71]- "the risk box"
- **Convention reason** [73]-[74] – "the reasons box"

**Conclusion** [75]-[76] – "the decision box"

And then, even in a complex precedent/guidance case:

***DS (Iran) [2016] NZIPT 800788***

**Index**

**Introduction and scope** [1]-[21]

**The Appellant's case** [22]-[42] – "the credibility box"

**Credibility** [43]-[48] – "the credibility box"

**Findings of Fact** [49]-[105] – "the credibility box"

**Legal issues arising**

**Being Persecuted** – "the harm box"

**Assessment of Serious harm** – "the harm box"

**Reformulation of Human Rights approach to being persecuted** [203]-[213]  
– "the harm and risk boxes"

**Assessment of Claim** [275-329] – "the risk, reasons and decision boxes"

## **Part II**

### ***A FLOWCHART USING INTERNATIONAL JUDICIAL CRITERIA AND GUIDANCE***

### **PROVIDING A STRUCTURED APPROACH TO THE DECISION-MAKING PROCESS IN REFUGEE AND OTHER INTERNATIONAL PROTECTION CLAIMS**

# A STRUCTURED APPROACH TO THE DECISION-MAKING PROCESS IN REFUGEE AND OTHER INTERNATIONAL PROTECTION CLAIMS

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## *A Flowchart using Established Judicial Criteria and Guidance*

### OVERVIEW: The core issues are:

What the past and present facts are as found by the judge (i.e. "the accepted facts")?  
Using these facts what is the nature of the predicament for the claimant on return and what is the degree of risk of it?  
On the totality of the evidence do you recognise refugee or complementary protection status?

### Step 1

#### PRELIMINARY ENQUIRIES

At the outset, the Judge may consider if the claim is so manifestly well-founded or manifestly unfounded (including clearly abusive claims), that a prompt decision can be reached (possibly without an interview) by accepting the credibility of the claim as it is presented. If the claim is:

**a. Unfounded** - do the facts establish, that the claimant simply does not meet the legal test and thus cannot be recognised for protection? If so, the appeal may be disposed of at this point. **Examples:** On all the facts, is the claimed risk merely remote and speculative? Is the presumption of state protection clearly not rebutted?

**b. Well-founded** – do the facts which can be said to be incontrovertible (and so do not need to be tested by oral evidence), establish that the person meets the legal test. **Example:** Noting the human rights violations in the claimant's country of origin, status may be recognised because of a particular nationality age, race or gender.

### STEP 2

#### THE CREDIBILITY BOX

#### Issue 1 - Objectively assessed, what parts of the account are accepted as "credible"?

This assessment will require the judge to assess, with sound reasoning, which (*material*) parts of the claim, as presented, are accepted as credible, or rejected as not credible.

#### Guidance:

- Follow the "*International Judicial Guidance of the Assessment of Credibility*" (see [www.iarlj.org](http://www.iarlj.org));
- Consider documentary evidence (e.g. medical, psychiatric, travel documents) that either supports or tends to disprove the claimant's story;
- Consider COI (noting guidelines on COI use, eg by IARLJ or UNHCR) to test the evidence;
- Consider any expert evidence, including an assessment of the weight to be attached to it;
- If needed apply the "benefit of doubt" principle, by which lingering uncertainty about the credibility of a claimant's evidence, or part of it, is resolved; and then, 'in the round'...
- Determine & record the material "facts as found" of the claimant's (and other) evidence.

### STEP 3

#### THE HARM BOX

#### Issue 2 - On the facts as found, does the claimant face serious harm arising from a sustained or systemic breach of internationally recognised human rights, demonstrative of a failure of state protection?

This requires consideration of the 'accepted facts/ profile' of the claimant, the relevant COI and established refugee law, in order to decide if the harm is serious and, if so, if it arises from a sustained or systemic breach of internationally recognised human rights.

Initially, in this assessment, the nature of available "home" state protection to the claimant can be relevant to the question whether there is serious harm. This recognises the most basic principle that refugee law is based on signatory countries to the RC and other IP Conventions agreeing to provide "surrogate protection" to those at risk of serious harm in their own country.

#### Guidance:

- Consider relevant COI and other accepted evidence such as expert witnesses and relevant case law, together with other relevant assistance (like Country Guidance cases from the UK).
- As to the nature of the harm, does it arise from a breach of an internationally recognised human right?
- How serious is the harm, taking into account any accepted characteristics of the claimant?



**STEP 4  
THE RISK  
BOX**

**Issue 3 – Is the risk of harm on return “well-founded”?** Noting the findings made on Issues 1 and 2, prospectively assessed, what is the degree of risk of persecution/serious harm to the claimant on return? The international test for this assessment is whether there is a “real risk/chance” (of being persecuted etc), as against a remote or speculative risk/chance. It is not “on the balance of probabilities”, and definitely *not* a criminal standard of proof. This is well-accepted international law, with similar terminology applying the same “real” level of risk. (Thus: “real chance” (Australia and NZ), “reasonable likelihood” (UK), “reasonable possibility” (USA), “serious possibility” (Canada), “considerable probability” (Germany), and “real risk” (Ireland and widely in Europe and by the ECtHR).

Note: In CAT and other complementary protection assessments this level is, internationally, expressed as “a real risk” or being “in danger of”. There is no practical difference between the levels of risk required under either status. The “reality of the risk” approach appropriately recognises the unique nature of Refugee law and all other forms of protection in their humanitarian context.

**Guidance:**

- a. Conclusions must be based on the totality of the findings of fact and all the other evidence. The combination of the “accepted facts” from the claimant’s account, together with all the other evidence including COI and other witnesses and documentary evidence, constitutes the “facts as found” upon which the risk assessment is made.
- b. Ensure that expert evidence is assessed for probative weight.
- c. Ensure that the COI is weighed in accordance with accepted COI guidelines (eg of IARLJ/UNHCR).
- d. The claimant’s subjective fear will almost always be part of their account but the test for the judge is an objective test only. The claimant’s subjective fear is not determinative, and is only relevant when consistent with the objective evidence. In this way, the accepted subjective fear can, along with the accepted objective evidence, become part of the totality of the “facts as found”.

**STEP 5  
THE REASONS  
BOX**

**Issue 4: If the answer to both Issues 2 and 3 are “yes” then decide:**

1. Is the risk of being persecuted for reasons of one, or more, of the five Convention grounds? (*i.e. race, religion, nationality, membership of a particular social group or political opinion*); or
2. If not, can the claimant still qualify for some other form of complementary protection?

**Guidance:**

- a. Use all relevant international and domestic protection-related legislation, UNHCR and other international guidance that relates to the issues of nexus and Convention reasons;
- b. Consider relevant case law at the domestic and international level, and relevant academic guidance and commentary, all duly weighted and assessed.

**STEP 6  
THE DECISION  
BOX**

The conclusion should record clearly, after sound, fair reasoning, that the claimant falls within or outside the inclusion provisions of Article 1A(2) of the Refugee Convention or, alternatively, qualifies, or does not qualify, for some form of complementary protection status.

NB: Note however that the domestic law of some states may allow the judge only to quash an earlier primary decision and require the claim to be re-assessed, in whole or in part.

**STEP 7  
EXCLUSION  
and  
CESSATION  
BOX**

**Issues 5 & 6: Determine any Exclusion or Cessation issues.**

Even if the claimant falls within the Inclusion clause (Art 1A(2)) there may be “*serious reasons for considering*” possible exclusion of the claimant (as in Article 1E or 1F). Exclusion, particularly under Article 1F, is complex and requires reference to international case law, UNHCR’s Handbook and Guidelines, as well as to IARLJ and academic commentaries.

The judge may also need to determine whether any cessation issues arise (as in Article 1C). This, too, is complex and similar resources must be consulted.

Caution must be exercised in applying the exclusion and cessation clauses.

**STEP 8  
WRITING  
THE DECISION**

Good, sound decision-writing requires a succinct “issues-based” approach, addressing the core issues, with the totality of the relevant evidence and jurisprudence being taken into account. It must also recognise both that “justice must be seen to done” and that, often, there will be “precedent” or “guidance” value within the decision. For this reason, a separate depersonalised (and, if necessary, redacted) version of the judgment should be made public.

**NB. All first-instance decisions should ideally contain a detailed record** of the evidence presented and fulsome reasoning should be recorded. First-instance decisions should not be made public.

## **PART III**

### **INTERNATIONAL JUDICIAL GUIDANCE FOR THE ASSESSMENT OF CREDIBILITY**

#### **Basic Criteria and Standards of Good Practice**

##### **Introduction**

This Guidance has been developed by the IARLJ internationally over the period 2013-2016, following the initial work of the Credo project in Europe in 2011/13. The Guidance consists of a statement of the basic criteria necessary for a sound credibility assessment of the evidence from claimants and a set of judicial standards for good practice in such assessment.<sup>4</sup> They have been agreed, after an extensive consultative process involving experienced IARLJ members and judges from across almost all states where the IARLJ has members. There has also been much assistance from many UNHCR representatives, NGOs, academics and experts in this field.

The aim of the IARLJ, and all others involved in this project, is to promote and attain best practice, not only in the core task of assessing credibility, but also in achieving greater overall international consistency (and thus “burden sharing”), in refugee and protection decision making. This is consistent with the objectives of the IARLJ, to promote the rule of law in refugee and protection determination.<sup>5</sup> The Guidance and content of this paper may be used in judicial training projects. Interested judges or courts should contact the IARLJ secretariat (info@iarlj.org) if they wish to arrange a training or professional development workshop on this significant area of status determination.

The criteria are prepared with the underlying recognition that:

- a. **It is the duty of claimants to present their own claims** for recognition of refugee and/or protection status and each application is to be assessed on an individual basis.
- b. **The determination of eligibility for protection is an onerous and specialist task.**<sup>6</sup> While the initial source of judicial reference will be the national law of the receiving State adopting the Refugee Convention or other protection instruments, it must always be borne in mind that this will be informed by the Refugee Convention and other international human rights conventions, together with judicial interpretation by courts.

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<sup>4</sup> We have referred in this Guidance to the role and duty of the judge but most of what is contained in this Part is equally applicable to decision-makers at all levels.

<sup>5</sup> “The International Association of Refugee Law Judges seeks to foster recognition that protection from persecution on account of race, religion, nationality, membership in a particular social group, or political opinion is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law.”

<sup>6</sup> See Part I.1 above.

