ABSTRACT

International Association of Refugee Law Judges

Assessment of Credibility in Refugee and Subsidiary Protection claims and appeals under the EU Qualification Directive

Judicial criteria and standards

Prepared by the International Association of Refugee Law Judges (IARLJ) in its role as a partner in the "Credo Project", January-December 2012

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Authors, list of judicial editorial group, other judges, and participants consulted in the preparation of this Paper

The authors of this paper, Allan Mackey and John Barnes, are both retired UK Senior Immigration Judges.[1]

They were greatly assisted throughout the project by an Editorial group of IARLJ members who are all European judges, highly experienced in this field of law, and by all the other judges and participants who took part in a two day workshop on this paper in Madrid (20-21 September 2012). Country reports from all of the countries represented and commentary from UNHCR, together with feedback on the many draft versions of this paper, also contributed significantly.

The Editorial group members were: Judges: Nicolas Blake (UK), Eamonn Cahill (Ireland), Jacek Chlebny (Poland), Jane Coker (UK), Bernard Dawson (UK), Katelijne Declerck (Belgium), Sebastiaan de Groot (Netherlands), Harald Dörig (Germany), Joseph Krulic (France), Hugo Storey (UK), Boštjan Zalar (Slovenia).

The wider judicial consultation group who attended in Madrid were: All the Editorial group, (except Judges Blake and Storey), Judges Anne Bruland (Norway), Maureen Clark (Ireland), Maria Contini (Italy), Dora Virág Dudas (Hungary), Bent Jespersen (Denmark), Dirk Maresch (Germany), Judith Putzer (Austria), Juha Rautiainen (Finland), Umberto Luigi Scotti (Italy), Jolien Schukking and Liesbeth Steendijk (Netherlands), Walter Stöckli (Switzerland), Karolina Tylova (Czech Republic), Juan Carlos Fernández de Aguirre, Celestino Salgado Carreo, Nieves Buisán García, Jesús Nicolás García Paredes and Isabel Perello (all from Spain),also Ms Anna Bengtsson (Sweden), Laurent Dufour (France) and Mike Ross (Canada/IARLJ). From UNHCR: Cornelis (Kees) Wouters (DIP, Geneva), Madeline Garlick and Fadela Novak (Bureau for Europe, Brussels), Maricela Daniel, Juan Carlos Arnaiz and Marta Garcia (all from Madrid) and Laura Cantarini (Rome). From EASO: Marta Ballestero Beltrán (Malta). From HHC: Gábor Gyulai and Tudor Roşu (Budapest).

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Assessment of Credibility in Refugee and Subsidiary Protection claims and appeals under the EU Qualification Directive:

Judicial criteria and standards

CONTENTS

INTRODUCTION

WHO IS THIS PAPER PREPARED FOR?

This paper, whilst directed to judges considering refugee and subsidiary protection cases also aims to be instructive and relevant to all decision-makers, counsel and claimants in this unique field of law

It provides guidance to judges in the Europe in best practice criteria and standards for credibility assessment. The guidance is for judges determining both "full merits reviews", and error of law only appeals. The paper will also provide assistance to: government first instance decision makers, claimants, counsel, the UNHCR, European Asylum Support Office (EASO), academics and NGOs working with claimants.

Apologies are made for the extensive use of abbreviations or acronyms (especially to non-English readers). While it is unavoidable in some places, such as citations, we have tried to use only the most common acronyms in the text and to avoid their use to make the paper more readable in places. This is especially the case in this abridged version which will be translated into French and German.

WHO PREPARED THIS PAPER AND WHY?

The aim in this paper is to assist and inform judges, and all asylum decision makers, in the use of appropriate criteria and standards of credibility assessment. Establishing the "accepted past and present facts" about each claimant is an essential first step in the assessment procedure of every refugee or subsidiary protection claim. Unless the credibility assessment is a sound one all further stages in the asylum recognition procedure will be fundamentally flawed. Hence understanding and applying correct criteria and standards is essential for all judges (and all other decision makers) who determine claims for asylum status recognition on behalf of Member states.

The paper has been prepared under the auspices of the IARLJ, in consultation with UNHCR and HHC, as partners in the European Refugee Fund (ERF) sponsored "Credo Project".

Much of the drafting of this paper was done by the two authors, noted below, after extensive consultation and guidance from some 35 highly experienced European judges, from 22 countries[2]. Commentary from the UNHCR, EASO and HHC has greatly assisted the authors, as has advice from psychologists and lexicologists on specialised sections of the paper

The criteria and standards recorded are primarily concerned with credibility issues which may arise in the consideration of refugee and subsidiary protection claims and appeals (together at times termed as IP claims) made under Directive 2004/83/EU (the 2004 QD). It is to be noted that Directive 2011/95/EU (the 2011 QD), in substitution for the 2004 Directive, was passed in December 2011, but will not come fully into operation until 21 December 2013 (see Art 40, 2011 QD). References in the text are, however, generally to the 2004 Directive[3].

WHAT IS IN THIS PAPER?

This is an abridged copy of a full paper on the same topic, published on the IARLJ website in February 2013. Many hyperlinks to the full paper provided in this shortened version will give wider background understanding of essential EU asylum law issues. Reading the full paper by those judges, and others, who are new to, or are only irregularly involved in asylum law issues is highly recommended, as without a reasonably substantive background to the unique nature of the subject, its history and the relevant legal framework, mistakes in credibility assessment, and indeed all other stages of assessment, literally cannot have more serious consequences.

This abridged version is to be translated into French and German, as part of the Credo project. The hyperlinked references to parts of the full paper however will only be available in English.

[2] See p.2 for details of the authors, judges and others consulted.

[3] These both relate to minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or persons who otherwise need international protection and the content of the protection granted. Neither Directive applies to Denmark. The later Directive applies to all Member States with the exception of Ireland and the United Kingdom who continue to be bound by the earlier 2004 Directive (see Recitals 50, 51 of 2011 QD). The differences between the two Directives are nevertheless, for our purposes, comparatively minor so that the general thrust of this paper is relevant to all EU Member States with the exception of Denmark.

In **Part I** we set out the background to refugee and other protection law by first discussing the unique nature of decision-making in this arcane and highly specialised area of law. We then refer briefly to the legal background, the way in which the CEAS is both structured and works in practice and the role of the judge.

Part II, in chart form, sets out a structured approach, with brief explanations, to all the steps needed in the judicial determination of appeals or reviews, in which the full merits of the claimant's case requires consideration.

In **Part III** we set out judicial guidance on criteria and standards for credibility assessment which are derived from best judicial practice both within the EU and internationally in the application of IP law.

(In the full paper Part IV and Part V provide substantive explanation of many of the assessment related issues raised in this abridged version. Part VI is a discussion paper on the highly relevant but vexed issues of burdens and standards or proof in the EU that may be applicable in credibility assessment of refugee and subsidiary protection claims.)

WHAT IS THE MEANING OF 'CREDIBILITY' IN THIS CONTEXT?

The problem of a duality of usage of the term/word: "credibility".[4]

We must recognise how and when, particularly in English, the term "credibility" can be used (validly) in refugee and other protection claims at all levels of assessment in two markedly differing contexts.

1. In the first context, it is for evaluating "the credibility of a claimant's evidence, presented as their past and present factual background". From this it follows that the assessment made by the judge, in this context, must conclude: are the claimant's statements and other evidence as to past events accepted as being believable? Or, put perhaps more simply: what are the "facts as found" by the judge that go to make up the claimant's holistic "accepted profile" that the judge will then use in the prospective risk assessment that follows?
2. In the second context, it is often used 'loosely" to cover the "credibility of everything related to the ***claim*** for recognition as a refugee or protected person". In this context the term "credibility" is used as meaning ***all*** the evidence relevant to the claim for protection status, duly assessed, (including the facts as found that make up the accepted profile of the claimant), does the claimant have a well-founded fear of being persecuted for a GC reason (Article 2 (d) of the QD 2004), if now returned to his or her country of origin. (Or, however ,if the facts as found do not support a recognition of refugee status, are there substantial reasons for believing that the claimant would face a real risk of suffering serious harm (Article 2(f) of the QD 2004). Thus in this second context the judge must determine both the past and present facts accepted AND the future prospective risk of harm.

To avoid any confusion, in this paper we address "credibility" in the sense of first context above, concerning the credibility of the claimant's past and present factual background.

The use, in lay terms, of the word "credibility", in these two different contexts, is linguistically valid. However, judges will be aware that Art. 1A (2) of the Refugee Convention does not refer *to the credibility of the claim* but rather to whether there is a *"well-founded fear of being persecuted".* Thus reliance on the concept of the "credibility of the claim for recognition as a refugee or a protected person" (or wider meaning) is, in our view, erroneous in law. It is thus strongly recommended that judges and other asylum decision makers should therefore refer to the "validity of the claim of a well-founded fear of being persecuted/persecution" and not use "credibility" in the secondary wider context[5].

It is thus important for judges (and all decision makers) to ensure that they clearly understand that the intended meaning can vary depending on its context. From consultation with lexicologist sources it appears these two contextual alternatives, for "credibility", are common to most European languages. What is needed therefore, in linguistic terms, is "contextual disambiguation" to ensure the concept of "credibility" is used correctly in the two possible contexts.

