9th World Conference of the International Association of Refugee Law Judges

"Between border control, security concerns and international protection"

"Current problems in asylum and protection law: the UK Judicial Perspective"

The Hon Mr Justice Nicholas Blake
A judge of the High Court of England and Wales
President of the United Kingdom Upper Tribunal Immigration and Asylum Chamber

Overview:

I propose to examine three inter-related questions that should serve to capture some of the more significant developments in the United Kingdom that may be of relevance to themes of this conference:

i. What are the obstacles to effective access to judicial protection of asylum seekers?
ii. What is the scope of judicial protection?
iii. How do judges decide on who should be protected?

I will give some information as to what the Upper Tribunal Immigration Asylum Chamber is endeavouring to do in pursuit of these questions, and consider our system of country guidance cases in asylum appeals.

I. Obstacles to access to justice:

1. This paper might well have carried the sub-title asylum adjudication in the age of austerity. The United Kingdom is not alone in facing intense pressure to reduce public expenditure generally and in the field of legal aid and assistance in particular. The coalition government in power in the UK since May 2010 has had to make decisions on the allocation of scarce public resources against a background of a concerted campaign in some press quarters against judicial protection of human rights in general and perceived abuses of the immigration and asylum system in particular.

2. Doubtless such expressions of public opinion are an inherent part of the tension between a state's right to control its borders on the one hand and the state's duty to afford protection to those in need of it on the other. But when the balance between competing considerations is performed against the background of a difficult economic climate: fewer jobs and funds for social housing, education, welfare and related community expenditure, as well as a perceived connection between immigrants and terrorist threats, or immigrants and criminality the debate can become positively toxic.

3. The risk is that executive decisions as to the substance of the law and the procedures and resources to enable asylum seekers will be taken for extraneous grounds and without sufficient regard to the impact on those who are least able to access justice.

4. As judges we know that asylum seekers can be some of the most vulnerable people in our societies. They may well have fled their own country as a result of civil war, persecution, harassment, discrimination and lack of effective protection. They will rarely have economic resources of their own; they may have few social connections with the host country and be unable to speak its language, and this is a tendency increased by the policy of the European Union's Dublin Regulations that seeks to deny asylum seekers a choice of place of asylum and generally require them to make claims in the first country they arrive in where effective protection is available. They will rarely have an understanding of asylum laws and procedures. They may be unaccompanied minors sent abroad for good reason or bad; they may be women who have suffered sexual abuse or related ill treatment. Any claimant of whatever age, gender, race, social status or sexual orientation who has indeed been prompted to leave their homes and communities for some pressing cause is likely to be at the least in a high state of anxiety and may well be depressed and traumatised and suspicious of those in authority.

5. They well may be detained on arrival whether because they have no valid identity papers or visa, or because they are assessed to pose a high risk of absconding or committing offences, or simply because they come from a country where it assessed that they can be readily returned to or meet some either administrative criteria for being placed in a fast track procedure. In some countries, outside the reach of judicially enforceable decisions to protect asylum seekers from arbitrary detention, they may be detained simply because the executive has decided that all asylum seekers should be "pour encourager les autres".

6. All of this can militate against effective participation in asylum procedures and appeals. We all know it takes time, patience and skill to tease out a coherent narrative from an anxious claimant, and to pose the questions that may be informative as to whether a valid claim exists or not. It requires good interpretation, an accurate record of what is said, and an environment in which the applicant is encouraged to put forward any credible protection claim as comprehensively as reasonably to be expected. Time and patience are unlikely to be commodities to be found in abundance with immigration officials who face asylum claimants in their thousands or tens of thousands, and who are under some encouragement to process cases speedily. Skill may also be a quality that is stretched at times of financial constraints, depending on the training, experience and access to reliable and relevant information of the official in question.