- c. **Because the issues involved (for both claimants and states) are so serious** in nature and involve fundamental principles of justice, **high standards of fairness are applicable** in the determination process. This fundamental premise is inherent in the humanitarian nature of international protection and underpins this Guidance.
- d. **The assessment of the credibility of the claim presented by a claimant is a tool used to establish the “accepted facts/characteristics”,** or a full “profile” of the claimant and, **from that, to determine their international protection needs.** The accepted facts are a vital part of the evidence then used in determining the risk<sup>7</sup> of the claimant being persecuted or suffering serious harm, on return. Thus, as shown in Part II (“The Structured Approach” flow chart, above), it is necessary to decide Issue 1 (credibility) before moving on to Issue 2, Issue 3 etc, ( harm and prospective risk etc).
- e. **This Guidance is based on well-recognised international administrative law norms and principles,** including the right to a fair hearing, equality of arms (*audi alteram partem*), legal certainty, and the right to an effective remedy.<sup>8</sup>
- f. **The principles contained in this Guidance are derived from international and regional legislative instruments, the jurisprudence of relevant courts** and the experience of the judges who have participated in this paper and related projects. In addition, we have had much regard to guidance from many UNHCR officials, the Handbook 2011) and Guidelines and several leading academic publications.
- g. In international law terms, there are some widely accepted criteria (as set out below), applied in all sound judicial reasoning, to evaluate the “lawfulness” of a credibility assessment. **These criteria, and the detailed standards of good practice that expand on them, have been developed in refugee and protection law and practice over the past 65 years.** The principles reflected in many regional protection instruments are also drawn largely from accepted international practices. A significant failure to apply these criteria and/or meet the standards, should, on appeal or judicial review, lead to a ruling that an error of law in the decision making has rendered the decision unsustainable.
- h. **This Guidance is non-exhaustive.** It includes, standards of good practice based on fundamental fairness, including procedural requirements and recognition of the specialised needs of vulnerable sub-groups of claimants. For ease of use, the standards of good practice are grouped into four sections: substantive fundamental fairness issues, procedural issues, assessing the claims of vulnerable persons with special needs and how benefit of the doubt issues should be dealt with.

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<sup>7</sup> “Well-founded fear” in Article 1A(2) of the Refugee Convention, which, as discussed below, is now firmly established in international refugee law as equating to a real risk or real chance and other like terms.

<sup>8</sup> For further elaboration, see Parts IV to VI of the EU paper on the IARLJ website.

## Basic criteria applicable for credibility assessment of claimants

The decision-maker must undertake an assessment of the credibility of the evidence. This assessment must be made by the decision-maker impartially and so as to minimise their own inherent subjectivity as far as possible. To ensure objectivity and concentration on the core elements in a credibility assessment, the following criteria are best practice. Following the guidance of these criteria will ensure that decision-makers make high quality decisions.

- a. **Impossibility, or near impossibility:** It can be possible to find that, when set against objective evidence, an aspect of a claim is impossible of belief. For example: relevant dates, locations, and timings, mathematical, scientific or biological/DNA facts.
- b. **External consistency:** These are findings on inconsistencies or discrepancies between the statements of the claimant and external objective evidence, including duly weighted COI and any other relevant evidence.
- c. **Internal consistency:** These are findings on inconsistencies or discrepancies within the statements and other evidence presented by the claimant from earlier interviews, applications, and examination at all stages of the processing of their application/appeal.
- d. **Plausibility:** Findings on the plausibility of claims can include the plausibility of explanations by the claimant for other credibility concerns, and they can add to or subtract from acceptance of those facts as being able to be believed. Within this criterion several types of concern can arise, such as: a lack of satisfactory or logical detail, an account which flies in the face of common sense and an explanation attempting to address another credibility concern which is simply not sensible. Plausibility may, to some extent, overlap with external consistency findings.<sup>9</sup>
- e. **Sufficiency of detail:** With some exceptions in cases of a claimant's mental or physical incapacity, culture, or educational background, a claim should be substantively presented and sufficiently detailed, at least in respect of the most material facts of the claim, to show it is not fabricated. Bearing in mind the limitations on most claimants in accessing evidence from the home country, this does not mean that claimants must present extensive documentary evidence if their claim is to be believed. Their written statements and oral evidence will in most cases be the core of their personal evidence.
- f. **"In the round":** Overall credibility conclusions should not be made only on the rejection of non-material, partially relevant or tangential aspects of the claim only. The substantive findings in the assessment of credibility should be made "in the round", based on the totality of the evidence and taking into account that findings on the criteria: **a**, **b**, and **c** (above) will logically have more weight than those solely relying on plausibility /implausibility.<sup>10</sup>

9 See M Kagan, "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations" (2003) 17(3) *Georgetown Immigration Law Journal* 367-415, especially the section on plausibility at pp390-391 where he argues that plausibility "adds very little" to external consistency.

10 See, for example, *Cruz Varas & ors v Sweden* [1991] 14 EHRR 1; *Vilvarajah v UK* [1991] 14 EHRR 248; *A v SSHD* [2006] EWCA Civ 973; Article 80 Polish Code of Administrative Procedure (CAP); Sections 108(1) and (2) German Code of Administrative Court Procedure.

- g. Timeliness of the claim:** Undue delay or the late making of a claim for recognition, and late presentation of evidence may negatively affect general credibility, unless reasonable explanations are provided.<sup>11</sup> While some jurisdictions require that delay in making a claim be taken into account, it is important to have regard to human nature and the inevitability that people with genuine fears can put off the difficult task of making a claim for a wide range of reasons, none of which go to credibility.
- h. Personal involvement:** It is important for judges to ensure that the claimant has been *personally involved* in the “story” and has not merely adopted the story of another (successful) claimant.

## **International Judicial Guidance on Best Practice** **in Credibility Assessments**

Many of the following standards of best practice are to be found in the Codes of Administrative Procedure and the jurisprudence of many States. This paper attempts to bring, as far as possible, such standards together in one document as a useful reference

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<sup>11</sup> 26 See ECtHR in *B v Sweden* (28 October 2004) European Court of Human Rights Appl No 16578/03; *Khan v Canada* (15 October 1994) Convention Against Torture Committee CATC No 015/1994; *Kaoki v Sweden* (8 May 1996) No 041/1996.

point and training tool. These standards have been developed by judges internationally, on a wide range of issues that arise in credibility assessments. The list that follows is not exhaustive and at times may appear overlapping, and experienced judges may indeed consider many of them to be obvious. However the list aims to be as extensive as possible, especially to assist and guide judges and decision-makers unfamiliar with this area of law, to carry out the challenging task of credibility assessment.

In refugee and protection claims, in contrast to civil *inter partes* litigation, there will only rarely be external evidence *directly* corroborating the claim, except possibly by reference to COI evidence. Such evidence in a civil *inter partes* case may either support or undermine the claimant's account of personal experiences. However, the judge in a refugee and protection case does not have the opportunity to assess and contrast the accounts and evidence of opposing parties as to past events, which is often determinative of the credibility assessment in the more familiar pattern of civil litigation.

Further, while appropriate deference will normally be accorded to the skill and experience of first instance decision-makers, or full merits reviewers, a material failure to adhere to one or more of these standards can lead to an error of law conclusion on judicial review.

The best practice criteria arise in four distinct categories:

- a) Treatment of Substantive Evidence
- b) Procedural Standards
- c) Treatment of Vulnerable Claimants
- d) Residual doubts and the "benefit of the doubt" principle

Detailed consideration of each of these categories follows.

## **(A) TREATMENT OF SUBSTANTIVE EVIDENCE**

### ***A.1: Consistency***

**Claims should be presented by claimants in an internally and externally consistent manner.**

**Explanation:** The effect on credibility of a material inconsistency or discrepancy in the evidence must be clearly explained to claimants and they must be given the chance to respond. The response and explanation given by a claimant must be taken into account. Real consideration must be given as to whether the explanation does, in fact, resolve the concern. Decision-makers must discipline themselves not to take a position about a seeming inconsistency or discrepancy until the explanation has been genuinely considered, and must be prepared to abandon a preliminary view about it, without prejudice to the claimant.

**Examples:** Claimant A states he was a long-term member of the ABC political party on arrival but, in later statements, claims to have been a member of the opposition DEF party. When challenged, the explanation is that he forgot the name of the party. A decision-maker would be entitled to find that the inconsistency remained a matter of concern because the explanation was implausible.

### ***A.2: Audi Alteram Partem or Equality of Arms***

**The “other side” must be heard. Potentially negative material evidence must be put to the claimant for comment. If not, it should not be taken into account in assessment of credibility.**

**Explanation:** All claimants must be provided a reasonable opportunity to refute, explain or provide mitigating circumstances in respect of negative or adverse evidence that is material and could potentially undermine their claim.

**Example:** Following the interview but before the final decision, COI is received which raises issues as to the credibility of the claimant. The proper course is to provide that COI to the claimant and to invite comment (including, if necessary, resuming the interview or hearing).

### ***A.3: Coherence***

**Coherently presented evidence by claimants is *prima facie* more likely to be accepted as credible.**

**Explanation:** Subject to the personal circumstances and background of the claimant (which could include suffering trauma from past mistreatment), their evidence of what has happened to them in the past, and what they expect in the future, should be expected to be coherently presented. An incoherent story may reflect a lack of credibility or a poorly “learned” account. Similarly, as with plausibility, coherence of evidence must be assessed against the background of the claimant in national, ethnic and personal terms and claimants must be given the opportunity to explain apparent incoherence in their evidence.

**Authorities:** Article 4(5)c EU Qualifications Directive (EUQD) and also see “Plausibility” above as these two standards are often considered together.

#### ***A.4: Plausibility***

**The plausibility of the claim will be reflected in the assessment of credibility of the claimant's history.**

**Explanation:** Plausibility may potentially reflect the subjective view of the judge about human behaviour or perceptions about the country of origin, which is very often a place he or she has never lived in or experienced in any manner beyond the superficial. Awareness of the risk of importing the judge's own personal views of "truth" and "likelihood" will help to ensure objectivity is maximised. The rejection of evidence for implausibility must be fully reasoned, including the addressing of any explanation provided by the claimant. Decisions based solely on implausibility are likely to be less persuasive than those based on a wider range of basic criteria.

**Example:** The claimant says that her father will kill her because, although the father knows that she did not, the neighbours have accused her of talking to a boy. The decision-maker considers that no-one would harm their child for such a trivial reason and it therefore seems implausible. However, the decision-maker is aware of the need to avoid assumptions based on personal experience and consults country information which confirms that some sectors of Islamic society in that country can expect a father to kill his own daughter, whether she is actually guilty or not, in order to restore the family's 'honour' in the community. What seemed implausible can thus become very plausible.

#### ***A.5: Reasons***

**Judges must provide substantive, objective and logical reasons, founded on the evidence, for rejecting an aspect of an account presented by a claimant.**

**Examples:** It is self-evident that a decision that fails to record the reasons for rejecting, or accepting a claimant's evidence will be potentially flawed.