The confusion is often held by claimants and their representatives as well. They will often present their claims for recognition on the basis of the claimant's subjective fears and then state that in all their past, present and prospective evidence, and risks

[4] The New Oxford Dictionary meaning is stated as:
"**Credibility ► noun** the quality of being trusted and believed in: *the government's loss of credibility*.
▪the quality of being convincing or believable: *the book's anecdotes have scant regard for credibility*."
"**Credible ► adjective** able to be believed; convincing: *few people found his story credible a credible witness*.
▪ capable of persuading people that something will happen or be successful: *a credible threat*."

[5] Similarly, in the case of subsidiary protection recognition, the proper reference is to the existence of "substantial grounds for believing that the claimant has a real risk of suffering the prescribed treatment.

on return, they are "wholly credible". However, the judge's task is to consider the evidence on an objective basis at each stage of the decision-making process.

The credibility assessment of the claimant's accepted profile is thus a part only of the totality of the evidence which will have to be considered at the second stage of determining future risk on return.[6]

PART I

"SETTING THE SCENE"

A. THE UNIQUE CHARACTER OF DECISION-MAKING IN REFUGEE AND OTHER INTERNATIONAL PROTECTION CLAIMS[7].

1. Refugee and subsidiary protection law, and related decision making on status recognition, is markedly different from almost all other areas of the domestic law of member states (MS), familiar to lawyers and judges in their respective jurisdictions. Because so much of this now extensive and specialised field of law has only developed in the last 25 years, many lawyers and judges will have had little or no formal training in the field and thus understandably firstly seek to rely on principles of domestic administrative law.

2. It is important therefore to set out the differences and 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[8].

3. There are several important characteristics that must be noted:

(i)One party is a non-national individual claimant while the other is a state;
(ii) The factual substance of every claim will be difficult to check and thus reference to the country information in other states will be needed;
(iii) The focus of the case is significantly on the future, not the past.
(iv) The core treaties, such as ECHR and GC, are living instruments;
(v)The decision-making is international rights-based, not domestic privilege-based;
(vi)The principles of surrogate protection arise from international treaty obligations;
(vii)Refugee and subsidiary protection status are declaratory, not constitutive;
(viii) Judicial independence and impartiality can be put under pressure from anti-refugee/migrant or societal pressures;
(ix) Many claimants will have vulnerabilities inherent in their situation, thus the psychological and trauma dimensions affecting them **must** be considered;
(x)Claimants will often have difficulties in presenting corroborative evidence thus careful attention will be needed in the use and abuse of "supporting" documentation, including web-sourced material; and
(xi)Cross-cultural awareness and challenges and working through interpreters are the norm.

(Whilst the first three are self-evident, explanation of points 3(iv)-(xi) is needed and can be found in Part 1 of the full paper

[6]**"Contextual use of the word "risk":** The use of the word "risk" (as in "real risk") can also be contextually problematic when, (as happens in some jurisdictions, and possibly ECtHR decisions) "risk" is used to refer to a standard of proof for acceptance of past evidence.(i.e in Step 2, Issue 1 in the Part II chart below). We consider that if a standard of proof is to be used at all, in the acceptance of a claimant's evidence of past facts, then referring to a real **risk** of past events as having occurred is contextually confusing. This is because "risk" is a word more appropriately used in a predictive assessment, not a past one. (As in Step 4, Issue 2 of the Part II chart). We discuss this issue further in Part VI below.

[7]This section of the paper reflects this unique character by reference to international law norms. The extent to which construing the EU primary and secondary legislation making up the CEAS may lead to a legally (though generally not practically) distinct application by the CJEU of its rules of interpretation of EU legislation will be considered in the section of this part of the paper dealing with "The legal framework and the CEAS".

[8] 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 Attachment 3 at p5) illustrates 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-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.

4.In summary each of the above factors alone illustrates the unique and specific character of refugee and subsidiary protection law and decision-making. However, the reality is that in virtually all refugee and subsidiary protection cases many of the above factors will be relevant. It is for these reasons that assessment and ultimate decision-making should always be considered "on the totality of the evidence" or "in the round".

B. THE LEGAL FRAMEWORK AND THE CEAS

5. Having noted the unique and specific character of refugee and protection law, it is also necessary, before undertaking full merits or judicial review of government first instance determinations on refugee and protection status claims, to gain background knowledge of the, historical development of refugee and international protection law, and all the relevant EU law and procedures in this context.

6. In this abridged paper it is not practicable to carry out a review of all these, and the related international and European law relating to issues of refugee status, subsidiary protection status and other forms of international protection. However reference should be made to the full copy of the paper where a reasonably in depth overview and discussion of the directly relevant legal and procedural provisions, and an introduction to the QD and APD are set out in Parts I, IV, and V. Part VI then provides a "Discussion paper" on the vexed issues of the Burden and Standard of Proof in EU and international asylum claims and appeals, here is the link to the full paper

C.THE ROLE OF THE JUDGE IN REFUGEE AND SUBSIDIARY PROTECTION CASES

7. Whilst many national judges will be operating within limited jurisdictions (confined to judicial review, or "decisions at the margin") the focus of this paper is on a full protection hearing. However this paper will assist substantively, those judges conducting a judicial review only, as well as providing an understanding of what should be expected of all decision makers who make findings on the protection issues/statuses themselves.

8. We have chosen to analyse here a typical full protection hearing because it is the judicial task which most closely resembles the task which is faced by the initial decision-maker. But there is no exact parallel. Unlike the initial decision-maker, the judge does not start with a 'blank sheet' because it is the duty of the court or tribunal to consider a review or appeal from that initial decision. It therefore follows that not only will all the material placed before the decision-maker, along with the first instance decision itself, be available but also any additional input from the failed claimant, supporting the review or appeal application, and up to date COI, will also be before the court from the outset of the appeal.

9. The need for a full judicial protection hearing will therefore usually arise under Article 39 APD where there is good reason in law why the initial decision cannot stand. Nevertheless, it is important that the initial decision-maker should understand the review or appeal process, and in particular the judicial criteria and guidelines, set out in Part III below, which the court should apply to its own deliberations.

10.The task of the court or tribunal may be summarised sequentially as follows: (Note: Elaboration of each of these points is set out in Part V of the full paper.

- to decide whether the claimant is entitled to recognition as a person in need of international protection –
- as at the date of the hearing –
- by reference to the relevant provisions of the QD governing recognition of refugee and subsidiary protection status –
- on the totality of the evidence before the court –
- including that obtained by the court of its own volition –
- considered and assessed objectively –
- so as to establish whether –
- if then immediately returned to his country of origin –
- there is a well-founded fear of the claimant being persecuted (Article 13 refugee status recognition) or –
- if not recognised as a refugee pursuant to Article 13 of the QD –
- whether, if so returned, substantial grounds have been shown for believing there is –

- A real risk that the claimant will suffer serious harm as defined in the QD (Article 18 subsidiary protection status recognition).

D.THE BURDEN AND STANDARD OF PROOF IN REFUGEE AND SUBSIDIARY PROTECTION CLAIMS AND APPEALS

11. Finally it is necessary to briefly consider the question of the burden and standard of proof in the CEAS in refugee and protection cases.

12. Whilst the concept of burden of proof is one with which all courts in the member states will be familiar, starting from the basic precept that the burden of proving an assertion lies on he/she who makes it, the concept of the standard of proof in these cases raises greater difficulty. It is a concept with which those familiar with the common law adversarial procedure are familiar but it has traditionally played a lesser or no role, in the civilian tradition in the area of asylum law.

13. We need only observe in this introduction that it is our view that the jurisprudence of the ECtHR provides some appropriate guidance for an understanding of how these concepts should be applied in ECHR protection claims and appeals, particularly as they relate to the risk on return assessment. However the standard of proof applicable, if any, in the assessment of the credibility of past and present facts (claimant's accepted profile), is not so readily apparent or ascertainable for claims and appeals by claimants under the EU QD. It is however another part of the necessary background knowledge for judges working in this field.

14. These two related issues can be explored in greater depth initially by reference to the Part VI "Discussion paper" of the full paper.

PART II

A STRUCTURED APPROACH TO THE DECISION-MAKING PROCESS IN EU REFUGEE AND SUBSIDIARY PROTECTION CLAIMS

1. Noting the "protection obligations" states have entered into, pursuant to EU and international law (as described in Part I), and recognising the gravity of the predicament that may face claimants who are in need of international protection, judges must approach all claims with an outlook that gives claimants full individual personal respect; and recognises the seriousness of the task being undertaken.

2. Judges carrying out full merits reviews in refugee and subsidiary protection cases (especially judges new to, or irregularly involved with, these cases) will be greatly assisted by approaching each case in a systematic, step by step manner.

3. The following one-page chart sets out the steps and issues involved, with brief explanations of tasks to be completed at each stage".(The words " accepted profile" used in this paper should not be confused with the terms "profile" or "profiling" commonly used in the criminal law or policing context. Its use here is to cover, holistically, all factors about a claimant accepted by the judge in the context of refugee and other international protection claims only.) An expanded explanation of each step in Part II is set out in the full paper.