7. Equally these are qualities that are rationed when it comes to public funding of asylum representatives. The United Kingdom has for the greater part of the last forty years had a mixed economy of legal advice to migrants and asylum seekers: those like the former Immigration Advisory Service and the Refugee Legal Centre (subsequently Refugee and Migrant Justice) who were funded directly by the state, and the private profession (broadly solicitors who prepare cases and barristers who may argue them, at least in the higher courts) for whom civil legal aid was available where there was an arguable case and an absence of means. Things have now changed. Civil legal aid has been

restricted considerably: both as to the sums that lawyers receive for taking on a case and the class of case in which funding is available. This has led to a reduction in the numbers of lawyers available to take on these cases, and in particular those able to spend the time to prepare a case deserving of judicial adjudication fully and effectively.

8. On the other hand direct funding has also been severely restricted to voluntary organisations such as the advice bodies previously mentioned and community law centres, with significantly reduced ability to take on new case work to prepare for appeals and challenges to administrative decision making. Legal aid will remain for asylum and Article 3 claims, for those in detention and those facing deportation, however since I became President of the Upper Tribunal in February 2010 asylum seekers have lost the services of both the Refugee and Migrant Justice and the Immigration and Advisory Service, following the decision to put these bodies in administration on the grounds that they cannot afford to maintain their staff and premises under the terms of the present and proposed legal aid arrangements. The loss of these experienced centres of advice and representation, that used to have advisers available in reception centres and fast track centres, poses very significant challenges for access to justice. Alternative sources of funding such as conditional fee arrangements are not appropriate for public law cases where fundamental human rights obligations are at stake

9. The Tribunal judiciary can expect to have to deal with a greater number of protection claims in the broadest sense of the word, with either unrepresented appellants or perhaps even worse, badly represented appellants on whom neither the claimant, the respondent nor the judge can rely to adequately prepare and present a case of potential moment and complexity.

10. All this suggests that to achieve access to justice the immigration judges will have to be more inquiring and interventionist than in the classical model of the common law adversarial system. Certainly Tribunal judges will be expected to use their expert knowledge of immigration and asylum law and practice and country conditions and bring them to bear in the task of adjudication. In this respect they may be better prepared for the age of austerity than their colleagues in the higher courts who have to deal with a wider range of legal issues than their personal histories may have equipped them for and who normally rely on expert advocates to present and contest the issues. This is the context for the work of the UTIAC described in more detail below.

11. Transparency as to the law, the rules and the relevant procedures is an important aspect of access to justice. Professional lawyers will know where to find the law but others may need to rely on publicly available web sites. A valuable resource is www.bailii.com from which all relevant decisions of the UK Courts: the Supreme Court, the Privy Council and the UK wide Tribunals such as UTIAC can be found, along with the decisions of the Courts of Appeal of England and Wales (EWCA) and Northern Ireland (NICA) and the Inner House of the Court of Session (CSIH) in Scotland and decisions of the Administrative Court on the High Court of England and Wales (HEWHC Admin) and the Outer House of the Court of Session (CSOH). It also includes

decisions of the two European Courts. Its funding is voluntary and it faces an uncertain future in 2012 as costs exceed income. Its demise would be a serious blow to access to justice.

ii) The scope of judicial protection

(a) adjudication on status

12. What unites as international judges is a common grounding in and adherence to the UN Convention on the Status of Refugees 1951 and the New York Protocol 1967 (together the Refugee Convention). Most of us will in addition be concerned with the protection from being returned to torture or inhuman or degrading treatment provided under domestic laws and constitutions or the three inter related international instrument: the UN International Covenant on Civil and Political Rights 1966 Article 7 (ICCPR); the UN Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (The Torture Convention) Article 3, and regional human rights instruments such as Article 3 European Convention on Human Rights.