#### ***A.6: Materiality***

**Judges must reach credibility conclusions on facts material to the claimant's case that go to the core of the fundamental issues.**

**Explanation:** This relates to core evidence that the claimant presents as the basis of their well-founded fear of being persecuted (i.e. the findings on Issues 1, 2 and 3 of the Chart, above). While it may appear self-evident, in order to reach conclusions on core facts (particularly in inquisitorial hearings), judges should focus on the material facts of the claim.



Some core issues, like those of identity and nationality, will be essential in every case. Credibility concerns about peripheral or minor issues only should not be a substantive basis for the rejection of a claim, no matter how well-reasoned.

#### ***A.7: Speculation***

**Judges must not engage in subjective speculation in their reasons for rejecting the credibility of claimants' evidence as to do so would be to rely on unfounded assumptions.**

**Explanation:** Decision-makers must rely on objective evidence in rejecting credibility. It is not sufficient to rely on subjective beliefs or speculation.

**Examples:** Without obtaining detailed COI, the judge finds that a claim of past domestic violence is not credible on the basis of personal views about the effectiveness of state protection for women in that country.

#### ***A.8: Objective approach***

**All credibility assessments in refugee and protection claims must be undertaken with a balanced and objective approach.**

**Explanation:** This goes to the issue of mind-set or outlook of the judge. Decisions and reasoning should not reflect a culture of either disbelief or of naïve acceptance. Simplistic rejection, ill-considered and also naïve acceptance of evidence by judges or decision-makers, without appropriate questioning and reference to objective evidence and COI, will lead to a flawed assessment of credibility. A balanced approach will also include taking into account the accepted background of the claimant, such as his/her education, social, gender, age and medical status.

**Example:** A culture of disbelief may include widespread cynicism about the presence of 'economic migrants' in the decision-maker's country, while the reality is that at least some of the migrants will be in genuine need of protection (even in addition to having economic motives). Naïve acceptance, on the other hand, might include weak findings of credibility because the person sounded genuine, or presented well, or cried in the interview.

#### ***A.9: Excessive or unreasonable concentration on details***

**Excessive or unreasonable concentration on details may lead to flawed findings of fact on material issues. Claimants cannot always be expected to have detailed knowledge, to recall exact dates, events, names, officers or organisations in their evidence.**

**Explanation:** While in most situations claimants should be able to provide coherent details of their background, especially those events that are material to their claim, there are situations where this may not be the case.

**Examples:** People not expecting to have to remember detail later may well not be able to convey more than a broad impression of what occurred, with little specific detail. Further, people being interrogated may have been in a state of fear that precluded observation of detail. On other occasions, age, infirmity, stress or confusion may make the recall of detail difficult.

#### ***A.10: Relevant corroborative documentation (hard copy or web-sourced)***

**The credibility of documents (not including COI, discussed below at A.14) should be accepted or rejected on the same basis as oral or written evidence from the claimant.**

**Explanation:** The decision-maker must consider whether a document is one upon which reliance should be properly placed only after considering the totality of the evidence. No document should be considered in isolation from the credibility of the rest of the claim. It is not, however, appropriate or sustainable for a decision-maker to attach no weight to a relevant document presented in support of a claim, without giving clear reasons for such a finding. Supporting documents should not be dismissed merely because such documents may be easy to falsify, or that the originals could not be provided by the claimant.

#### ***A.11: Delayed claims***

**A delay in the presentation of a claim should not be treated as a presumption that the claim lacks credibility.**

**Explanation:** Claimants should be expected to give good reasons for delay and failure to do this *may* contribute to a lack of credibility. However, there should be recognition that avoidance of disclosure may have arisen through shame, possibly associated with sexual violence, cultural/wider family and indirect personal “costs” of disclosure. Further, a person holding a visa or even just living illegally in the country of refuge, may have wanted to put off the difficult and stressful process of seeking protection.

**Examples:** A woman can be ashamed or embarrassed to discuss being raped and may delay providing such evidence until being utterly assured of confidentiality. Even claimants who lack such trauma in their past can simply be afraid of applying in case the claim fails and they are returned to a country where they will be harmed. Countries known to have very low rates of successful claims should be cautious before finding that delay in making a claim impacts on its credibility.

#### ***A.12: Past persecution***

**Because of the potential relevance to the future risk of harm, decision-makers must make specific findings on evidence of past persecution or serious maltreatment.**

**Explanation:** It is important to make such findings (see Step 2 of the Chart above). If accepted, past mistreatment is highly relevant to a claimant’s accepted

characteristics/profile and to the assessment of the risk of being persecuted or suffering serious harm on return. ***But see A13 below on absence of past persecution.***

**Example:** Unless there has been a clear and demonstrable improvement in human rights in the person's country (say, as a result of regime change), a person seriously mistreated when detained by the police in the past, may well face a real risk of further mistreatment in the future, if he/she falls into their hands again.

### ***A.13: Absence of past persecution***

**Judges should not reject the credibility of the claim to be at risk in the future, simply because the person was not harmed in the past. Also of course in *sur place* claims this may, logically not be available or relevant.**

**Explanation:** As under A.12 above.

**Examples:** The very reason the person is able to make a claim may be because they were able to avoid harm by leaving the country. Further, some claimants may have avoided serious harm in the past by modifying their behaviour.

### ***A.14: Use of Country of Origin Information (COI)***

**Judges must refer to reliable COI as a vital part of testing the internal and external consistency of a claim (indeed judges should see the obtaining and use of COI as part of the "shared burden" approach to credibility assessment).**

**Explanation:** Reference to COI guidelines, such as those prepared by the UNHCR and the IARLJ (see Part IV of this paper and the IARLJ website for further guidance on COI) will assist correct use. The absence of COI to support a material fact does not necessarily mean an incident did not occur, or a fact cannot be accepted. This is particularly so with cases involving children, gender and LGBTI claims. Extra vigilance in the assessment of these cases is needed by judges (see further guidance under *C.1 Vulnerable claimants* below). However, judges should also be alert to situations where a less than honest claimant may tailor the claim to be consistent with relevant COI. It should also be noted that EASO has now commenced issuing COI prepared in accordance with a model methodology to which reference may also be usefully made.<sup>12</sup>

There are some States in which decision-makers are obliged to make sure that they use the newest available country report of their countries' "Foreign Office". If they do not, it is regarded as a procedural flaw which normally leads to a reversal of the decision. Such material should be weighted and balanced (using guidance as noted above) in the same way as all other COI. It should not be determinative of the claim.

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<sup>31</sup> For example, COI prepared in respect of Afghanistan, July 2012.

### ***A.15: Expert evidence***

**Decision-makers must take note of “expert” evidence and attach appropriate and balanced weight to such evidence.**

**Explanation:** The term “expert” encompasses a wide range of persons with specific knowledge. Sometimes there may be an issue as to whether a person is in fact “expert” in the legally accepted sense of the word. Where, however, expertise is accepted, the witness is entitled to give “opinion evidence”.

“Expert evidence” would include that based on medical, psychiatric and psychological qualifications, as well as COI. All such evidence can be relevant to credibility. Like any other adverse evidence, expert evidence which negatively impacts on the claimant’s case must always be put to him/her for comment and/or rebuttal. Where appropriate, judges should recognise that they are not themselves experts (medical or psychiatric, for example) and should ensure that appropriate deference is given to that expertise. Assistance in the use of expert evidence can usefully be obtained from the *IARLJ Publications relating to COI (Part IV of this paper) and Expert Medical Evidence*.

Judges and decision-makers have to come to credibility conclusions by themselves after considering such expert evidence. This will not mean they are obligated to accept all expert evidence going to credibility, but reasons should always be given for not taking such evidence weight. As a rule, it is not an error of law if the court comes to the conclusion that an expert’s evidence is not needed to assess the credibility of the claim.

**See for further comment:** “Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony” *International Journal of Refugee Law* (2016) 28 (1): 163-166

### ***A.16: Findings made in previous claims***

**When judges are determining second or subsequent claims from the same claimant, findings from the earlier claim, whether of positive or negative credibility, can be taken into account.**

**Examples:** In the EU, the EUQD and EUAPD (and domestic regulations in many EU states) provide that negative credibility findings from earlier claims can be adopted by a decision-maker or indeed, that the decision-maker is bound by earlier findings. The provisions of Article 5 of the EUQD (5(3) particularly) should be noted in regard to *sur place* claims and potential “bad faith” claims where a claimant cynically creates the circumstances underpinning the claim since leaving his country of origin.

### ***A.17: Corroboration***

**Because of the particular nature of refugee and protection assessment, there is no specific requirement for corroboration of the claimant’s account.**

**Explanation:** In circumstances where there is no reason to doubt the claimant's evidence, an uncorroborated account can be accepted without further support. Judges and decision-makers may, however, consider that some facts can be accepted and others require some form of corroboration (where there do not appear to be any particular difficulties for the claimant in producing relevant documents or other corroborative evidence). It must also be noted here that the instant availability of web-based COI can, at times, provide corroboration readily, or otherwise, right up to the time of the final determination. Again, caution must be exercised to ensure fairness and "equality of arms" in the use of such material.

#### ***A.18: Partly credible claimants***

**Rejection of some evidence, material or peripheral, relating to past or present facts will not necessarily lead to a rejection of all of the claimant's evidence.**

**Explanation:** The accepted profile of a claimant, used in "risk" and "well-founded fear" assessments must take into account *the accepted past and present facts* presented by the claimant. It is important in decision-making that the rejection of some aspects of credibility does not warrant rejection of the account as a whole (and vice versa, of course). In particular, the more peripheral the facts that are not accepted are, the more difficult it will be to justify wholesale rejection of the claimant's entire evidence.

**Example:** It may be rejected that a gay man was detained and beaten. However, the fact of the man's sexuality must be assessed against the totality of the evidence, including COI which may establish that gays can only avoid serious harm in the country in question by the impermissible concealment of the manifestation of their sexuality.

#### ***A.19: Treatment of similar claims***

**A finding of credibility, or incredibility, in similar claims, from claimants of the same nationality, does not imply that this claimant's evidence is also credible or incredible. Individual assessment is required.**

#### ***A.20: Treatment of substantially different claims***

**Evidence from a claimant that is substantially different from that presented in other claims by persons of that nationality does not imply that this claimant's assertions are incredible.**

#### ***A.21: Group-based persecution***

**Appeals coming before judges will, in virtually all cases, need individual assessment. Decisions should not be made merely by virtue of a credibility assessment that either accepts or rejects claims based solely on having "common characteristics shared by other members of a group". However, in mass arrival situations, UNHCR or first-instance**

makers may sometimes, of necessity, make such assessments by virtue of the claimants' nationality, sex, age, ethnic or religious identity, or any combination of these, based of valid COI. Thus whole groups of people may be recognised as refugees without particular claims needing to be assessed further. No wholesale rejection of claims should occur, however.