A STRUCTURED APPROACH TO THE DECISION-MAKING PROCESS IN REFUGEE/SUBSIDIARY PROTECTION CLAIMS
Summary Chart © www.iarlj.org

The core issue to address, in the vast majority of appeals, is whether, based on the accepted facts the claimant presents and his/her predicament on return, should he/she be granted status, under the QD, either as a refugee or person entitled to subsidiary protection. The step by step process we set out below is suggested as a way in which confusion can be minimised by making required findings in the correct order. NB: "IP" means international protection, i.e. both refugee and/or subsidiary status.

STEP 1: INITIAL ASSUMPTIONS

A PRELIMINARY ENQUIRY: UNIQUE PROFILES – DETERMINING WHETHER A FULL IN-MERIT REVIEW IS NEEDED

As a preliminary step however, in IP appeals, of claimants with unique profiles below, it will prove convenient and pragmatic for the Court to consider:

(1) Assuming that the whole factual basis of the IP claim is accepted, without reservation, do these fully accepted facts establish, as a matter of law and pursuant to the QD, that the claimant has actually **not** made out his or her case and thus **cannot** be recognised either as a refugee or as a person deserving of subsidiary protection? If so, effectively the appeal may be disposed of at this point.

(2) At the other extreme, credibility is not always or necessarily determinative of an IP claim. Whilst credibility is very often at the heart of every appeal, it may sometimes occur that, by virtue of the situation in the claimant's country of origin, that he or she can qualify for refugee or subsidiary protection status merely because he or she is accepted as being of that nationality and is of a particular age, gender or ethnicity.

STEP 2: ESTABLISHING THE FACTS OF THE CLAIMANT'S PAST AND PRESENT STORY

ISSUE 1: THE BELIEVABILITY BOX

Objectively assessed, is all or part of the claimant's story, which he or she presents as a factual background to their case, accepted as "credible"? The assessment required in this box will require the judge to set out the material facts of the claimant's story that are found to be credible and those facts that are rejected, along with sound reasoning for the findings made.

Evidence and guidance that need to be taken into account in addressing this issue:

(A) the extensive list of criteria and standards of good practice for assessment of whether the claimant (and other witnesses, where applicable) is/are credible (believable) in the presentation of his/her past and present facts (as set out in Part III of this Paper); **(B)** the relevant details of the claimant's evidence and responses to questions/cross-examination; **(C)** the evidence of other witnesses in support of (or contrary to) the claimant's case; **(D)** the consideration of expert evidence (if any), including an assessment of the appropriate weight to be attached to such evidence and it's inter-relation to the claimant's evidence; **(E)** relevant country of origin information (COI), duly weighted (using such guidelines on the use of COI as those published by the HHC and the IARLJ). This COI is applied in this box at this time to test both internal, external consistency and plausibility of the claimant's evidence; **(F)** consideration of other documentary evidence (e.g. medical, psychiatric, travel documents etc.) that either supports or detracts from the claimant's story; and **(G)** the application of residual doubt principles where a claimant's story is otherwise accepted as credible. (Art 4.5 QD)

STEP 3: THE ASSESSMENT AND REASONING ON ISSUE 1

Set out in the Decision, a full credibility assessment, with reasoning as to which material facts are accepted and those that are not. Following that, record an " accepted profile" of the claimant as found by the judge, subsequent upon the full analysis of issue 1.

STEP 4: ESTABLISHING "WELL FOUNDED FEAR" OR REAL RISK

ISSUE 2: THE RISK BOX

Objectively assessed, based on the accepted profile of the claimant, and all other relevant factors, what is his/her (prospective) predicament on return to the country of origin? ***AND DOES*** the claimant have a well-founded fear of being persecuted/there are substantial reasons for considering the claimant will be tortured etc on return. This decision will be based on the totality of the findings of fact set out in the claimant's profile and the duly weighted assessment of all of the other evidence presented. The combination of the accepted facts that make up the claimant's profile, together with all of the duly weighted other evidence, constitutes the "facts as found" from which the risk assessment is made at the applicable (if any) "standard of proof". See Parts I and VI of the full paper.

Evidence and Guidelines to be taken into account:

(A) the claimant's accepted profile at the time of assessment; **(B)** the accepted evidence of other support witnesses; **(C)** expert evidence duly assessed for probative weight; **(D)** The relevant COI (duly assessed and weighted in accordance with good COI guidelines); **(E)** the relevant legal framework applicable in the CEAS, QD, PD, CJEU, ECtHR and international law; **(F)** relevant binding or persuasive case law of the CJEU, ECtHR, other MS national courts, and non-EU courts; and **(F)** academic guidance and commentary, duly weighted and assessed.

STEP 5: DECISION ON ISSUE 2 – RISK

After the analysis and conclusion on Issue 2, set out in the "Risk box", taking into account the totality of the evidence and relevant applicable law and jurisprudence, particularly on the issue of the reality v the remoteness of risk on return (Articles 2-9 and Article 15 QD), is the claimant eligible to be recognised for either (a) refugee (subject to determination of issue 3 in the "Reasons box" below) ? or (b) subsidiary protection status?

STEP 6: REASONS AND NEXUS FOR REFUGEE STATUS RECOGNITION

ISSUE 3: THE REASONS BOX

If the answer to **issue 2** is "yes", (a) is the risk of being persecuted for reasons of one of more of the five Geneva Convention reasons (as expanded upon in Article 10 QD)? Or, if not, (b) does the claimant qualify for subsidiary protection (Articles 15 – 17 QD)?

Evidence and law to be applied:

(A) all relevant QD, ECHR, international and domestic law that relates to the legal framework on issues of nexus and Convention reasons; **(B)** relevant, binding and/or persuasive case law at the CJEU, ECtHR, domestic and non-EU level; and **(C)** relevant academic guidance and commentary, duly weighted and assessed.

STEP 7: DECISION ON ISSUE 3 – INCLUSION RECOGNITION

Record that the claimant thus falls within or without the inclusion provisions (Article 9, 10 QD) as a refugee or alternatively qualifies, or does not qualify, for subsidiary protection. **Note however that the domestic law of some member states may not allow the judge to make a finding on recognition** but only to allow the appeal/application or to quash an earlier primary decision and require the claim to be re-assessed, in whole or in part.

STEP 8: CESSATION

If cessation (Article 11, QD) provisions arise, the judge must then continue to determine the cessation issue. Also IP law and UNHCR commentaries on Article 1F, GC may assist.

STEP 9: EXCLUSION

If exclusion (Article 12, QD And Article 1F, GC) provisions arise, the judge must then (subject to domestic state provisions that permit earlier consideration) continue to determine the exclusion issue.

PART III

JUDICIAL GUIDANCE FOR THE ASSESSMENT OF CREDIBILITY IN EUROPE

Basic Criteria and Standards of Good Practice

Introduction to Criteria and Standards

1. This Guidance has been developed by the European chapter of the IARLJ as a partner with HHC and UNHCR in the "CREDO - improved credibility assessment in EU asylum procedures" project. The Guidance consists of a statement of basic criteria applicable for credibility assessment of past and present evidence presented by claimants and a set of judicial standards for good practice in such assessment.[9] They have been agreed, after an extensive consultative process involving some 35 experienced IARLJ members and other European judges from across almost all member states who participated in this project. There was also input from the European wider judiciary, EASO, UNHCR, HHC and NGOs, academics and experts in this field.

2. The aim of the IARLJ, and all others involved in the Credo project, has been to promote and attain excellence, not only in the core task of assessing credibility, but also in achieving greater overall consistency, in refugee and subsidiary protection decision making across the EU. This is fully consistent with the objectives of the IARLJ, namely to promote the "rule of law" in refugee and other international protection determination. It is planned, in the near future, that the Guidance and content of this paper be used in judicial training projects across the EU. A working party, within the IARLJ (EU), will continue to update and improve the contents of this paper and related judicial procedures.

3.These criteria are prepared with the underlying recognition that:

a. It is the duty of claimants[10] to present their own applications for recognition of refugee and or subsidiary protection status and each application is to be assessed on an individual basis (Article 4.1-4.5 QD).
b. The determination of eligibility for protection within the EU is an onerous and specialist task.[11] Whilst the initial source of judicial reference will be the national law of the Member State transposing the applicable EU Directives in the CEAS, it must always be borne in mind that this will be informed by the GC and other European and international human rights conventions themselves, together with judicial interpretation by courts over the past sixty years.[12]
c. Because the issues involved (for both claimants and states) are so serious in nature and involve fundamental principles of justice, only the highest standards of fairness are applicable in the determination process. It is this most fundamental premise, inherent in the humanitarian nature of international and EU protection that directly or indirectly underpins this Guidance.
d. The assessment of credibility of past and present facts (evidence) presented by a claimant is a tool used to establish the "accepted profile" of the claimant and to determine their international protection needs. This profile is a vital part of the "material facts" in determining the risk of the claimant being persecuted or suffering serious harm on return. Thus, as shown in Part II ("The structured approach" above), it is necessary to decide Issue 1 before moving on to Issue 2 ("the prospective risk").
e. This Guidance is based on EU administrative law principles, including the right to a fair and public hearing, equality of arms (*audi alteram partem*), proportionality, legal certainty, and the right to an effective remedy. These principles are set out in the core instruments of the EU (including the TFEU and the EU Charter) and the ECHR.[13]
f. The principles contained in this Guidance are derived from EU legislative instruments, the jurisprudence of relevant courts and the experience of the judges who have participated in this project.[14] In addition we have had regard to guidance from the UNHCR Handbook and Guidelines (2011) and leading academic publications.