13. Judges from jurisdictions in the European Union will in addition have the responsibility for determining claims to subsidiary protection to those at risk of being exposed to serious harm under Council Directive 2004/83/EC of 2004 (the EU Qualification Directive) Article 15. For present purposes as the Court of Justice of the European Communities has explained in Case *C*-465/07 Elgafaji[1] it is Article 15 c. that adds something extra to Articles 2 and 3 of the ECHR:

    "serious and individual threat to a civilian's life or person by reason of indiscriminate violations in situations of international or internal armed conflict"

14. A person who meets the test of well founded fear or substantial grounds for a real risk of apprehension of persecution or other ill treatment, is a person in need of protection irrespective of their immigration status in the host country. People who are refugees and cannot be safely returned to another third country are entitled under the Refugee Convention to a status in their host country. The EU Qualification Directive also requires Members States to grant status to those who qualify as refugees (Art 13) or for subsidiary protection (Art 18) subject to exclusion clauses broadly mirroring by the exclusion clauses with respect to subsidiary status under the EU Qualification Directive.

15. The UK Supreme Court has recently reviewed how the exclusion clauses should operate when a claimant has a connection with an organisation (LTTE) that has engaged in terrorist operations in the case of JS (Sri Lanka) [2010] UKSC 15 [2011] I AC . It has concluded that it is not sufficient that a person

[1] A summary of the developing case law in the UK applying the judgment of the ECJ is set out in the Iraq case of HM Article 15 C Iraq [2010] UKUT 331 IAC now under appeal to the Court of Appeal. Essentially a broad approach to risk of harm was taken including but not confined to actions that are a violation of international humanitarian law as long as there is some foreseeable causal nexus between the applicant and the risk feared.

has an association with an organisation that has been guilty of terrorist acts. In summary:

> "that the organisation's political aims were not a relevant factor; that the nature of the organisation itself was only one of the relevant factors in play and so no presumption of individual liability arose based solely on membership of it; that in order to fall within article 1F(a) the applicant's involvement in furthering an organisation's aims had to be such that he would have been aware that his actions would in the ordinary course of events be facilitating the commission of article 1F(a) crimes and so to go beyond mere passivity or continued involvement after acquiring knowledge of such crimes; that, accordingly, an applicant was disqualified under article 1F if there were serious reasons for considering him voluntarily to have contributed in a significant way to an organisation's ability to pursue its purpose of committing war crimes, aware that his assistance would in fact further that purpose;

By contrast with Germany there is very little case law on cessation clauses, and it may be that this is less important in the UK because a person who has been recognized as refugee for four years or more is eligible to naturalise as a British citizen (and thence ceases to be a refugee) and others will have built up significant residence such as removal would be inconsistent with respect fro private life.

16. The statutory regime for determining asylum appeals in the United Kingdom largely pre dates the coming into force of the Qualification Directive, and so an issue arose as to whether there was a right of appeal to the immigration judge against a decision refusing subsidiary protection status under the Directive. The Government argued that this question only arose when a removal decision was likely to be taken. The Court of Appeal of England And Wales concluded that the EU law principle of equivalence required a right of appeal to achieve a status under the Directive where there was such a right for those seeking the status of refugees. The UK Supreme Court was less sure and made a reference to the Court of Justice in FA (Iraq) v SSHD [2011] UKSC 22 25 May 2011 but this reference has now been withdrawn in the light of the undertaking by the Government to provide such a right of appeal and so the Court of Appeal decision still stands.

17. The right to a status in domestic application of refugee law is important for the security of the individual claimant and his/her family in an age where undocumented aliens are generally not able to access employment, social assistance, or qualification for nationality. It is thus clear that judicial determination of whether a person is entitled to protection is more than a mere prohibition on removal to the territory of a state where life or freedom is threatened or there is a real risk of torture or inhuman or degrading treatment. It may be noted that although these norms do not normally require a a status to be granted, the protection of Article 8 and /or the principles of non discrimination may do so (see the decision of the ECHR in Kiyutin v Russia 10 March 2011 where an alien had been denied a residence permit because he was HIV positive and this violated Article 14 ECHR taken with Article 8)

18. Nevertheless the prohibitions on expulsion found in Article 33(1) Refugee Convention; Article 3 CAT Art 7 ICCPR and related regional instruments)

remain of fundamental importance in assessing the scope of judicial protection.

b) Territorial reach of the protection from expulsion

19. Human rights case law has expanded and extended the duty on non-return. The jurisprudence of CAT, ICCPR or the ECHR, indicates:-
    a. Expulsion is prohibited even if the exclusion clause can be invoked to deny a residence status.
    b. The obligation to protect the human rights of asylum seekers and others extends to wherever a person is subject to the jurisdiction of the state, whether in territorial waters, or on board a ship in international waters, or during an armed conflict where the states forces are in effective control of part of the territory.