***A.22: Treatment of admission of earlier lies, contradictions or inconsistencies***

**Earlier lies or inconsistencies, openly admitted and explained, must be explored very carefully as to their impact on credibility.**

**Explanation:** Such evidence may assist positive or negative credibility assessment, particularly taking into account the nature of refugee and complementary protection assessment and relevant medical/psychiatric evidence where applicable.

***A.23: "May have happened"***

**It is an error of law to make a finding that a fact, or facts, asserted by the claimant "may have happened".**

**Explanation:** Merely to say that certain events "may have happened", lacks sufficient clarity. Clear findings are required and such a conclusion by a decision-maker is too vague. The task of the decision-maker is to identify the facts from the claimant's evidence that are accepted and those that are not accepted. The accepted facts (the facts as found) make up the profile of the claimant that is then used as part of the risk and harm assessments that follow. Thus, vague conclusions of what "may have happened", without either accepting or rejecting the claim made, must be treated as errors of law in the decision-making process.

***A24: Demeanour***

**Extreme caution must always be exercised in using aspects of the claimant's demeanour, and the manner in which a claimant presents his or her evidence, as a basis for not accepting credibility.**

**Explanation:** The basic principle is that using demeanour as a basis for credibility assessment should be avoided in virtually all situations. If demeanour is used as a negative factor the judge must give sustainable reasons as to why and how the demeanour and presentation of the claimant contributed to the credibility assessment, taking into account relevant capacity, ethnicity, gender and age factors. Additionally, it should only be used in the context of a thorough understanding of the relevant culture, and in acknowledgment of culture as a repertoire of possible behaviours which may or may not be manifested by an individual. However, it must be recognised that, in reality, demeanour can have some impact in an oral hearing. A major reason for having an oral hearing (as happens in most jurisdictions) is so that the decision-maker can see and hear the claimant.

**Example:** In many cultures, it is a sign of respect *not* to make eye contact. In Western culture, however, avoiding eye contact can appear evasive or dismissive. A Western decision-maker who does not understand the culture he/she is dealing with would make a serious error by relying on demeanour which was not properly understood. Similarly, post-traumatic stress disorder can make the sufferer's presentation flat, or distracted, or stilted. Clearly, such odd behaviour is explicable and, in fact, would be likely to *support* the claim, not undermine it.

#### ***A.25: Credibility findings on past behaviour modification to avoid risk***

**It is sometimes necessary for decision-makers to assess whether a person will modify their behaviour in the future, in order to avoid serious harm.**

**Explanation:** Such assessments will require consideration of the credibility of any claim that the claimant modified his/her behaviour in the past in order to avoid the harm. The decision-maker will need to explore closely the reasons for past behaviour and whether or not it was done to avoid serious harm.

In some instances, the depth of their *current* beliefs or convictions may also be important to assess, particularly where the country information establishes that only that certain types of conduct (eg, proselytising) attracts serious harm. Past and present behaviour linked to beliefs genuinely held, or other characteristics protected by international human rights law, are often the best indicators of future forms of behaviour (fundamental to the exercise of these human rights).

Credibility findings on the claims of past behaviour are thus required as they then become part of the accepted characteristics/profile of the claimant, used by the judge, step-by-step as necessary, in the conclusions to be reached in the Harm, Risk and Reasons boxes that then follow.

**Further guidance:** Following a workshop in Berlin in June 2015 an Opinion / article on this issue was prepared by a group of experienced IARLJ members, in which they considered credibility assessment in such cases, particularly in the European context. Parts 3 and 4 of this Opinion will be of assistance to judges dealing with this vexed issue. The article is "*Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach*" by Berlitz, Doerig and Storey, *IJRL* 2015 (4 December 2015). It is available for subscribers at <http://ijrl.oxfordjournals.org>.

**(Note: Findings on behaviour modification are clearly not just part of credibility assessments** and impact upon all the steps that follow. It is fair to say it is currently one of the most vexed areas of refugee and protection assessment. The issue is often referred to as 'the requirement to be discreet' or 'concealment' and most developed countries have grappled with it in different ways. Put simply, should a person be expected to modify their behaviour, to avoid exercising an internationally recognised human right in order to avoid serious harm, where to do so would give rise to a real chance of persecution/serious harm? If so, in what circumstances?

Recent jurisprudence in many countries is now addressing this issue closely. While different arguments have been put forward as to why expecting someone to avoid harm by foregoing a human right is impermissible, international refugee law has now accepted that it **is** impermissible for a decision-maker to decline a claim that is accepted as credible and giving rise to a well-founded fear of being persecuted because the decision-maker considers it is possible for the claimant either to modify behaviour arising from the exercise of their basic human rights, or to conceal a characteristic protected by the Convention.

One issue which has arisen is whether, where the very act of concealment itself involves the claimant abandoning the exercise of a human right, persecution is thereby established? This line of argument does not address the concomitant requirement that the breach of the right must also occasion serious or severe harm. If the act of concealment (even if it causes a breach of a right) does not cause serious harm, it is certainly arguable that it is not persecutory.)

**Authorities:** *DS (Iran)* [2016] NZIPT 800788; *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (9 Dec 2003) [2003] HCA 71; *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.

### **Reading:**

1. Berlitz, Doerig and Storey "Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach" *IJRL* 2015 (4 December 2015)

## **(B) PROCEDURAL STANDARDS**

### ***General guidance on procedure***

**Credibility assessments may be fundamentally flawed where, through faulty or inappropriate procedures, claimants do not have the opportunity to present their claims and supporting evidence fairly and reasonably.**

**Example:** In Europe, at the first-instance stage, the EUAPD contains extensive provisions designed to ensure procedural fairness. At the appeal or review stage, the requirements are governed by Article 39 EUAPD but note the requirement for granting an 'effective remedy' also requires observance of a number of related concepts for a fair disposal.

Failure to observe procedural fairness requirements, which can lead to errors of law in credibility assessment, also includes failures to observe the following standards.



### ***B.1: Interpreters***

**So far as is reasonably possible, claimants must have access to competent and unbiased interpreters. There must be an ability to communicate effectively.**

Decision-makers should ensure, so far as is reasonably possible, that claimants have access to competent and unbiased interpreters. Further, there may be claimants who speak rare languages or dialects, and able interpreters are simply not available. In such cases fair and pragmatic approaches should be adopted, recognising the constraints. In extreme circumstances, double translation or telephone procedures may be required. There must, however, be a sufficient ability for meaningful communication. In most situations, a reviewable error of law will be only be established where incompetence or bias is established.

At the commencement of any hearing, the role of the interpreter should be explained, including the interpreter's awareness that the hearing is confidential and the ability of the claimant to understand the interpreter should be tested.

There is a need for particularly skilled interpreters in claims involving gender, religious conversion and domestic violence cases, where terminology may be specialist and where sensitivity to trauma is required.

### ***B.2: Legal representation***

**Recognising that legal aid/representation is not available in some countries and/or at all levels of status determination or judicial review, decision-makers should ensure that claimants have access to competent legal or other suitable representation, with or without legal aid.**

**Explanation:** Unrepresented appellants must be accorded the highest standards of fairness, recognising that whilst the burden to present their case is on the claimant, there is also a shared burden with the decision-maker. This is particularly important for claimants who fall within the vulnerable groups referred to below.

### ***B.3: Effect of time limits***

**Unreasonable time limits upon claimants to respond to prejudicial information or to provide further evidence of changed circumstances or COI, can breach basic fairness principles which can render a whole determination/assessment unsustainable.**

### ***B.4: Interview facilities***

**A failure to provide a reasonable interview environment can, in some circumstances, breach basic fairness and confidentiality principles amounting to an error of law.**

**However, situations may arise where, even in very poor facilities or surroundings, a fair hearing has still taken place (eg, such as within a prison).**

**Examples:** Where a government, tribunal, judge or decision-maker fails to provide, where reasonably possible, a conducive physical environment and/or facilities wherein interviews and/or appeal hearings can be conducted with claimants (including the provision of specialist facilities for children, vulnerable claimants and, where available, the requested gender of judge and/or interpreter).

### ***B.5: Bias, incompetence and conflict of interest***

**Like substantive issues, procedural issues also involve the application of the maxim that “justice must be seen to be done” and, where a breach of any of these issues arises, any findings on credibility, and indeed all other issues, may be wrong in law.**

**Explanation:** Such issues should not arise in a well-administered system as they will breach principles set out in Administrative law codes and/or binding jurisprudence in States. Even sound credibility findings risk being set aside on review if the judge cannot be satisfied as to their reliability because of the existence of procedural errors. Systems which fail to treat claimants in a procedurally fair manner are likely to face high levels of successful reviews.

## **(C) TREATMENT OF VULNERABLE CLAIMANTS**

### ***General guidance on vulnerable claimants***

#### **Overview**

Only one general standard of good judicial practice is provided here, rather than setting a list of separate standards for every known type of vulnerability or sensitivity. This is done because, not only would it be impossible for such a list to be exhaustive, it is frequently the case that the vulnerability of individual claimants has a number of overlapping causes. It is the totality of the claimants’ physical and psychological predicament that must be taken into account in the assessment of their evidence.

In adversarial jurisdictions, because of the need to recognise vulnerabilities and their impact on the giving of evidence, its nature and coherence, as well as in the credibility assessment, a more “interventionist” (or shared burden) approach by the judge is often allowed and encouraged by the highest courts, due to the serious risks involved of considering all the evidence.. If it is used, however, it must be used carefully, with the knowledge and co-operation of counsel and/or the claimant.

Vulnerable or sensitive individuals may be more easily influenced by the way information and choices are presented, leading to a tendency to guess an answer rather than say “I don’t know”. Apparently contradictory answers may indicate a lack of understanding of a question or a wish to provide answers when in fact the memory of the event is impaired, whether due to psychological difficulties or normal memory decay.

Gaps in knowledge may not of themselves undermine credibility as for example in many cultures detailed political, religious, military or social matters may not be disclosed by men to women, children, or other vulnerable individuals.

Vulnerable and sensitive witnesses may not be forthcoming with information if inappropriate interviewing, interpretation and questioning techniques are utilised.

COI may not be readily available to support claims from vulnerable and other minority groups. Their experiences of political or other activity may not be direct and thus not readily corroborated through documentation.

Background reports frequently lack sufficiently detailed reportage and analysis of the position and status of women, children and other vulnerable individuals other than in general societal form. Thus, in such circumstances, decision-makers will need to ensure, if possible, that more detailed information is obtained from the claimant and other sources of direct testimony during the hearing.

### ***C.1: Vulnerable claimants***

**In assessing the credibility of the evidence of a vulnerable or sensitive claimant, a failure to take into account appropriately their specific vulnerabilities can lead to an error of law.**

**Explanation:** The need to protect vulnerable people is at the heart of the humanitarian nature of international protection determination. The predicament of particularly vulnerable or sensitive claimants requires careful understanding and reflection in the credibility assessment (see, for example, Article 13.3 EU Asylum Procedures Directive (EUAPD)).