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[9] 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.
[10] See discussion on burden of proof in Part VI in the full paper
[11] See Part I.1 above.
[12] Certain national legislation of MS seeks to prescribe issues which are to be reflected in the assessment of the claimant's credibility – e.g. s. 8 of the UK Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Such national legislation cannot be relied upon as a substitute for assessment of credibility being made on an '*individual, objective and impartial*' basis in order to comply with both EU and internationally recognised standards of decision-making – see, e.g., Article 47 EU Charter and Article 8 APD.
[13] For further elaboration, see Parts IV to VI in the full paper.
[14] The legislative instruments include both the primary legislation, such as TEC, TFEU and the EU Charter, and secondary legislation comprising regulations and directives concerned with the implementation of the CEAS, with particular reference to the QD and APD. The jurisprudence includes not only that of the CJEU and ECtHR but also that of the national courts of MS and internationally recognised case-law dealing with IP law principles. That hierarchy has been adopted in the sources quoted in the text.

g. In EU, and wider international law, there are some basic criteria (as set out below), applied in all valid judicial reasoning, to evaluate the "lawfulness" of credibility assessment. These criteria, and the detailed standards of good practice that expand on them, specifically in the assessment of credibility in refugee and subsidiary protection cases, have been developed in asylum law and practice over the past 60 years. The explanatory memoranda of the EC make it clear that EU legislative principles are drawn largely from accepted international practices in the field of asylum and international human rights law and that in many instances the EU legislation is partly declaratory of the best international practice. A failure to apply these criteria and/or meet the standards, will, on judicial review, lead to consideration of whether an error of law in the decision making has rendered it unsustainable.

h. This Guidance is non-exhaustive. It includes, often with overlap between them, 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: those relating to fundamental fairness issues, those of a more procedural nature, those applicable in assessing the claims of vulnerable groups with special needs; and a discussion of how residual doubt, and Article 4 QD issues (or what is also referred to in some jurisdictions as "the benefit of the doubt") should be dealt with.

Basic criteria applicable for credibility assessment of claimants

4. Unless there is a conceded or obvious acceptance, *in full,* of a claimant's credibility, the judge independently must carry out the assessment task. This assessment must be approached by the judge impartially and so as to minimise their own inherent subjectivity so far as possible. To ensure objectivity and concentration on the core elements in credibility assessment, the following criteria are seen as judicial best practice. Following these criteria should ensure judges (and all other decision-makers) reach high quality decisions. The credibility findings, in respect of the assessment of the claimant's accepted profile, should explain (as applicable) whether the following criteria are established or not:

a. Internal consistency: These are findings on consistencies or discrepancies within the statements and other evidence presented by claimants from their first meetings, applications, and personal interviews and examination at all stages of processing their application/appeal until final disposal.

b. External consistency: These are findings on consistencies or discrepancies between the statements of the claimants and all the external objective evidence, including duly weighted COI, expert and any other relevant evidence.

c. Impossibility: These are findings, which when set against objective internal or external evidence, show alleged "facts", presented by a claimant, as impossible, (or near thereto) of belief. For example: relevant dates, locations, and timings, mathematical, scientific or biological facts.

d. Plausibility: These are findings on the plausibility of the claims including explanations by the claimant of alleged past and present "facts", and whether they add to or subtract from acceptance of those facts as being able to be believed. Within this criterion several specific issues may be relevant, such as: a lack of satisfactory or logical detail in explanation, explanations for the use of false or misleading documentation, delays in presentation of claims; and reasons given in previous claims and appeals. Plausibility will, to some extent, often overlap with external consistency findings.[15]

e. "In the round": Overall credibility conclusions should not be made only on "non-material", partially relevant or perhaps tangential findings only. Thus the substantive findings in the assessment of accepted credibility profiles, including the weight accorded to the above issues, should be made "in the round" based on the totality of the evidence and taking into account that findings on a, b, and c (above) criteria will logically have more weight than those solely relying on "implausibility".[16]

f. Sufficiency of detail: With rare exceptions, based on a claimant's incapacity, 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 manifestly unfounded.

g. Timeliness of the claim: Late submission of statements and late presentation of evidence may negatively affect general credibility, unless valid explanations are provided.[17]

h. Personal involvement *(persönliche Betroffenheit)*: If all the above criteria are met it is still important to ensure the claimant has been personally involved in the "story" or evidence presented (*Realkennzeichen*).

[15]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 section on plausibility at pp390-391where he argues that plausibility "adds very little" to external consistency.

[16]See, e.g., *Cruz Varas and Others 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); Section 108(1) and (2) German Code of Administrative Court Procedure. .

[17] 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.

EU judicial standards of good practice in credibility assessment

5. Several of the following standards of good practice are often to be found in the Codes of Administrative Procedure in many Member States. Additionally they have been developed by EU and international judges on a wide range of issues that are applicable in credibility assessment. The list that follows is not exhaustive and experienced judges may indeed consider applying many of them "goes without saying". However this list aims to be as extensive as possible, especially to assist and guide those judges, and all others, unfamiliar with this area of law, to carry out the challenging task of credibility assessment, with the assistance of the cumulative experience reflected in these suggested standards.

6. Also, it must be said that, while appropriate deference to skill and experience will normally be accorded to experienced, first instance decision-makers, or full merits review judges, a material failure to adhere to one or more of these standards will often lead to an error of law finding on judicial review. For ease of use they are grouped in the four categories that follow.

(A) Treatment of Substantive Evidence

A.1Consistency

Past or present facts should be presented by claimants in an internally and externally consistent manner.

Explanation: The effect on credibility assessment of inconsistencies and discrepancies in the evidence, taking into account the personal circumstances of the claimant, should be clearly explained to them and they must be given the chance to respond. The responses and explanations given by claimants when challenged on the apparent contradictions must be taken into account.

Examples: Claimant A states he was a member of a named political movement on arrival but in later statements claims this is not the case. No satisfactory explanation is provided when confronted on this. This validly has a negative impact in assessment.
Whereas Claimant B's evidence at all stages is consistent with well-sourced COI from UNHCR reports, giving this evidence positive impact.

Authorities: *R.C. v. Sweden* (2010) European Court of Human Rights, Appl No 41827/07; Committee Against Torture "General Comment No. 1: Implementation of Article 3 of the Convention in the context of Article 22" A/53/44, annex IX, 21 November 1997; United Kingdom: *Y v SSHD* [2006] EWCA Civ 1223; Poland: SACP File 11OSK 902/10 (20 April 2011); Croatia: *Re. Miroshnikov* (15 June 2012) ACZ No Usl-1287/12;Norway: *Case HR-201102133-A* (16 November 2011) Norwegian Supreme Court, 2011/817 (also provides commentary on the burden and standard of proof applicable in international protection cases under the Immigration Act 2008); Czech Republic: CzRCP (26 January 2006) File No 48 Az 44/2005;CZRCUnL (12 March 2009),File No 58 Az 26/2008(Treatment of implausible statements by claimant) Netherlands: Re. Malumba AJDCS (27 January 2003), JV 2003/103.

A.2Plausibility

The plausibility of factual evidence will be reflected in the assessment of credibility of the claimant's history.

Explanation: These are not ends in themselves. Plausibility may potentially reflect the subjective view of the judge. Awareness of the judge's own personal theories of "truth" and "risk" should be noted by the judge to ensure objectivity is maximised. It is a fundamental characteristic of refugee and subsidiary protection claims that their proper consideration requires that specific conditions applicable in the claimant's country of origin be understood and reflected in the assessment. Rejections of evidence for implausibility must be fully reasoned, including explanations provided by claimants in regard to the potentially implausible parts of their evidence. Decisions based solely on implausibility are likely to be less persuasive than those based on a wider range of basic criteria.

Examples: Claimant A from a country with a poor human rights record, but efficient police force, claims he escaped from custody to leave the country, whereas all COI indicates there are no records of detainees escaping. No satisfactory explanation was provided and the escape appeared implausible.
Claimant B presents a story that has minor inconsistencies, but, in the round, the core of the evidence is plausible.

Authorities*:* United Kingdom: *XY (Iran) v SSHD* [2008] EWHC Civ 533; *Y v SSHD* [2006] EWCA 1223; Poland: SACP (31 August 2011) File No.II OSK 1535/10;SACP (20 April 2011)File No II OSK 902/10 and II OSK 903/10; Czech Republic: CzRCP (19 August 2004), File No 4 Azs 152/2004;New Zealand: *Refugee Appeal No 1/92 Re SA* (30 April 1992).

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 maltreatment), their evidence of past and present facts should be expected to be coherently presented. An incoherent story may reflect a lack of credibility or a poorly "learned account". Similarly to plausibility, coherence of evidence must be assessed against the background presentation 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 QD and also see "Plausibility" above as these two standards are often considered together.