20. The first point is a well established principle of ECHR law [2] that appears to been accepted and adopted by the authorities with competence over the application of the ICCPR and the Torture Convention. It has been re-affirmed since the events of 9/11 and in the context of Islamic fundamentalism in Europe see Saadi v Italy, despite the UK Governments arguments to the contrary.

21. In the case of MSS v Belgium and Greece January 2011 the Grand Chamber of the European Court of Human Rights has concluded that the Belgian Government violated Article 3 by sending an applicant to Greece under the transfer arrangements made pursuant to the EU Dublin Regulations. At the time of the decision the Belgian government had sufficient information to suggest that the Greek governments determination of asylum claims in accordance with the their legal measures was illusory and secondly should have been aware of the defective reception and detention arrangements that had lead asylum claimants to be exposed to degrading treatment. The Court has thereby affirmed the principle that even multi lateral arrangements made in good faith cannot relieve a state of the foreseeable consequences of an expulsion decision of the evidence of actual practice is available,..

22. The second point deserves a little further consideration particularly in the light of the broad judicial consensus internationally that refugee law is to be interpreted in the light of human rights law.

23. The extensive jurisprudence arising in the United Kingdom from the activities of the British military in Iraq has given rise to an important decision of the Grand Chamber Strasbourg Court in the case of application no 55721 Al-Skeini v United Kingdom 7 July 2011clarifying its earlier decision in Bankovic and demonstrating at [133] to [142] that jurisdiction is exercised for the purpose of Article 1 ECHR in a number of different circumstances not limited to the exercise of power within the sovereign territory of the state. The Court stated:

[2] See the sequence of cases following on from Chahal v United Kingdom (1996)

> "137. It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" (compare *Banković,* cited above, § 75)"

24. For present purposes the fact that jurisdiction is exercised whenever a contracting state exercises its authority abroad with the consent of the other state, whenever it exercises control over the territory through military force and whenever it exercises control over a person within the custody of its forces has implications for extra territorial interventions of asylum seekers whether in the Mediterranean or elsewhere; see in this respect also Medvedyev and Others v. France [GC], no. 3394/03 ECHR 2010 at [67].

25. It seems likely that the clarity of the Court's reasoning may require the United Kingdom courts to reassess the territorial principle in asylum law stated in House of Lords case of European Roma Rights [2004] UKHL 55 and drawing on Australian case law (notably observations in Khawar and Ibrahim) that duties with respect to asylum do not generally arise until the applicant reaches UK territory. Given the similar reference to jurisdiction in Article 2(1) of the ICCPR, it is likely that this reasoning will prove compelling in nations outside Europe that adhere to the ICCPR or regional human rights instruments.

c) protection of other human rights of asylum seekers

26. Further we should recognise that although as immigration judges be are concerned with the determination of the rights of the asylum seeker to protection, other human rights of the asylum seeker particularly with respect to protect from irregular or arbitrary detention and the right to respect to family and p[private life will also be engaged under other instruments including Articles 5 and 8 of the ECHR and other measures of EU law such as the the Procedures Directive (Council Directive 2005/85/EC) and the Reception Directive (Council Directive 2003/9/EC). In this context reference should be made to ZO (Somalia)and others [2010] UKSC 36 upholding the Court of Appeal [2009] EWCA 242 Civ [2009] 1 WLR 2477 and concluding without the need to make a reference to the Court of Justice that Article 11 of this Directive applied to second applications for protection that remained undecided after one year.