Some individuals are, by definition, vulnerable or sensitive. (For example: children, some women, other individuals who suffer from mental illnesses, have been victims of trafficking or who have sustained serious harm, torture, sexual and gender based violence.) However others are less easily identified. For example, persons who have suffered long-term discrimination may be suffering mental health effects which are not immediately apparent.

**Factors to be taken into account** in assessing the level of vulnerability and the impact on assessment of credibility include:

- Mental health problems
- Social or learning difficulties
- Sexual orientation
- Ethnic, social and cultural background
- Domestic, education and employment circumstances
- Physical impairment or disability

**Examples:** The experiences of **women** (and other vulnerable and sensitive individuals) often differ significantly from those of the generality of male claimants because for instance, political protest, activism and resistance may be manifested in different ways. The second-class status of women in some countries must be understood, including their ability to give certain evidence in the presence of their husbands (or other men).

Awareness of the marginalisation of women and other vulnerable and sensitive claimants must be taken into account in the assessment of credibility. For example, expression of political opinion may not be manifested through conventional means, such as involvement in political parties, but may take less conventional forms of expression such as refusal to abide by discriminatory laws or to follow prescribed codes of conduct. Unless it is appreciated that such conduct may either be a manifestation of political opinion or be perceived as such, it may be incorrectly categorised as personal and private conduct. The decision-maker should bear in mind in assessing such claims that acts suppressing vulnerable claimants in their country of origin may be based on political opinion in its widest sense, and this may be relevant when later assessing whether there is a nexus to a Convention reason.

Consideration may sometimes need to be given to holding the hearing in private to avoid overt or covert intimidation. "In private" may even mean in the absence of all other persons, or all males, or all members of the claimant's family. The extent will depend on the circumstances.

Improper or aggressive cross-examination should be curtailed to avoid harassment, intimidation or humiliation. Questions should be open and appropriate to the age, maturity, gender, level of understanding, personal circumstances and attributes of the witness.

**Children** often do not provide as much detail as adults in recalling experiences and may manifest their fears differently from adults. The special needs of unaccompanied minors must be particularly taken into account and it is important that they have appropriate adult representation to assist in giving their evidence (see, for example, Article 17 of the EUAPD). A modified, less restrictive approach should be adopted in assessing the credibility of children; particularly younger ones (see the UNHCR Handbook (2011) at [217]).

In addition, some forms of **disability and/or trauma** may cause or result in impaired memory, and the manner in which evidence is given may be affected by mental, psychological or emotional trauma or disability. Torture and other persecutory treatment can produce profound shame and this may be a significant obstacle to disclosure.

With **family dependants of a claimant**, it is important not to assume that they have only derivative claims. Indeed, such claimants may have substantially different, and even stronger, claims. For example, a wife whose husband lodges a politically based claim may have a separate claim based on domestic violence, family honour or serious harm based on local customs, religion or norms.

Where a first claim was initially made as a dependant (or the person was treated as a dependant), a subsequent later claim may emerge because the person never received adequate legal advice and, in such cases, an adverse inference may not be appropriate.

The presence of family members in any interview or hearing may be a help, but it can sometimes be an obstacle to the disclosure of information. Enquiries as to whether family members should attend the interview or not will often be a judgement call based on the nature of the claim, an understanding of the culture involved and the best interests of the claimant.

## (D) RESIDUAL DOUBTS AND THE “BENEFIT OF THE DOUBT” PRINCIPLE

**D.1 Where a decision-maker is left with residual uncertainty or there are remaining doubts about some parts of the claim, perhaps due to unsupported evidence, if all other evidence is accepted as credible, the benefit of the doubt should be applied.**

It is internationally accepted best practice for judges to apply the “benefit of the doubt” principle where there is residual doubt held in the acceptance of material facts in the claimant’s evidence.

**Explanation:** The principle of the benefit of the doubt reflects recognition of the considerable difficulties claimants face in obtaining evidence to support their claim as well as the potentially grave consequences of a wrongful denial of protection. The application of the benefit of the doubt allows the decision maker to reach a clear conclusion to accept a material fact as credible where an element of doubt remains.

Expectations as to a claimant’s ability to substantiate his or her application; the indicators used to assess the credibility of the claimant’s statements; and the criteria applied in determining whether to afford the claimant the benefit of the doubt are all based on assumptions about human memory, behaviour, values, attitudes, perceptions of and responses to risk, and about how a genuine account is presented. However, scientific research has shown that many of these assumptions may not be in accordance with what is now known about human behaviour, memory and perceptions. Where a decision-maker has a basic underlying assumption there is a norm of behaviour or response, he/she may (wrongly) conclude that deviations from this norm may be indicative of a lack of credibility. In fact, research indicates that there is no such norm, and that human memory, behaviour and perceptions of risk vary widely and unpredictably because they are affected by a wide range of factors and circumstances.

***For this reason, the credibility assessment must be conducted taking into account fully the individual and contextual circumstances of the claimant.*** This requires the decision-maker to look cross geographical, cultural, socio-economic, gender, educational and religious barriers and to take into account different individual experiences, temperaments and attitudes. Indeed, such an approach is the internationally accepted legal requirement. Decision-makers also need to strive to be aware of the factors that may influence their own approaches to credibility.

The claimant’s individual and contextual circumstances should be taken into account routinely and in an integrated manner in all aspects of the credibility assessment. This includes, for instance, in determining whether the claimant has made a genuine effort to substantiate the application; whether the decision-maker has discharged his or her duty to

cooperate in this process; whether specific factors are reliable indicators of credibility; whether explanations given by the claimant for credibility concerns are reasonable; whether reasons provided by the claimant for a lack of supporting evidence are satisfactory; and whether the principle of the doubt should be applied. As such, it is crucial that the decision-maker seeks to identify and understand, at the earliest possible opportunity, all individual and contextual circumstances which may affect the credibility assessment.<sup>13</sup>

The recommended UNHCR approach to the benefit of the doubt emanates from the development of international refugee law and practice that goes some years back to the provisions of the UNHCR Handbook (1979), at [195]-[205]. The Handbook states that, while the duty rests with the claimant to establish their case, there is a shared duty between the claimant and the decision-maker to identify supporting corroborative evidence and it is then the responsibility of the decision-maker to evaluate all the relevant facts. Paragraphs [195]- [197] of the Handbook state:

“195. The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.

196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.”

As noted by UNHCR, even shared research may not always be successful at finding corroborative evidence and, ultimately, the claimant's statements may not all be capable of proof. In such cases, the claimant should be given the benefit of the doubt ***provided that the account is otherwise credible***. The UNHCR Handbook confirms, at [203]-[204], that the benefit of the doubt should be given, while also explaining that it does not mean that there must be unqualified acceptance of uncorroborated claims. Paragraph [204] states:

“The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general

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<sup>13</sup> This useful quote is taken from a paper produced by the UNHCR: “Beyond proof-credibility assessment in EU asylum systems – Summary”, May 2013.

credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts."

At the international court level, the ECtHR has reconfirmed the application of the benefit of the doubt principle in *JH v UK Application* (20 March 2012) Appl no 48839/09, stating:

"52. The assessment of the existence of a real risk must necessarily be a rigorous one (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, Reports 1996-V, § 96; and *Saadi v. Italy*, cited above, § 128). It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *N. v. Finland*, no. 38885/02, § 167, 26 July 2005). The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies (see, also other decisions from ECtHR, such as *N. v. Sweden*, no. 23505/09, § 53, 20 July 2010 and *Collins and Akasiebie v. Sweden* (dec.), no. 23944/05, 8 March 2007)."

### The term "benefit of the doubt" in different legal contexts

It must be observed also that the phrase "the benefit of the doubt" is used, in the asylum context, in a different sense from its more familiar application in criminal proceedings. In the criminal context it is a reflection of the fact that the burden is on the prosecution (state) to demonstrate that, on the totality of the evidence, there is no residual doubt which a reasonable person might have as to the guilt of the accused. Where such a doubt exists it must be resolved in favour of the accused and the charge be dismissed. It reflects the fact that the duty on the prosecution is to prove guilt "beyond a reasonable doubt".

*In refugee and protection claims the term's application, as we have noted, is wholly different in nature. First, the primary burden of proof rests on the claimant who is asserting the 'facts' on which he or she relies to support his/her claim. Secondly, it is in the nature of refugee claims, for the reasons which have been explained above, that a claimant may not be able to 'prove' his or her claims by reference to corroborative evidence, because of the circumstances of his/her departure, the need to maintain the confidentiality of his/her claim, or because of other factors which impair the claimant's ability to give evidence.*

**(NOTE:** In the EU context, when judges make assessments for recognition under the EUQD, it will be an error of law not to adopt, at least, the minimum provisions of Article 4 of the EUQD. In Member States which consider that it is the duty of the claimants to submit all elements needed to substantiate their applications (as expressed in Article 4.1 (first sentence), and 4.5 of the EUQD), judges who have residual doubts as to credibility (arising where claimant's statements are not supported by documentary or other evidence), must resolve such doubt by applying, at a minimum, Article 4.1 (second sentence), the provisions of Article 4.2 –4.4, and in particular 4.5 (a)-(e). The differences and possible compatibilities which appear to now be adopted between the EUQD approach and the

more established, “benefit of the doubt” approach in international refugee law, as suggested by the UNHCR, clearly need considerable study.<sup>14)</sup>

## PART IV: THE COI JUDICIAL CHECKLIST

### JUDICIAL CRITERIA FOR ASSESSING COUNTRY OF ORIGIN INFORMATION (COI): A CHECKLIST AND EXPLANATION

Prepared by Allan Mackey and Martin Treadwell

Adapted from Papers presented at the IARLJ, UNHCR, ACCORD - COI conference in Budapest, 2005, the 7<sup>th</sup> Biennial IARLJ World Conference, Mexico City, 6-9 November 2006 and Papers presented and discussed at the First IARLJ Conference for Asia/Pacific Judges at Seoul, Korea (JRTI) 10-11 June 2016.

When using and assessing the content of Country of Origin Information (COI) in the context of refugee and protection cases, judges will find the following nine questions highly relevant:

#### ***Relevance and adequacy of the information***

<sup>14</sup> The IARLJ judges and others who participated in the Madrid workshop (September 2012), on this paper, debated the dilemma of the two optional approaches and resolved that this issue was one that needed much more consideration and research by the IARLJ (Europe) Working party, which will continue work on Credibility assessment issues. However it may be of some reassurance to note that, from their anecdotal views and wide experience, the general consensus was that, in practice, if all the other criteria and standards set out in the paper are applied, similar outcomes resulted from the application of either option.