A.4: Audi alteram partem or Equality of Arms

The "other side" must be heard. Potentially negative material evidence, in respect of which a claimant is not afforded the opportunity for explanation or rebuttal, 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 contradictory or confusing evidence that is material and could potentially undermine core elements of their claim.

Examples: Following the conclusion of the interview process, but before the final decision, COI information is received which raises issues as to the credibility of the claimant. The proper course is to provide that evidence to the claimant and to invite comments and if necessary, to resume the interview.

Authorities: Germany: GFAC (21 July 2010), 10 C 41.09 – para 3 ff; Hungary: BMC (30 September 2010), Decision No 24.K.32 957/2009; *SWJ v OIN* (2010)Decision No 17.K.30.302/2010; *SWJ v OIN* (21 April 2011) (NB: since April 2011 the Budapest Municipal Court no longer has exclusive authority in asylum cases.); Czech Republic: CzRCP (28 July 2009), File No 5 Azs 40/2008; CzRCP (21 December 2004),File No 6 Azs 235/2004; CzRCP (13 March 2009),File No 5 Azs 28/2008,CzRCP (29 October 2003), File No 48 Az 44/2005.

A.5:Reasons

Judges must provide substantive, objective and logical reasons, founded in the evidence, for rejecting past or present facts presented by claimants in support of their claim.

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.

Authorities: United Kingdom: *Karanakaran v SSHD* [2000] EWCA Civ 11; *Y v SSHD* [2006] EWCA Civ 1688;,*Ilkhani v SSHD* [2005] EWCA 1674; *Traore v SSHD* [2006] EWCA Civ 1444;German Code of Administrative Procedure s.108 (1); GFAC (17 November 2008), 10 B 10.08 para 2 ff; GFAC (29 June 2010), 10C 10.09-para 20-22; GFAC (22 June 2011), 10 B 12.11para 2 ff.

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 on return to their country of nationality (i.e. the findings on Major issues 1 and 2 of Part II above). Firstly, while it may appear self–evident, it must be noted that in order to reach conclusions on core facts (particularly in inquisitorial hearings), and judges must ensure questions to the claimants are focussed on the material facts of the claim. Some core issues, like those of identity and nationality, will be essential in every case. However even validly reasoned rejections, in respect of only peripheral or minor present or past facts, will not be a substantive basis for the rejection of material past or present facts presented by the claimant. Whilst questions about events outside the core elements of evidence are a proper basis for testing the general consistency of an account, they will not render core testimony incredible unless they undermine central, as opposed to peripheral or incidental, elements of the account.

There are some Member States in which the courts are obligated to make sure that they use the newest available country report of the Foreign Office. Otherwise it as a procedural flaw which normally leads to a reversal of the judgement.

Authorities: United Kingdom: *HH (Iraq) v SSHD* [2006] EWCA Civ 1374; *Ngrincuti v SSHD [2008]* EWHC (Admin) 1952; Germany: GFAC (9 May 2003), 1 B 217.02.

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: This is particularly so where judges or other assessors may put subjective speculative questions regarding potential risks to other persons and the manner in which other people may be expected to react to potential danger. The claimant's unique predicament is to be assessed, not generalised risks or speculative risks to others in the home country.

It is, however, legitimate for judges or decision-makers to draw inferences as to what may happen in the future, from all the evidence, when undertaking the prospective risk assessment (see Major issue 2 (Risk Box) above). Where since arrival of the claimant there have been fundamental and durable changes in the country of origin which render a past fear no longer sustainable, such an inference may clearly be drawn from reliable COI.

Examples: Without obtaining detailed knowledge of the COI situation, the judge finds the evidence is not credible on the basis that he/she does not, on unsubstantiated evidence or personal feelings, believe such behaviour could take place.

Authorities: United Kingdom: *Ilkhani v SSHD* [2005] EWCA 1674; Germany: GFAC (16 April 1985), 9C 109.84 para 16; Czech Republic: CzRCP (13 March 2009), File No 5 Azs 28/2009.

A.8: Objective approach

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

Explanation: This goes to the issue of mind-set or outlook explored in greater detail in Part I above. Thus when considered in the round, 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 often lead to a flawed assessment of credibility. A balanced approach will include taking into account the accepted background of the claimant's education, social, gender, age and medical status.

Examples: In refugee and subsidiary protection claims, in contrast to the situation which applies in civil *inter partes* litigation, there will only exceptionally be any evidence *directly* relating to matters upon which the credibility of the claimant rests, except possibly by reference to COI evidence, which is necessarily usually of a more general nature. Such evidence may thus either support or undermine the claimant's account of personal experiences. However the judge, in an asylum case, does not have the opportunity to assess and contrast the accounts of opposed parties as to past events, which is often determinative of the credibility assessment in the more familiar pattern of civil litigation.

Authorities: Article 4(5)(c) QD; United Kingdom: *JK (DRC) v SSHD* [2007] EWCA Civ 831; Czech Republic: CzRCP(20 March 2008), File No 47 AZ 28/2008; New Zealand: *Refugee Appeal No 70074/96* (17 September 1996).

A.9:Excessive or unreasonable concentration on details

Excessive or unreasonable concentration on details may on occasions lead to flawed findings of fact on material issues. Claimants cannot always be expected to have detailed knowledge, exact recall of 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 apply.

Examples: Where the evidence related to events which happened many years back, claimants had only minor roles in the events giving rise to the risk of being persecuted; and/or age, gender, or other vulnerabilities are relevant. Embellishments

and exaggerations can also have relevance in credibility assessment but they may also be irrelevant in some situations. These are factors that must be assessed in the round.

Authorities: Czech Republic: CzRCP (28 July 2009) File No 5 Azs 40/2009

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

The credibility of all relevant documentation (not including COI which is discussed below at A.14) should be accepted or rejected on the same basis as oral or written evidence from the claimant.

Explanation: It is for the judge to consider whether the document is one upon which reliance should be properly placed, after considering the evidence in the round as part of the totality of the evidence. Thus no documentation should be considered in isolation from the rest of the claimant's 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.

Authorities: Article 4.2 and 4.3 (b) QD; *Singh and others v Belgium* (2 October 2012), European Court of Human Rights, Appl No 33210/11; United Kingdom: *Tanveer Ahmed*[2002] ImmAR 318*;* Czech Republic: CzRCP (1 April 2008), File No 9 Azs 15/2008.

A.11:Delayed claims

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

Explanation: Claimants should be expected to give good reasons for their delay and failure to do this *may* contribute to a lack of credibility. However, there should be recognition of situations where avoidance of disclosure may have arisen through shame, possibly associated with sexual violence, cultural/wider family and indirect personal "costs" of disclosure.

Example: A Kosovar woman who potentially might lose her children if her husband learnt of her being raped and thus is extremely reluctant to give evidence of the rape and may delay providing such evidence.

Authorities*:* Article 4(5)(d) QD (in contrast to Article 8.1 APD);*Jabari v Turkey* (11 July 2009), European Court of Human Rights, Appl No *40035/98 (Limited to Turkey);* United Kingdom: *Q v* SSHD [2006] EWCA Civ 351*; Shah v SSHD [2006]* EWCA Civ 674*;* Germany: GFAC (19 October 2001), 1B 24.01, para 6*;* GFAC (27 March 2000), 9B 518.99- para 21; Czech Republic: CzRCP (6 March 2012), File No3 Azs 6/2011; New Zealand: *Refugee Appeal No 2254/94* (21 September 1994).

A.12: Past persecution

Judges must make specific findings on evidence of past persecution or serious maltreatment.

Explanation: It is important to make such findings (in Step 2 Part II above). If accepted, this is a serious indication of a claimant's accepted profile and subsequently risk of being persecuted or suffering serious harm on return.

Authorities: Article 4(4) QD*;* Germany: GFAC (27 April 2010), 10 C 5.09 - para 23;GFAC (27 April 2010), 10 C 4.09 - para 31 (the last one with English translation in: http://www.bverwg.bund.de/enid/6116b3c12d03e766a9e86e379ec57539,0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss__C_4__9_nh.html);Czech Republic: CzRC (26 March 2008), No 2 Azs 73/2006; New Zealand: *Refugee Appeal No 70366* (22 September 1997) (this case provides discussion on comparative jurisdictions).

A.13: Absence of past persecution

Judges should not reject the credibility of all past and present facts presented by a claimant because evidence of past persecution has not been provided or is delayed in presentation.

Explanation: As under A.12 above.

Authorities: New Zealand; *Refugee Appeal No 300/92* (1 March 1994).