27. There has been much case law in the UK on the principles governing the detention of asylum seekers and the liability to damages of the executive for detaining such people in breach of the legal regime and any published policy applicable to them or human rights norms including detention that is too long or inappropriate in the light of the personal circumstances of the claimant. See for example Kambazi (previously SK (Zimbabwe) v Secretary of State for the Home Department [2011] UKSC 23; MXL [2010] EWHC 2397 Admin; SM [2011] EWHC 338 Admin, T [2011] EWHC 370 Admin. Participants may like to know that in its annual report and accounts published in August 2011 the UK Border Agency has said that in the last financial year it paid out more

than £4 million for compensation for unlawful detention in 152 cases and is setting aside £4.5 million to compensate for unlawful detention cases in 2011/12).

c) asylum and the expression of personal characteristics

28. A significant judicial development in the application of refugee law has been the clarification of the correct approach to claims of persecution on the grounds of sexual orientation. The UK Supreme Court reviewed the previous UK case law in the case of HJ (Iran) [2010] UKSC 31. It rejected the proposition that a person of homosexual orientation could be expected to avoid the risk of persecution by being discrete about his or her sexual orientation as long as it was reasonably tolerable for that person to do so. This approach was found to be inconsistent with an approach to refugee law based on respect for human rights and the prevention of discrimination inconsistent with human dignity. The fact that a person would be discrete about his sexuality would only be relevant to an assessment of whether there was a real risk of persecution if the likelihood was that discretion was unrelated to avoiding persecution but for personal reasons such as avoiding conflict with family and such like.

29. This case has resulted in a number of new asylum claims particularly from countries in Africa and the Caribbean where homosexual acts are punished and popular prejudice from which there is not effective state protection is substantial. Judges are having to decide: whether a person is indeed homosexual as claimed; whether he or she would be discreet if returned and why; whether there is a real risk of harm amounting to persecution if the claimant was not discreet. The Upper Tribunal has applied these principles in a recent country guidance SW (Lesbians) Jamaica [2011] UKUT 251 IAC where it allowed the appeal[3].

30. A consequence of the new approach in HJ (Iran) has been to apply the principles developed in the field of sexual orientation to political speech. In a country guidance case issued at the height of the violence surrounding the presidential elections in Zimbabwe the former Asylum and Immigration Tribunal concluded that Zimbabweans who had claimed asylum in the United Kingdom would be at risk of persecution if they could not demonstrate loyalty to the Mugabe regime when challenged on return to Zimbabwe. In RT Zimbabwe [2010] EWCA Civ 1285 the Court of Appeal considered whether such a risk could be avoided by expecting people to pretend to demonstrate loyalty to Mugabe for the purpose of passing through road blocks manned by his supporters, even if they had no firm political views of their own. It said:

> It may be said that there is marked difference in seriousness between the impact of having to lie on isolated occasions about political opinions which one does not have, and the "long-term deliberate concealment" of an "immutable characteristic", involving denial to the members of the group their "fundamental right to be what they are" (see per Lord Hope para 11, 21). We are not persuaded, however, that this is a material distinction in this context. The question is not the seriousness of the prospective maltreatment (which is

[3] For country guidance cases generally see the last section of this presentation.

> not in issue) but the reason for it. If the reason is political opinion, or imputed political opinion, that is enough to bring it within the Convention. In this case, we are concerned with the "imputed" political opinions of those concerned, not their actual opinions (see para 4 above). Accordingly, the degree of their political commitment in fact, and whether political activity is of central or marginal importance to their lives, are beside the point. The "core" of the protected right is the right not to be persecuted for holding political views which they do not have. There is nothing "marginal" about the risk of being stopped by militia and persecuted because of that. If they are forced to lie about their absence of political beliefs, solely in order to avoid persecution, that seems to us to be covered by the *HJ(Iran)* principle, and does not defeat their claims to asylum.