- i) How relevant is the COI to the case in hand?
- ii) Does the COI source adequately cover the relevant issue(s)?
- iii) How current or temporally relevant is the COI?

*Source of the information*

- iv) Is the COI material satisfactorily sourced?
- v) Is the COI based on publicly available and accessible sources?
- vi) Has the COI been prepared on an empirical basis using sound methodology?

*Nature / type of the information*

- vii) Does the COI exhibit impartiality and independence?
- viii) Is the COI balanced and not overly selective?

*Prior judicial scrutiny*

- ix) Has there been judicial scrutiny of the COI by other national courts of the COI in question?

## **COI JUDICIAL CHECKLIST:** **EXPLANATORY MEMORANDUM**

**1. In the course of dealing with refugee and protection appeals, decision-makers and judges<sup>15</sup> will depend to a great extent for their ability to make sound judgments on having before them up-to-date and reliable country background information or "Country of Origin Information" (COI).<sup>16</sup> The probative value of an asylum seeker's evidence has to be evaluated in the light of what is known about the conditions in the country of origin.<sup>17</sup>**

The demands on decision-makers and judges are huge. Sometimes, within a very short period, he/she may be called on to decide cases of claimants from several different countries. He/she may be expected to decide at one moment on whether an asylum seeker is a member of a sub-clan of a minority clan based in Somalia and also to determine whether that a member of that clan is at risk and without effective state protection. At the next moment he/she may be asked to assess whether a member of a Syrian "rebel group" is at risk from ISIS, the Assad regime or generalised violence. In a rapidly changing world he/she may need to decide whether a former Tamil member of the LTTE from Northern Sri Lanka would today face a real risk of serious harm, or only a remote risk in the light of changed circumstances there. Faced with such diverse cases and shifting political scenarios, judges desperately need accurate and reliable information in order to determine justly who is in need of international protection.

**2. COI is evidence the decision-maker should take into account. It is a crucial aid. But it will rarely be determinative by itself. How much it will help to determine the individual case will vary depending on, among other factors, the extent to which the claimant's case is based on personal characteristics or circumstances which he shares with others similarly situated. COI may not be relevant to the same degree in every case.**

**3. For a decision-maker, making findings on country conditions is not an end in itself: indeed it is not his/her function to pass judgment on the human rights performance of other countries.<sup>18</sup> He is only required to make a finding on the need for protection in a particular case. Nevertheless, within that context, general findings as to country conditions must sometimes, of necessity, be made.**

**4. Conversely, assisting refugee decision-makers is not an end in itself for most bodies that produce COI. Usually, their aim is to provide an analysis (for general**

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<sup>15</sup> The term "judges" or "refugee law judges" is used here to cover all types and levels of judicial or quasi-judicial decision-makers regardless of whether they deal with asylum or asylum-related cases regularly or only occasionally.

<sup>16</sup> COI has been defined as "[a]ny information that should help to answer questions about the situation in the country of nationality or former habitual residence of a person seeking asylum or another form of international protection". See B Svec of the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), in a presentation to the IARLJ November 2005 Budapest Conference.

<sup>17</sup> UNHCR Handbook para 42: "[T]he applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. Knowledge of conditions in the applicant's country of origin - while not a primary objective - is an important element in assessing the applicant's credibility".

<sup>18</sup> 1979 UNHCR Handbook at, para 42.

circulation) of a country's human rights performance or of some related aspects. That has perhaps the advantage, from the point of view of the decision-maker, that it cannot be suggested the COI has been "tailored" for use in supporting refugee claims.

5. In recent years a number of states who are signatory to the Refugee Convention have written into their national law specific provisions as to how decision-makers (including judicial decision-makers) are to approach the assessment of a person's refugee or protection claim.<sup>19</sup> There has also been a major regional initiative within the European Union to harmonise national approaches in this and other respects. Article 4 of the EUQD deals with the assessment of facts and circumstances relating to a claim for international protection where Article 4(3) states:

"The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:..."

6. Five matters are then mentioned. The first specifies:

"(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied."

This provision highlights the importance of COI to all refugee decision-makers.

7. Background COI will derive from diverse sources, including reference works (for example, maps, encyclopaedias and yearbooks), reports or papers by international bodies (eg, UNHCR, UN Human Rights Committee), international NGOs (eg, Amnesty International reports, Human Rights Watch reports, Austrian "ACCORD" publications, International Crisis Group reports), national bodies (eg, the US State Department Reports, the Danish Immigration Service reports, the United Kingdom Country of Origin Reports (COIR), news and media clippings and databases, legal materials (laws, jurisprudence, etc) and cross-checking of other refugee claims. Reports can be generic (eg, US State Department reports and EASO reports), event or group specific (e.g. reports from trials, minority profiles) or claimant specific (eg, embassy checks). There are a number of databases which are specific to protection-related work: eg, UNHCR's 'Refworld' and ACCORD's online COI database.

8. Practices vary as to how COI comes to be placed before judges in refugee and protection cases. Adversarial systems often depend on the parties submitting such materials. Judges in inquisitorial systems, however, may obtain COI by their own initiative, usually with the help of dedicated staff/research units/trained specialists. Other systems mix the two approaches and are sometimes able, in important cases, to hold a preliminary hearing at which the parties are notified of relevant country materials and are asked to cover them in their submissions.

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19 See e.g. s.8 of the Immigration and Asylum Act (Treatment of claimants, etc) Act 2004 (UK).

9. Another source of COI comes in the form of reports written by country experts who are typically academics, researchers or journalists with considerable experience in the field.

10. Despite the fact that judges are not country experts, they are often faced with having to evaluate country materials in order to make findings, where relevant, on general country conditions, eg, on whether draft evaders in Eritrea are at risk or whether ordinary Christian converts are at risk on return to Iran. The judicial focus is always on the individual case, but individual cases often involve generally occurring facts.

11. The question arises – by reference to what criteria should judges evaluate background country materials? In approaching this question, regard must be had to the considerable work over the past 25 years on developing reliable COI databases. UNHCR, together with many other bodies, has been at the forefront of efforts to develop proper systems and criteria for COI. UNHCR sees scope for considerably enhanced international cooperation in the field of COI, particularly at the regional level and is actively co-operating with the EASO on a number of COI initiatives. Major country report-writing bodies both at governmental level (eg, the US State Department reports) and at NGO level (eg, Amnesty International) have developed their own methodologies for compiling and evaluating COI. But there are particular features of the judicial decision-making role which require us to develop and identify our own criteria. **Below, we offer a nine-point COI “judicial checklist” which lists in the form of questions, a number of (non-exhaustive) criteria which reflect current best international judicial practice adopted when assessing how much weight can be attached to a particular COI source or reference.** There then follows an explanation for each inclusion. It will be obvious that some of these criteria overlap. No single criterion should be treated as decisive. They are grouped under three main sub-headings. Whilst the ordering given is not to be seen as fixed, it is intended to reflect the usual order in which questions relating to the evaluation of COI will normally be raised.

## THE CHECKLIST

### 1. Relevance and adequacy of the Information

#### 1.1 How relevant is the COI to the case in hand?

1.1.1 Relevance is an obvious criterion; for the judicial decision-maker, the primary concern is with information that is legally relevant in the sense of helping to answer case-related questions.

1.1.2 Obviously, there is little value in background materials that do not bear on the principal country issues that have to be determined. As trite an observation as this may sound, it is remarkable how often decision-makers find nothing in country materials directly on the point with which they have to grapple. That does not mean that COI found to be of no or little relevance is not extremely salient in other cases or in other contexts. Relevance of the material is a judgement about the particular case, rather than the COI.

1.1.3 Generally speaking, preference will be given to reports whose content relates to protection-related issues, eg, which deals with human rights violations and the situation of minorities and displaced persons. The pioneering Evian Report (1990) identified as a key criterion that "the main scope of the database would be material describing the human rights situation in countries from where there are refugees coming or likely to come."

## **1.2 Does the COI source adequately cover the relevant issue(s)?**

1.2.1 One obvious criterion for evaluating the worth of certain types of COI sources is whether or not they give full or adequate treatment of the relevant country conditions/issues. If, for example, there is an issue about the fairness of a country's judicial system, then it is obviously important that the decision-maker should be able to learn about all relevant factors relating to the national justice system.

1.2.2 Given that the duty on a decision-maker is normally to consider a person's claim in the context of the evidence relating to conditions in the country of origin as a whole, considerable value may be placed on reports which furnish both a detailed overview of conditions there and also particulars about relevant groups and categories (eg, the position of different ethnic minorities or of vulnerable categories). Thus, within the EU, judges dealing with cases from Somalia have increasingly begun to have regard to periodic Joint reports drawn up by officials from several EU countries who have conducted a fact-finding mission.<sup>20</sup> The 2004 Joint report contains sections dealing in detail with diverse aspects of Somali affairs: its history, political institutions, legal system, clan structure, the position of vulnerable categories etc.

1.2.3 However, the extent to which COI that is both general and particular is required will vary from case to case and over time.

1.2.4 It may be difficult to find material that deals only with a specific incident or situation, eg, however there is a duty on all parties to seek the most up to date on line and printed information from all sources up to the time of interview or hearing. This will be balanced with reports which purport to give a detailed overview of the general country situations. However, just because a report which purports to be comprehensive does not mention a particular event or fact does not necessarily mean it did not happen/is not true.

## **1.3 How current or temporally relevant is the COI presented?**

1.3.1 Most national refugee determination systems require the decision maker to decide the issue of whether someone is a refugee or in need of protection on the basis of the situation at that time. What is normally being assessed is "future risk" by reference to the prevailing circumstances as at the date of hearing. This requirement is not an easy one for

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<sup>20</sup> For example, the joint British, Danish and Dutch fact-finding Mission (17-24 September 2000); The joint British and Danish fact-finding mission to Nairobi (Kenya) and Baidoa and Belet Wayne, Somalia, "Report on political, security and human rights developments in southern and central Somalia, including South West State of Somalia and Puntland State of Somalia", 20 May to 1 June 2002; the joint Danish, Finnish, Norwegian and British Fact finding mission to Nairobi, Kenya 7-12 January 2004 published 17 March 2004 entitled "Human Rights and Security in Central and Southern Somalia".

judges to apply, since the reports placed before them will by definition be dealing with events that, by then, are past. But in order to maintain the integrity of the decision-making process it is vital, when national legislation requires decision-makers to assess current risk that they make assessments in the light of the latest (often online ) evidence and avoid reliance on obsolete or out-of-date COI. This can be a challenge in some cases, since even very well-established country reports can rely on sources that are no longer recent. The balancing of recent online information that is not well or is poorly sourced against well researched reports is still necessary in each case.