A.14.Use of COI

Judges must refer to reliable COI as a vital part of testing the internal and external consistency of a claimant's asserted past and present facts. **(This is particularly so if, as recommended by UNHCR, they accept the "shared burden" approach to credibility assessment.)**

Explanation: Reference to COI guidelines, such as those prepared by the UNHCR and the IARLJ (see Attachment 3.2), will assist correct use. 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.[18]The absence of objective 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.) However, judges should also be alert to situations where some, less than honest, claimants may "tailor their claims" to be consistent with relevant COI that they consider "assists" their claim

Authorities: Article 4(1) *QD*; Germany: GFAC (17 December 2007), 10B 92.07;United Kingdom: *A v SSHD* [2006] EWCA Civ 973 (Neuberger LJ), *Horvarth v SSHD* [1997] INLR 7; *Ire: Camara v MOJ* [2000] IEHC *1247, Atanasov v Refugee Appeals Tribunal* [2006] IESC 53*, Z v Minister for Justice, Equality and Law Reform* [*2002*] IESC 14*;* Spain: SC Appeal No 7130/2000 (2004);Netherlands: Council of State, AJDCS (2005) case no. 2004-07775/1; Belgium: Perm Appeal Bd (2006), case no. 04-3388/F1755 (2006);Slovenia: Admin Ct U 696/2006;Hungary: 6K/31468/2005/8;Slovakia: 2 Saz/1/2006*;* Lithuania:A6-626-03 and 11112-12-04;Czech Republic: RC (3 November 2011, File No 2 AZs 28/2011; New Zealand: *Refugee* Appeal No 72668/01 [2002] NZAR 649.

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 such persons are 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 highly determinative of credibility. Expert evidence which negatively impacts on the claimant's case must always be put to claimants for comment and/or rebuttal. Where necessary and appropriate, judges, recognising in particular that they are not medical or psychiatric experts, must, after balanced and reasoned assessment, ensure that appropriate "deference" or understanding is given to that expertise. Assistance in the use of expert evidence can usefully be obtained from *the* ***IARLJ Publications relating to COI and Expert Medical Evidence (see Attachment 3.1 and 3.2)***

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 make use of all expert evidence in credibility matters, but reasons should always be given, for not taking such evidence into account. As a rule it is not a legal error of law if the court comes to the conclusion that an expert is not needed to assess the credibility of the claimant and his/her story.

Authorities: *Bensaid v UK* (6 February 2001) European Court of Human Rights, Appln No 44599/98; United Kingdom: *HK v SSHD* [2006]EWCA Civ 1037, *AK (Afghanistan) v SSHD* [2007] EWCA Civ 535; Germany: GFAC (17 September 2003), 1 B 471.0; GFAC (11 September 2007), 10C 8.07 – para 13-17; Poland: SACP (20 April 2011), File No II 902/10; Hungary: SWJ v OIN (30 September 2010), BMC Decision No 24.K.32 957/2009; UNHCR Handbook (2011) at [207] & [208].

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, must be taken into account.

Explanation: The QD and APD (and domestic regulations in many Member States) provides that negative credibility findings from earlier claims can, or must, be adopted by a subsequent decision-maker or indeed, the subsequent decision-maker is bound by earlier findings.

[27]COI prepared in respect of Afghanistan, July 2012.

Authorities: Article 5 QD; Poland: SACP (9 May 2012), File No 1344/11.

A.17: Corroboration

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

Explanation: In circumstances where there is no reason to doubt the totality of a claimant's evidence of past and present facts, 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 in the way of the claimant 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.

Authorities: United Kingdom*: Traore v SSHD* [2006] EWCA Civ 1444; Germany: GFAC (16 April 1985), 9C – 109.84 para16 ; New Zealand: *Refugee Appeal No 75962* [2007] NZAR 307;UNHCR Handbook at [203].

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/well-founded fear assessment" will consist of *the accepted past and present facts* presented by the claimant. It is important in decision making to explain why the acceptance of some aspects of credibility does not warrant acceptance of the account as a whole, or vice versa. Careful reasoning in relation to material evidence is essential, in which the appropriate weight accorded to different parts of that evidence must be reasoned and assessed. The more peripheral the facts that are not accepted become, the more difficult it will be to justify wholesale rejection of all the claimant's evidence.

Authorities: United Kingdom*: Karanakaran v SSHD* [2000] EWCA 11*;* Czech Republic:, RC (18 May 2011), File No 5 Azs 6/2011-49.

A.19: Treatment of similar claims

Evidence of either credible or incredible factual findings from similar claims from the same nationality does not imply the subject claimant's evidence is also credible or incredible. Individual assessment is required.

Authorities: Article 4(3) QD; Czech Republic: RC (6 February 2008), File No 1 Azs 105/2006-59; New Zealand: *Refugee Appeal No 71066/98* (16 September 1999) pp 10-11.

A.20:Treatment of substantially different claims

Evidence from a claimant that is substantially different from that presented in other claims from that nationality does not imply the subject claimant's factual assertions are incredible.

Authorities*:* Article 4(3) QD

A.21: Group-based persecution

Regardless of A.19 and A.20 it is nevertheless possible, in certain circumstances, for a claimant (whose accepted profile at Step 2 Part II above is established) to succeed merely by virtue of having common characteristics shared by other members of a group.

Example: By virtue of their nationality, sex, age, ethnic or religious identity, or any combination of these at times, based of valid COI, whole groups of people may be recognised as refugees without further facts being accepted by the judge or decision-maker.

Authorities: Germany: GFAC (Judgement dated 21 April 2009), 10 C 11.08 (Iraq); Czech Republic, RC (30 September 2008), File No 5 Azs 105/2008-70.

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

The effect of earlier lies or inconsistencies, openly admitted and explained, must be explored very carefully as to their impact on credibility.

Explanation: It is self-evident that such evidence may assist positive or negative credibility assessment, particularly taking into account the nature of refugee and subsidiary 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, stated by the claimant "may have happened".

Explanation: Merely to say that certain events " may have happened" to a claimant (their family, fellow supporters or the like), lacks sufficient clarity to confirm whether the judge or decision-maker means only that there is a possibility the claim made is correct, or perhaps that there is something much stronger in possibility terms. Such a conclusion by a decision-maker is too vague. The task of the decision-maker is to set out the past and present 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 then used as part of the risk/well-founded fear assessment that follows. Thus vague conclusions of what "may have happened", without either accepting or rejecting the evidence/claim made, must be treated as errors of law in the decision-making reasoning process.

Authorities: Article 4 (3)(a)-(d) QD; Germany: German Code of Administrative Court Procedure, S. 108.

A. 24: Demeanour

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 here 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 a context of evidenced understanding of the relevant culture, and in acknowledgment of culture as a repertoire of possible behaviours which are not binding on any individual. However, it must be recognised that in reality, demeanour will always have some impact in an oral hearing. A major reason for having an "oral hearing" (as happens in most European jurisdictions) is so that judges can "see and hear" the claimant, and witnesses and claimants can see, hear and address the judge(s).

Example: In many cultures, it is a sign of respect not to make eye contact. In Western culture avoiding eye contact is a sign of shame. However, someone from a Western culture trying to combat feelings of shame might decide to use eye contact to indicate defiance of their persecutors.

Authorities: United Kingdom: *DP (Israel) v SSHD* [2006] EWCA Civ 1375; W. Kälin "Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing" (1986) 20(2) International Migration Review 230-241 (A still relevant Article).

A.25: Behaviour modification as a means of avoiding risks, as indicated by COI

Explanation: It can be an error of law to conclude that real risks of claimants being persecuted on return may be avoided by them modifying their behaviour. It is vital for judges to make sound findings, on their past and present behaviour, and the depth of their current convictions. As the best indicators of future forms of behaviour (fundamental to the

exercise of core human rights) will be found in the past and present behaviour (that is accepted by the judge), sound and well-reasoned findings must be made, and set out as part of the claimant's accepted profile.

This is essentially so when those findings are then used as part of the risk on return assessment, which of necessity must include assumptions on the claimant's future behaviour, especially where that behaviour could involve the exercise, or restraint from exercise, of a core human right.

This is probably the most vexed area of credibility assessment. It typically arises in cases where certain religious, sexual or political beliefs or activities are banned and/or societally or otherwise strongly opposed or punished. The issue of whether a claimant may be held to be capable of avoiding a risk of being persecuted, in his or her own country, by refraining from behaviour in ways which are fundamental to the existence of and/or the manifestation of core protected human rights has long been the subject of debate. Recently, there has been growing recognition that the fundamental issue is how the claimant is likely to behave on return to the country of origin. In its landmark ruling in *Germany v Y and Z* (the facts of which are given in the example below), the CJEU held that such considerations are irrelevant to the assessment of risk on *refoulement* if*, "it may reasonably be thought that … he will engage in … practices which will expose him to a risk of persecution".*

Although the case concerned the exercise of the right of freedom of religion, the principle is arguably of wider application and may extend (as held by the UK Supreme Court in the cases cited below) to cases concerning the right to political opinion and the expression of immutable characteristics arising from membership of a particular social group.

Example: Y and Z are Pakistani nationals and members of the Muslim Ahmadiyya community, which is an Islamic reformist movement. Article 298 C of the Pakistani Criminal Code provides that members of the Ahmadiyya religious community may face imprisonment of up to three years or a fine if they claim to be Muslim, describe their faith as Islam, preach or propagate their faith or invite others to accept it. Moreover, under Article 295 C of that Code, any person who defiles the name of the Prophet Mohammed may be punished by death or life imprisonment and a fine. In the reasoning of the Immigration Judge who assessed the appeal, it was found that on several occasions Y had been beaten in his home village by a group of people and had stones thrown at him at his community's place of prayer. Those people had also threatened to kill him and reported him to the police for insulting the Prophet Mohammed. Z was also found to have been mistreated and imprisoned as a result of his religious beliefs. Based upon these essential findings that related to the claimant exercising his core human right to freedom of religious expression, the Court was then validly able to conclude in the risk assessment that upon return to Pakistan, both Y and Z would continue to engage in religious practices, which would expose them to a real risk of persecution.