31. The principle is under challenge in the Supreme Court. The practical implications for Zimbabwean claims have been reduced by reason of a fresh country guidance case issued by the Upper Tribunal EM and others Zimbabwe [2011] UKUT 98 IAC where the Tribunal reviewed current evidence and concluded that it was no longer necessary for every returnee to have to demonstrate loyalty

d) The rights of the child

32. The third area of significant development has been the consideration given to children in the asylum process. In the case of ZH (Tanzania) [2011] UKSC 4 the court considered the impact of the deportation of the mother on British citizen children born here to a father from whom mother was now estranged. It concluded that the test under Article 3 of the UN Convention of the Rights of the Child had to be respected in testing the legality and proportionality of the deportation decision. The best interests of the children were a primary consideration. They were not the only one and the best interests could be displaced by compelling rights based considerations that outweighed them such as protecting the public from the risk of harm, but they were much more than a relevant consideration. A number of other decisions at various levels of the judicial hierarchy have stressed different aspects of the same principle in a variety of contexts: see MXL at [27] above for application to the detention of a child's mother; see also Mansour [2011] EWHC 832 (Admin); Reece-Davis [2011] EWHC 561 (Admin); Omutunde-best interests (Nigeria) [2011] UKUT 247 IAC; E-A(Article 8-best interests) Nigeria [2011] UKUT 315 IAC and in Scotland HS v SSHD [2010] CSIH 97; AK Israel [2010] CSIH 98.

33. A child asylum seeking may be as a dependent of its parent or carer or be unaccompanied. If a dependent there may be cases where the issue arises whether it is in the child's best interests to be separated from the parent: where the parent is being detained, or there is evidence of abuse of the child; or a complete absence of social provision for the child if returned with the parent. If unaccompanied a series of problems may arise from the claim: is the child of the age s/he claims to be? How should the credibility of the narrative be assessed particularly in the case of young children? Do the country conditions reveal that children as a social group face the risk of exploitation from which there is no adequate state protection if returned? What is the age of minority to be used by the judge the age in the host state or the country of origin?

34. The present UK practice where a refugee claim is refused is to grant discretionary leave to an unaccompanied child asylum seeker until the age of 17 ½ when removal directions may be issued if there is no other basis of stay. But judges may have to face challenge to this practice: if it was in the best interests of a child to be given discretionary leave to remain and during that time pursue a course of education, is it appropriate to remove a former child whose education in the host state has not been completed? Does the policy of parking removal decisions in the case of children undermine a right to remain indefinitely as a refugee on the basis of membership of a social group that will cease to exist with the achievement of the age of majority?

35. Underlying these questions is the more general one how far do the principles of the UNCRC create a new class of protected persons whose claims will need to be evaluated by immigration judges? This question chimes with the developing jurisprudence on respect for private and family life (Art 8 ECHR) where the Strasbourg Court has stressed that the development of human rights should be consistent with other relevant international obligations (see Maslov v Austria [2008]; Omojudi v United Kingdom [2009]). It also chimes with the developing recognition that the rights of the child citizen in EU law lead to residence rights for the non citizen parent: see Case C 34/09 Ruiz Zambrano. [2010] CJEU 8 March 2011; but these collateral aspects of the question go beyond the scheme of this conference.

iii) How do judges decide on whom should be protected?

36. Alongside the problem of what the criteria for the grant of protection are, is the problem of assessing whether these criteria are met on the facts. Given the paucity of supporting evidence that asylum seekers generally will be able or reasonably expected to produce credibility problems are always likely to be central to the determination process.

37. Indeed perception amongst claimants that certain classes are favoured by asylum law may lead to false claims being made to be being a member of that class. Since the decision in HJ (Iran) a number of people have made claims or further claims to be at risk of persecution because of their sexual orientation who had previously presented as heterosexual in their personal life. Some last minute claims have clearly been fabricated to prevent removal but others may require a more caring approach: has a person assumed a heterosexual partnership in order to provide cover for their true sexual orientation; was the reason why sexual orientation was not previously because the applicant was advised and/or believed that it would not found a basis for protection.