1.3.2 It is largely because of the importance of basing decision on current information that particular value is often attached to reports which are produced on a regular or periodic basis. UNHCR Position Papers, the US State Department reports, Amnesty International reports and Human Rights Watch reports are produced annually, the latter two bodies sometimes producing additional interim or periodic reports. In the UK, the Home Office Country of Origin Services Reports (COIR) provides information on a number of countries and are produced bi-annually, and UNHCR and EASO reports are constantly being updated or replaced.

1.3.3 Of course, COI can also be vitally relevant in testing or establishing matters relating to *historical* aspects of the appellant's experiences. As Alice Edwards put it in her paper to the November 2005 IARLJ Budapest Conference on COI:

While 'future risk' of persecution is a key question in any asylum determination, it is almost always necessary to review the individual's past experience and past practices in order to determine the likelihood of harm in the future. An individual who fled in 2000 due to serious abuses at the hands of government officials arising out of their political activities should have this information taken into account. It would produce a distorted picture of his or her claim if a decision-maker only considered the practices of the government in 2005. Historical evidence and patterns of behaviour and practices are important indicators of potential future risks.

1.3.4 Having to decide questions about current risk categories by reference to COI which is not up-to-date may not be an easy situation for judicial decision-makers in some countries, since their legal system can still require an answer on the basis of whatever evidence that is before the judge. However, as a general rule judicial decision-makers must try to ensure the COI is case specific and not merely taken from previous cases of a similar nature.

## **2. Sources of the Information**

### **2.1 Is the COI material satisfactorily sourced?**

2.1.1 Depending on the context, sourcing may be about accurate referencing (eg, footnoting) or about recording corroborating statements or reports.

2.1.2 Attribution, where possible, increases judicial confidence in a report. A report which simply sets out its account and conclusions without making clear from where, or from whom, it has obtained the information can rarely be given credence. Judges may well

regard such reports as being of uncertain or unknown provenance. On the other hand, judges have to be aware that sometimes sources are anxious not to be identified.

2.1.3 In a world in which there are often vested interests in how a country's human rights performance is presented, decision-makers may be wary of COI or reports which depend wholly or mainly on just one or two sources. For this reason, they tend to place more reliance on reports which are multi-sourced and demonstrate cross-referencing or corroboration for what they describe.<sup>21</sup> Where there is more than one source for any particular observation contained in a country report the judge may be able to consider that that observation has been corroborated. Sometimes a decision-maker may be able to seek corroboration in the fact that there is more than one report confirming the same point.

2.1.4 The independent research unit within the Immigration and Refugee Board of Canada (IRB) employs what it refers to as the "Triple 'C' Methodology" – compare, contrast and corroborate. This captures very well the need for COI from which one can see that its contents are the result of cross-checking.

2.1.5 In certain cases, such as reports which purport to be definitive on a particular issue, it may be appropriate to expect them to annex all the background materials on which they have relied, so that readers know precisely the data on which the principal conclusions were based.

2.1.6 Much will depend on the quality of the sources cited. Decision-makers will be wary of too-ready acceptance of accounts based on obscure, unrepresentative or inaccessible sources. In Ireland, it is seen as a helpful rule of thumb for judicial decision makers to corroborate information by taking examples from at least three strata in a "hierarchy" starting with (1) intergovernmental sources, then governmental sources and international NGOs, (2) then international news reports, national NGOs, national news, then local governmental sources, local news, then (3) ordinary witnesses. Whether or not one agrees with the notion of a hierarchy – perhaps better would be the notion of perspectives from different vantage-points – recourse to different types of sources as indicated would appear to be useful.

2.1.7 What the decision-maker needs to be assured of is whether the COI is accurate, but he/she can only do that by reference to multi-sourced information.<sup>22</sup> Otherwise, there is no proper basis of comparison for deciding whether information given is accurate. At the same time, it may be important on occasion to make allowances for the fact that the source has tried to give vital information quickly, without being able to be certain of the full story, so that the outside world will begin to take an interest, or because the information is needed to force an international response (Rwanda in 1994 is a case in point). Sometimes, having one source will be better than none.

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<sup>21</sup> To similar effect the 2004 UNHCR COI Report states at para 24: "Experience shows that a coherent body of information requires multiple sources and that no particular source can generally be ruled out."

<sup>22</sup> Care must always be taken to ascertain whether sources are genuinely different and are not in fact based on the same primary source: this is the well-known problem of information "round-tripping".

2.1.8 It may be that, on occasion, information will emerge that is not, or cannot easily be, corroborated yet which may be said to be highly indicative of the real situation. Clearly, decision-makers must be astute to the possible value of all kinds of sources, but it remains a reality that they are obliged to decide cases in accordance with the evidence, not hunches or inspired guesses.

2.1.9 Decision-makers also need to assess accuracy within the context of the facts of the individual appeal. When considering accuracy, it will always be important to keep a sense of proportion. A source may be found to contain several errors but not necessarily ones which undermine the reliability of the rest of the report. In this regard, it may be necessary to consider how well-established the source is and whether, over time, it seeks to correct and remedy inaccuracies in later reports.

2.1.10 Because we do not live in an ideal world where all COI meets rigorous standards, it is inevitable that, to some degree, decision-makers will tend to attach weight to materials that have achieved an international reputation and are frequently used: eg, reports of the UN Human Rights Committee, UNHCR Position Papers, US State Department reports, Human Rights Watch reports and Amnesty International reports. They will do so in part because of their need for digested information: even in inquisitorial systems, judges do not have the time to go hunting for uncollated/unassimilated country information or to conduct their own statistical analyses. The rationale for considering reputation is that such sources have earned respect from many quarters for having been shown to provide a relatively reliable picture of country conditions over a significant period of time. The reputation may attach to the organisation or body producing the report and/or to the report itself.

2.1.11 Judges are aware, however, that even reputable sources are criticised from time to time and that it may be necessary on occasions to examine whether such criticisms are valid in relation to a particular issue and/or whether those writing the reports have acted to improve the standards of their reports. We have also to be aware of new bodies in the field with emerging reputations as providing reliable country data, not necessarily known to the judicial decision-maker.

2.1.12 Furthermore, reliance on a source because it has an established reputation may not always assist, eg, when two well-established sources adopt opposite or conflicting views or where an eminent expert disputes for cogent reasons what is said in an established source.

2.1.13 For these reasons, although considering the reputation of a source may be justified on pragmatic grounds, it is not itself a criterion going to the merits of the COI directly.

## **2.2 Is the COI based on publicly available and accessible sources?**

2.2.1 The pioneering 1990 Evian Report identified as a basic criterion:

“Public Material – the database would contain only public material, including non-conventional and unpublished material provided it is from a named and traceable source”.

2.2.2 This criterion remains of enduring importance. The Report closely related it to the requirement of access to databases containing only public material. Part of the thinking



behind the requirement that material be public is that it should be clear to the asylum-seeker what evidence is available and where it can be found and that he should be able to make use of it in support of his asylum claim and/or appeal. This helps achieve an “equality of arms” between the decision-maker and the claimant. A further factor here is user-friendliness: qualities such as appropriate formatting, divisions into appropriate headings and clear tables of contents will assist here.

2.2.3 Obviously, there will from time to time be a need to consider confidential data, eg, testimonies of human rights researchers in a country of origin who cannot disclose their identities directly without placing themselves at risk, reports whose authors are bound by professional ethics not to disclose the identity of a particular source. Whilst this may raise difficulties about the accuracy of the informant’s material, the weight to be attached to the information may be greater if the reason for anonymity is explained or if it possible to assume that the publisher of the report is an organisation of sufficient probity to ensure the source will have been checked insofar as it is possible to do so. But, subject to exceptions of this kind, COI may only be viewed as generally reliable if it is in the public domain and transparent as to its authorship.

### **2.3 Has the COI been prepared on an empirical basis using sound methodology?**

2.3.1 Just as judges are not country experts, neither are they social scientists. Nevertheless, they will naturally attach more weight to sources that demonstrate in transparent fashion a sound empirical basis for their principal findings. There is a premium on objectively verifiable facts. Sometimes even methods of obtaining statistical information will need to be scrutinised. It will ordinarily be apt to ask of a document, two particular questions, “How does the source know what it says it knows?” and “To what extent is it based on opinion and to what extent is it based on observable or established facts”?

2.3.2 One aspect here is to what extent a source is based on reports from persons “on the ground” in a particular country. One of the reasons why UNHCR Position Papers are often accorded considerable weight is because it is known that in relation to many countries UNHCR relies for its evaluation, not only on background sources, but also on reports from UNHCR staff that are posted in the particular country concerned.

2.3.3 Credit is also seen to accrue to reports identifying in explicit fashion what their own data-gathering methods and processes are. For example, the Preface to the US State Department reports usually state that:

“Throughout the year, our embassies collect the data contained in it through their contacts with human rights organisations, public advocates for victims, and others fighting for human freedom in every country and every region in the world. Investigating and verifying the information requires additional contacts, particularly with governmental authorities. Such inquiries reinforce the high priority we place on raising the profile of human rights in our bilateral relationships and putting governments on notice that we take such matters seriously. Compiling the data into a single, unified document allows us to gauge the progress that is being made. The public release of the Country Reports sharpens our ability to publicise violations and advocate on behalf of victims. And submission of the reports to the Congress caps our year-round sharing of information and collaboration on strategies and programs remedy human rights abuses – and put us on the path to future progress.”

2.3.4 The wording of this Preface requires care in itself as it has been criticised for disclosing a US foreign policy bias and one can certainly see that it does contain several value-judgments. Equally, it does this in a way which lays bare the principal focus of its concerns and so it is arguable that transparent statements of this kind permit the reader to take account of any bias that results. But it should not be ruled out that in particular instances, despite reports being transparent in this way, their stated agenda or value judgments may get in the way of objectivity, eg, by being too heavily influenced by that country's foreign policy concerns. In relation to US State Department reports, for example, it could possibly be argued, especially in relation to countries in which the US is presently or recently involved in the internal affairs of a country (eg, Afghanistan, Iraq) that its reports lacked independence. Having said that, the clear primacy that the US State Department reports place on the monitoring and gauging of the human rights performance of particular countries (by reference to international human rights norms) may be thought to render such reports of particular assistance to judges. That is because, by and large, judges determining whether a state of affairs is persecutory under the Refugee Convention or contrary to international human rights guarantees likewise seek to base their decisions on internationally accepted standards as enshrined in public international law. Much the same can be said of reports by international NGOs such as Amnesty International which clearly pursue a number of political goals (eg, trying to shift world opinion against capital punishment) but which try, as far as possible, to assess country conditions by reference to methods of analysis and evaluations based on international human rights norms.