Authorities: Germany: *Germany v Y and Z*(5 September 2012) CJEU, C-71/11 and C-99/11. This decision highlights the essential need to establish "the applicant's personal circumstances" in the credibility assessment ("Believability box") and the implications such findings have in the risk assessment ("Risk box") that follows. In Germany v *Y and Z* it was held:

> 1. Articles 9(1)(a) of Council Directive 2004/83/EC of 29 April 2004, on minimum standards for the qualification and status of third country nationals, or Stateless persons as refugees, or as persons who otherwise need international protection, the content of the protection granted must be interpreted as meaning that: not all interference with the right to freedom of religion which infringes Article 10(1) of the Charter of Fundamental Rights of the European Union is capable of constituting an "act of persecution" within the meaning of that provision of the Directive;
>
> – there may be an act of persecution as a result of interference with the external manifestation of that freedom, and
>
> – for the purpose of determining whether interference with the right to freedom of religion which infringes Article 10(1) of the Charter of Fundamental Rights of the European Union may constitute an 'act of persecution', the competent authorities must ascertain, in the light of the personal circumstances of the person concerned, whether that person, as a result of exercising that freedom in his country of origin, runs a genuine risk of, *inter alia*, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 of Directive 2004/83.
>
> **2.** Article 2(c) of Directive 2004/83 must be interpreted as meaning that the applicant's fear of being persecuted is well founded if**, in the light of the applicant's personal circumstances,** the competent authorities consider that it may reasonably be thought that, upon his/her return to the country of origin, he/she will engage in religious practices which will expose him/her to a real risk of persecution**. In assessing an application for refugee status on an individual basis, those authorities cannot reasonably expect the applicant to abstain from those religious practices.**

Two recent cases from the United Kingdom courts also give good examples of the essential need to make sound findings on past and present behaviour and "convictions" that go to the expression of core human rights. These are: *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31 (relating to membership of a particular social group – homosexuality), which was expanded upon in *RT (Zimbabwe) and Others v SSHD* [2012] UKSC 38 (involving political opinion) and in particular Lord Hope's judgment at paras 18-20.[19]

(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.

At the first instance decision stage, the APD contains extensive provisions designed to ensure procedural fairness.

At the appeal or review stage, the requirements are governed by Article 39 APD but, as appears from other parts of this paper, 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 that can lead to errors of law in credibility assessment also includes 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.

This is a major and vexed area of complaint on appeal from primary decision-makers. Whilst caution must be exercised if claimants, or their representatives, do not raise concerns over interpretation, judges should ensure, so far as is reasonably possible, that claimants have access to competent and unbiased interpreters (particularly in claims involving gender, religious conversion and gender or blood feud violence). In most situations, however, a reviewable error of law will be only be established where incompetence or bias is established.

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[19] See the analysis of Mr Fordham QC that five principal reasons were given by the court. First, the treatment of those who lived openly as homosexuals in Iran and Cameroon constituted being persecuted (para 40-42). Secondly, sexual orientation was a protected characteristic within the category of membership of "a particular social group" (para 42). Thirdly, the underlying rationale of the Convention was that "people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay" (para 53). See also paras 52, 65, 67 and 78. Fourthly, the necessary modification in order to avoid persecution (carrying on any homosexual relationships "discreetly") ran contrary to this underlying rationale. It involved surrendering the person's right to live freely and openly in society as who they are, in terms of the protected characteristic, which was the Convention's basic underlying rationale: see per Lord Rodger at paras 75-76, Lord Hope at para 11 and Sir John Dyson SJC at para 110. Fifthly, the modification was a response to the feared persecution "because of these dangers of living openly" (para 40). There was a difference between a case where the individual would live "discreetly" because of "social pressures" (para 61) and the situation where he/she would behave "discreetly" in order to avoid persecution because he/she is gay (para 62). Only the latter would be entitled to refugee protection, assuming, of course, that he/she would suffer persecution if he/she were to live openly as homosexual. In the course of its reasoning, the court rejected three arguments advanced on behalf of the Secretary of State. The first was that it was necessary for a refugee to be able to characterise living "discreetly" in order to avoid persecution as being itself "persecution"....
...The second was that it was appropriate to see living "discreetly" in such circumstances as analogous to "internal relocation", so that the "unduly harsh" test applied in relation to internal relocation should be applied here too: see per Lord Hope at paras 20 and 21. The third was that the question was whether living "discreetly" was or was not "reasonably tolerable" to the asylum seeker. See the Court of Appeal in HJ(Iran).
In reaching his conclusion, Lord Rodger (para 69) followed the reasoning of the majority in the High Court of Australia in *Appellant S395/2002 v Minister of Immigration* (2003) 216 CLR 473. At para 72, he also referred to the approach adopted in New Zealand, particularly in *Refugee Appeal No 74665/03* [2005] INLR 68 where at para 124 the New Zealand Refugee Status Appeals Authority considered that its own approach and that expressed by the majority in *Appellant S395/2002* converged on the same point, "namely that refugee status cannot be denied by requiring of the claimant that he or she avoid being persecuted by forfeiting a fundamental human right"

Examples: There may be circumstances where through claimants speaking rare languages or dialects, able interpreters are simply not available. In such cases fair and pragmatic approaches should be adopted, recognising the constraints. For example, double translation or telephone procedures may be required. There must, however, be a sufficient ability for meaningful communication.

Authorities: Article 22 QD; Article 10 and 13(3)(b) APD - a fortiori applies to appeal/review; Czech Republic: CC (8 August 2005), File No II. US 186/05 –(referring to Art 36 of the EU Charter); Poland: SACP (30 October 2008), File No II OSK 1097/07

B.2:Legal representation

Recognising that legal aid/representation is not available in some Member States and/or at all levels of status determination or judicial review, judges should ensure (wherever possible) that claimants have access to competent legal or other suitable representation, with or without legal aid.

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.

Examples: There is no inherent right to state-funded legal representation at first (state) level – see Article 47 EU Charter and Article 15 APD. Lack of representation of a party shall not affect the duty of the judge to carry out an impartial and objective individual assessment of the evidence.

In situations where this is simply not possible, judges should take a more pro-active and involved role to ensure a fair and pragmatic interview and assessment takes place, often by relying more on objective COI, and possibly friends, relatives and supporters of the claimant giving evidence.

Authorities: Article 47 EU Charter*;* Article 15 APD; Article 4(1)-(5), 20(1)-(3) QD; United Kingdom: *JK (DRC) v SSHD* [2007] EWCA Civ831 - *on competence of counsel;* Czech Republic: RC (11 December 2008), File No 9 Azs 64/2008-67; UNHCR Handbook (2011) at [196].

B.3:Effect of time limits

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

Authorities*: IM v France* (2012) European Court of Human Rights, Appl No *9152/09-ECHR 043*; *Jabari v Turkey* (2000) European Court of Human Rights, Appl No 40035/98(2000).

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, through necessity, within a prison).

Examples: Where a government, tribunal, judge or individual 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).

Authorities: Article 4 and Art 13 QD

B.5:Bias, incompetence and conflict of interest

Procedural and substantive issues will involve the application of the maxim that manifestly "justice must be seen to be done", and where any of these issues arise findings on credibility, all other issues will *prima facie* be wrong in law.

Explanation: Such issues should not arise in a well-administered system as they will breach ECHR principles and/or Administrative law codes and principles in Members States.

Authorities: Czech Republic: *RC (26 July 2006), File No 3 Azs 35/2006*.

(C) Treatment of Vulnerable Claimants

General guidance on vulnerable claimants

Overview

One general standard of good judicial practice only is provided here, rather than setting a list of separate standards for every known type of vulnerability or sensitivity. This is done as, not only would it be impossible for such a list to be exhaustive, but also it is frequently the case that the vulnerability of individual claimants may have 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 or even encouraged by the highest courts. 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 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 appropriate interviewing and questioning techniques are not 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 circumstance, the judge will need to ensure that more detailed information is obtained from the claimant and other sources of direct testimony during the hearing.

C.1:Vulnerable claimants

In the assessment of the credibility of the evidence from 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 for refugee or subsidiary international protection by vulnerable people is at the heart of the humanitarian nature of international protection determination assessment. The predicament of particularly vulnerable or sensitive claimants requires careful understanding and reflection in the credibility assessment (Article 13.3 APD).

Although some individuals are by definition vulnerable or sensitive (for example: children, victims of trafficking, individuals who suffer from psychiatric illnesses or who have sustained serious harm, torture, sexual and gender based violence, and some women), others can be less easily identifiable.

Factors to be taken into account in assessing the level of vulnerability, the degree to which an individual is affected and the impact on assessment of credibility include:

- **Mental health problems**
- **Social or learning difficulties**
- **Sexual orientation (the LGBTI claimants)**
- **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.

Awareness of the marginalisation of the experiences of women and other vulnerable and sensitive claimants in the interpretation of the EU and International Conventions must be reflected 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 judge should bear in mind in assessing the accepted profile of claimants 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 the nexus for GC reasons.

Although the primary responsibility for identification of vulnerability lies with the claimant, the judge should be vigilant to recognise that such issues may follow from the nature of the totality of the claimant's personal profile. Vulnerability and its effect on assessment of credibility must be recognised and reflected in the assessment.

Consideration should be given to holding the hearing in private to avoid overt or covert intimidation. Improper or aggressive cross examination should be curtailed to avoid harassment, intimidation or humiliation. Questions asked 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. In addition, some forms of disability and 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 shame response may be a significant obstacle to disclosure. The special needs of **unaccompanied minors** must be particularly taken into account and it is important that they have appropriate representation to assist in giving their evidence. (See Article 17 APD). A modified, less restrictive approach than with adults, having careful regard to all the objective evidence available, should be adopted in assessing the credibility of children, particularly younger ones. (See UNHCR Handbook (2011) at [217]).

Family dependants of a claimant, it is important not to assume that vulnerable and sensitive claimants have only derivative claims. Indeed, such claimants, based on their own separate evidence, may have substantially different or 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 potential serious harm based on local customs or norms that she may face on return.

Where a claim was initially made as a dependant or the person was treated as a dependant, a subsequent later claim may be as a result of the person never receiving adequate personal 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 or sometimes an obstacle to disclosure of information. Enquiries as to whether family members should attend the interview or not will often be a judgement call based on the best interests of the claimant.

Authorities: United Kingdom: *Malaba v* SSHD [2006] EWCA Civ 820 - Blake J*; AA Vulnerable female-Article 3) Ethiopia CG* [2004] UKIAT 00184*; FS (Camps - Vulnerable Group - Women) Sierra Leone CG* [2002] UKIAT 05588;Czech Republic, RC (31 August 2011) File No 1 As 16/2011-98.

(D) Residual doubts and Article 4 QD

D.1 Where residual doubts are held by judges in the assessment of the claimant's facts and circumstances due to unsupported evidence, it will be, *prima facie*, an error of law not to adopt, at least, the minimum provisions of Article 4 QD.

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 QD), 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).

However, in other Member States where the UNHCR Handbook [195]-[205] "shared duty" and "benefit of the doubt" principles (or principles of a like nature) are adopted domestically, judges, noting also the terms of Article 3 QD, should apply these principles (in lieu of Article 4.1 (first sentence), and 4.5 QD).

Explanation: Consideration of the possibly confusing "optional" approaches and an explanation of the background, drafting history and how Article 4 and related provisions in the APD impact on the issue of residual doubts in credibility assessments of claimants, is set out in Professor Hailbronner's text, *EU Immigration and Asylum Law – Commentary* – 2010, pp 1025 – 1032.

Before looking at the optional minimum standard approach set out in Article 4.1 (first sentence), and the other permissible and well recognised approach found in international refugee and subsidiary protection law,, it is necessary to set out all the relevant provisions of Article 4 and the detail of the "shared burden" and "benefit of the doubt" approach suggested by the UNHCR.[20]

Articles 4 .1, 4.2 and 4.5 QD provide (in both the 2004 and 2011 versions) *(with emphasis added):*

> 4.1 Member states **may consider** it the duty of the applicant to submit as soon as possible **all** elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member state to assess the relevant elements of the application.
>
> 4.2 The elements referred to in paragraph 1 consist of the applicant's statements and all documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies),country(ies) and place(s) of residence, previous asylum applications, travel routes, identity and travel documents and reason for applying for international protection.
>
> 4.5 Where Member States **apply the principle according to which it is the duty of the applicant to substantiate the application** for international protection and where aspects of the applicant's statements are **not supported by documentary or other** evidence, those aspects shall not need confirmation when the following conditions are met:
> (a) The applicant has made a genuine effort to substantiate his application;
> (b) All relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;
> (c) The applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
> (d) The applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; **and**
> (e) The general credibility of the applicant has been established.

In must be noted from the Article 4.1 provisions that other permissible approaches to the consideration of "all relevant elements of an application" are envisaged. Presumably, as the QD provides minimum standards, any other standard adopted by Member States must be of a "more favourable" nature. Researching the general approach on this issue, in several Member States and internationally, shows that the alternative practice emanates from the provisions of the **UNHCR Handbook (1979), at [195]-[205].**This states that while the burden of proof (or duty on the claimant) to establish their case, lies with the claimant, there is a shared duty between the claimant and the state examiner (judge or decision-maker) to evaluate all the relevant facts. Paragraphs [195]- [197] 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**

[20] 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.

> **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, [shared] research may not always be successful or statements may not be susceptible of proof. In such cases, the claimant should be given the "benefit of the doubt" provided that otherwise the claimant's account appears credible unless there are persuasive contrary reasons. The UNHCR Handbook later refers, at paras [203]-[204], to "the benefit of the doubt" being given to the claimant, explaining that this does not mean there should be an unqualified acceptance of uncorroborated claims because of these difficulties.

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

At the European jurisprudential level there has to date been no commentary on this issue by the CJEU. However the ECtHR has recently confirmed the application of the benefit of the doubt principle in: *JH v UK Application* (20 March 2012) Appl no. 48839/09. At [52] the ECtHR states:

> "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, among other authorities, 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 "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 reflects that the burden is on the prosecution (state) to demonstrate that, on the totality of the evidence before the court, there is no residual doubt which a reasonable person might entertain as to the guilt of the accused. Where such a doubt exists it must be resolved in favour of the accused and the charge against him/her be dismissed. It reflects the fact that the duty on the prosecution is "to prove the defendant's guilt beyond a reasonable doubt".

In refugee and subsidiary 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 all 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 (see the treatment of the evidence of vulnerable claimants discussed at C.1 above).

In Germany and Austria for example, the "benefit of the doubt" principle is a concept in criminal law only, but unfamiliar in refugee and subsidiary protection law. They follow the approach of Article 4.1 and 4.5 QD.

Authorities: Article 4 QD; *JH v UK* (20 March 2012) European Court of Human Rights Appl no. 48839/09;*Saadi v Italy* (28 February 2008) European Court of Human Rights Appl no. 37201/06; *Karanakaran v SSHD* (2000) 3 All ER 449); UNHCR Handbook at [195]-[204]; Hailbronner, EU Immigration and Asylum Law – Commentary – 2010,pp 1025-1038; G. Noll, "Salvation by the Grace of State? Explaining Credibility Assessment in the Asylum Procedure" in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff Publishers), 197-214.

List of abbreviations and terms

ACZ	Administrative Court of Zagreb
AJDCS (Ne)	Administrative Jurisdiction Division of the Council of State (Netherlands)
APD	Council Directive 2005/85/EC of 1 December 2005 establishing minimum standards on procedures in Member States for granting and withdrawing refugee status, (or Assessment Procedures Directive)
Asylum law	A general term for the law on refugee status, subsidiary protection, Art 3 ECHR protection
BMC	Budapest Municipal Court
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CzCC	Czech Constitutional Court
CzRC	Czech Regional Courts, in Prague, Usti nad Labem, Ostrava
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
Claimant	All applicants and or appellants for status recognition at all stages.
Dublin Regulation	Council Regulation (EC) 343/2003 of 18 February 2003
EASO	European Asylum Support Office
EC	European Commission
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
ECJ	European Court of Justice (now usually CJEU)
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	The Charter of Fundamental Rights of the European Union 2000
EWCA	England and Wales Court of Appeal
GC	1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol
GFAC	German Federal Administrative Court
HHC	Hungarian Helsinki Committee
IARLJ	International Association of Refugee Law Judges
IARLJ (EUR)	European Chapter of the IARLJ
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Cultural and Social Rights
IP	International Protection- includes refugee and/or subsidiary status

LGBTI	Lesbian, Gay, Bi-sexual, Trans-sexual and Inter-sexual
MS	Member State(s) of the European Union
NGO	Non-governmental organisation
2004QD	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or persons who otherwise need international protection and the contents of the protection granted
2011QD	Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, ,and for the content of the protection granted
QD	Either or both of the above QD's
RSAANZ	Refugee Status Appeals Authority, New Zealand
SACP	Supreme Administrative Court of Poland
SIAC	Special Immigration Appeals Commission
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKIAT	United Kingdom Immigration Appeal Tribunal
UKSC	United Kingdom Supreme Court
UKUT (IAC)	United Kingdom Upper Tribunal, Immigration and Asylum Chamber
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties 1969

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Hyperlinks to legislation and IARLJ-publications

EU legislation

1. Article 78 TFEU
2. Article 63 TEC
3. The EU Charter
4. The 2004 QD
5. The 2011 QD
6. The APD 2005

IARLJ Publications

1. Judicial Criteria for assessing Country of Origin Information (COI): a judicial checklist.
2. Guidelines on the Judicial approach to Expert Medical Evidence
3. IARLJ Conference 2002 Handbook: Asylum: "Can the Judiciary Maintain its Independence?" (paper delivered by Sir Stephen Sedley)
4. IARLJ Conference 2005: The Asylum Process and the Rule of Law: "Judicial or Administrative Protection of Asylum-seekers – Content or Form?" (paper delivered by Rodger Haines QC)