2.3.5 Another aspect has to do with methodology. It may not be easy to place great reliance on a source which states, without giving any relevant background facts and figures, that there are "reports" or "incidents" or "cases" of detainees being tortured in custody. Obvious questions arise in respect of such statements. How many cases? In which prisons (all or just some)? Involving what type of prisoners (political/ordinary)? If a report gives specific figures of persons reported to have suffered human rights abuses in detention, they will generally carry more weight if they include relevant comparators: eg, what is the prison population in the relevant country? If a report refers to certain human rights abuses being widespread or routine or frequent, but elsewhere indicates small numbers of persons are affected, that will tend to detract from the weight such evidence may be given. Questions of scale and frequency can be vital in assessing risk. On the other hand, decision-makers must be astute to real constraints that may affect data-gathering in certain countries, eg, the authorities might deliberately prevent journalists or others from learning anything about certain detention centres, or official statements may significantly downplay the real numbers of detainees involved, etc.

2.3.6 The excellent reputation of particular sources (whether UNHCR, EASO governmental, or non-governmental, eg, Amnesty International and Human Rights Watch) should not deter the decision-maker from scrutinising their methodology and data-gathering research methods as much as that of any other source. Nor can it be automatically assumed that because past reports from a particular body have normally been of a high standard that the specific report before the judge measures up to the norm.

### **3. Nature/Type of the Information**

#### **3.1 Does the COI exhibit impartiality and independence?**

3.1.1 For credence to be placed on COI it is essential for the judicial decision-maker to be satisfied that it is not partisan or affected by bias. Although this is an elusive criterion to state with any precision, it is clearly a very important one. It is elusive because of the recognition that there is no such thing as “value-free” assessment of country conditions. Arguably every report adopts a particular vantage point. As can be seen from their Preface, US State Department reports are an example. However, it remains that perceptible bias or partisanship or having an “axe to grind” may be seen as reducing the value of a particular report. In the current situation where we can almost overwhelmed with information from a huge range of sources, including, news reporting of highly variable standards, social media, and determining information that is prepared specifically for political and other gains judges and decision makers, to the best of their ability, ensure they remain impartial and independent and still make their reasoned conclusions “in the round”.

3.1.2 To this end, judges need always to pose a number of critical questions of any source so as to evaluate its purpose, scope and authority. It may add value to a report that it is known to emanate from an independent source, eg, a report prepared by a reputable research body dedicated to compiling reliable data for use by international agencies.

3.1.3 Nevertheless judges should be cautious of being too judgmental about such matters. For example, it may be that the only recognised country expert on a particular country is an émigré who has aligned himself (or herself) to a particular political group in exile. One of the reasons why he may have come to be regarded as an expert is that he has “frontline”, on-the-ground knowledge of recent events. If a report from such a person nevertheless exemplifies an objective and balanced treatment of relevant issues, it may be given as much (if not sometimes more) weight as if it came from an academic body or source with no apparent political colouring.

3.1.4 In respect of reports from governmental agencies, or from joint government fact-finding missions, it may be necessary to consider whether there is any governmental bias. Factors of some importance are the extent to which the agency or agencies in question can be said to be shielded from political pressures by having a separate budget coupled with administrative independence from the decision-making authority. A further safeguard may be an independent monitoring body able to check on the quality and accuracy of ongoing reports.

3.1.5 The language and tone in which COI reports are written is also of some importance. Reports which frequently resort to hyperbole or employ emotive terminology or which contain rhetorical and prejudicial phrases, risk not being taken seriously.

3.1.6 **In respect of country experts** it is important to establish what material has been provided to that expert (other than that relating to the claimant’s individual history). Has he/she referred to the most recent COI? If he/she takes a different view as to risk than that taken by established sources such as UNHCR, what are the reasons for doing so? Has he/she taken an empirical approach to the evidence? Do the facts he/she identifies logically support the inferences he draws from them? Does he/she provide sources for his various statements? Is he/she bringing direct knowledge of relevant political events or political actors to bear or simply relying on (and making inferences from) very much the same body

of evidence which is before the judicial decision maker? Has he/she noted evidence or opinions which are contrary to his/hers? What are his/her credentials?

**3.1.7 Judicial experience of country expert reports may count for a lot here.** For example if judicial decision-makers see over time that a particular expert constantly seeks to paint a worse (sometimes rosier) picture than do other recognised sources, this may lead to a conclusion that the expert has lost the right to be considered impartial and has become an advocate. As was said by Collins J in the UK Tribunal case of *Slimani*:<sup>23</sup>

“In all cases, we have to distil the facts from the various reports and documents. Bodies responsible for producing reports may have their own agenda and sources are not always reliable. People will sometimes believe what they want to believe and, aware of that, those with axes to grind may feed willing recipients. Many reports do their best to be objective. Often and inevitably they will recount what is said to have happened to individuals. They will select the incidents they wish to highlight. Such incidents may be wholly accurately reported, but not always. This means that there will almost always be differences of emphasis in various reports and sometimes contradictions. It is always helpful to know what sources have been used, but that may be impossible since, for obvious reasons, sources are frequently anxious not to be identified. We are well aware of criticisms that can be and have been levelled at some reports and are able to evaluate all the material which is put before us in this way”.

**3.1.8 It is particularly important to assess the impartiality of so called “expert witnesses”.** If their evidence is sound academically, demonstrably objective and the expert is not acting as an advocate for the applicant’s case, strong weight can, and should rightly, often be given to such reports.

**3.1.9** Such country experts are not usually legally trained. Nor can they be expected to have a firm understanding of the skills or concepts judicial decision-makers have to deploy when making a credibility assessment. They may not even know that their reports will end up being used in a judicial process. Matters relating to standards and burdens of proof must be matters for the judge. Consequently what country experts describe as a serious risk or danger cannot be taken as determinative of that question. This does not mean their reports are to be given no weight, or to be treated as devalued or irrelevant simply because they are unaware of the precise legal criteria.

**3.1.10** Even when country expert reports fail to exhibit all the characteristics of a good report, and so only limited weight can be attached to them, that does not necessarily mean they are to be entirely discarded. Such “expert” reports are still part of the totality of the applicant’s case which the judge has to evaluate and then apply the correct legal principles to before reaching his own conclusions.

**3.1.11** The independence of experts must also be considered. It may be relevant in certain cases, for example, to consider whether an expert who derives a significant level of income from preparing country reports for claimants can be regarded as independent.

## **3.2 Is the COI balanced and not overly selective?**

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<sup>23</sup> *SSHD v S* (01/TH/00632) 1 May 2001, para 19.

3.2.1 Closely allied to the impartiality and independence criteria is that of non-selectivity.<sup>24</sup> The judicial decision-maker expects a report to present a balanced account noting items of evidence that go one way and the other. COI which was found for example to ignore consistently or overlook reports of acts of impunity by police and security forces would be deeply suspect. Conversely, a report which highlighted human rights abuses exclusively, without noting evident and significant improvements in a government's human rights record, would be received with scepticism. What judges want to learn is the real picture. However, a report is not necessarily lacking in balance simply because it comes down on one side of the argument about conditions in a particular country: the balancing required here is **only to take account of all relevant considerations for and against**.

#### **4. Prior Judicial Scrutiny**

##### **4.1 Has there been judicial scrutiny by other national courts of the COI in question?**

4.1.1 It is widely recognised by those involved in data-gathering that sources should cover case law emanating from different courts and tribunals. That is a valid requirement for at least two reasons. A judge's decision on a case may sometimes necessitate a forensic analysis of, and conclusions about, conflicting sources of evidence. Such analyses and conclusions may be of value to all. Second, much of the skill of judicial decision-makers in dealing with COI consists in correlating what it says about risk and dangers for particular categories with the legal concepts arising in the Refugee Convention and human rights treaties. For example, a country report or expert may state that the risk for a particular category is "serious" or "real". But whether such assertions are accepted as demonstrating a "well-founded fear of being persecuted" under Art 1A(2) of the Refugee Convention is a matter for judges to decide in particular cases. Thus the decision-maker may have before him/her a UNHCR Position Paper which frames its evaluation of risk categories more broadly than is justified under the terms of the Refugee Convention (or even under international human rights law). It may for example base itself on a concept of international protection which embraces, for example, humanitarian categories such as persons fleeing from the ordinary incidents of civil war or famine.

4.1.2 For this reason judicial decision-makers benefit from sight of decisions reached in different countries. They should thus be aware that just as refugee law judges seek a single universal or autonomous meaning of key concepts under the Refugee Convention, so they should strive to reach common views on the same or broadly similar country data.

4.1.3 We would accept, however, that reliance should only be placed on decisions from judges in other countries in limited circumstances and subject to careful review. There a number of reasons for this. Country conditions are mutable and in any event the primary focus must always be on the individual claimant's particular circumstances. It will sometimes be difficult to know the status of a decision from another jurisdiction (whether, for example, there has been a further appeal reversing the case). It may be unclear whether the court of tribunal in question has employed different standards of proof or different legal principles.

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<sup>24</sup> Meaning here failure to mention all relevant facts.

4.1.4 A further difficulty is that, as the theme of our paper highlights, even with the online information sometimes almost live information available, we are a long way away from a stage where we can be confident that judges always have available to them, at the time of decision making, COI meeting all of the standards we have identified.

4.1.5 **Country Guidance (CG) cases:** Perhaps one of the most interesting and useful developments over the past 10 years, since the substance of this paper was initially prepared, has been the now very extensive set of CG decisions prepared by the UK Upper Tribunal (Immigration and Asylum Chamber) - UKIAC. The unique need for these non-binding, but strongly persuasive, decisions arose through the sheer volume of cases before the UK Asylum and Immigration tribunals and the first instance UK Border Agency and the need to develop consistency and efficiency in the processing of the tens of thousands of cases. These CG cases are usually extensive and thorough investigations on a very wide range of relevant and often reoccurring country specific issues. The approach taken by the UKIAC in the CG system has been recognised and approved, particularly its usefulness and *non-binding* guidance in high volume jurisdictions, by not only the highest courts in UK but also by the European Court of Human Rights (Strasbourg). Whilst the CG system was designed for UK use of course, these cases are now a rich source of relevant, detailed, well analysed, non-binding COI and are available to judges and decision makers all around the world.

## **5. Conclusion**

5.1 The above Checklist is product of considerable discussion and exchange, involving judges as well as those active in the refugee law and policy field. Whilst it seeks to reflect the views of judges generally – ie, to furnish a specifically judicial perspective – it must not be thought that it necessarily achieves that; it is only a work in progress.

### **Further reading:**

- *LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG* [2007] UKAIT 00076 and *TK (Tamils - LP Updated) Sri Lanka CG* [2009] UKAIT 00049.
- *NA v UK*, Application No. 25904/07 (6 August 2008) ECtHR
- CG decisions of the UK Upper Tribunal, at <http://www.bailii.org/uk/cases/UKUT/IAC/>
- Decisions of the New Zealand Immigration and Protection Tribunal, in a searchable database at [www.justice.govt.nz](http://www.justice.govt.nz), with cases having high levels of COI noted.