38. As ever, refugee law judges will have to tread the narrow path between undue scepticism and gullibility. One deputy judge who was foolish enough to participate in a radio call in show under conditions of anonymity expressed the views that he and his colleagues found it hard to believe such claims arising from Africa and the Caribbean. There was a complaint made against him; he was identified and he was required to resign as he had failed to uphold judicial standards of impartiality. Stonewall a UK campaigning organisation issued a report in 2010 giving examples of inappropriate questions into sexual life

being asked by presenting officers and sometimes reflected in the language of the judges[4]. The judges of Immigration and Asylum Chambers of both the First Tier and Upper Tribunal have been fortunate to take the opportunity to build on this report to involve Stonewall in our judicial training days, so a more holistic assessment of sexual identity can be made.

39. A similar problem arises with claimants who claim to be children in order to receive more favourable treatment than adult asylum seekers. Under present arrangements in the United Kingdom, where age is disputed the Immigration Officer will not determine age on arrival unless there is compelling evidence that the person is not the age claimed. In other cases the claimant is referred to the social services department attached to the place of arrival or such other authority as have agreed to undertake the assessment. There is no direct right of appeal against an adverse assessment by social workers, but such decisions may be challenged by judicial review in the High Court. It used to be thought that the test was whether a reasonable local authority properly directing itself and acting fairly could have reached the conclusion to which it came, but the Supreme Court has determined in the case of R (on the application of) A v London Borough of Croydon [2009] UKSC 8; 26 November 2009 that whether a child is indeed a child is a question of status to be decided by the judge on a factual investigation rather than a local authority subject to judicial supervision.

40. This is a challenging task in the absence of reliable records of births and related milestones in childhood. At one stage it was considered that paediatricians could give expert testimony that might outweigh the assessment of a social worker but recent judicial decisions have rejected as having much probative value different techniques of paediatric age assessment (see R (on the application of) R v London Borough of Croydon [2011] EWHC 1453 Admin.

41. Immigration judges deciding the asylum appeal would tend to rely on the social services assessment of age when evaluating the credibility of the asylum claim, but that may now be just one factor among many, indeed there has been recognition that asylum judges with experience of assessing the credibility of the narrative of the foreign child may be better equipped to make judicial age evaluations than their generalist colleagues.

42. Other issues relating to credibility are well known to this association: the timing of the asylum claim; the failure to make a claim in an earlier country; the failure to mention material facts at the first opportunity; the failure to support a claim with material that might be reasonable expected to be available; the support of a claim by documentary material that may well have been created just for this purpose particularly in countries where both forgeries and corruptly obtained originals can be had for a price.

[4] "No going back: lesbian and gay people and the asylum system" 2010 available at www..stonewall.org.uk

43. Appellate decisions on credibility are torn between recognition that fact finding is reserved to the first instance judge who will have had the advantage of seeing a witness and expertise in claims arising from the country in question, and setting standards of fairness appropriate to the subject matter in hand. A detailed examination of the jurisprudence would be beyond the scope of this presentation but the following principles may be a fair summary of the extracted from the case law applied in the UK to prevent the assessment of credibility becoming arbitrary and subjective:-

    a. Judges should be astute to ensure that adverse decisions on credibility are not made without the fact that credibility is in issue having been brought to the claimant's attention, and the broad reasons why this is so. In cases where the judge is minded to pursue an evidential point not taken by the decision maker this will generally require alerting the claimant to the point and giving him or her, a fair opportunity to address it.
    b. Judges are entitled to evaluate the weight to be attached to documentary evidence in support of a claim in the light of what appears on the face of the document, the comments of any expert, what is known about the ability to obtains such documents in the country in question, the practices in the country concerned to which the document relates, what the judge is or is not informed of as to how the document came into existence. It is not necessary to be find it to be proved that the document is a forgery before dismissing it as a probative source of evidence.
    c. Statutory presumptions based on a failure to claim at the first opportunity can never be conclusive and will rarely be decisive. There are frequently reasonable explanations why a claimant was unable or unwilling to make a claim earlier.
    d. The position of vulnerable persons: children, the victims of past torture or sexual abuse, the mentally disabled and such like, must be taken into account before an adverse view is taken of credibility. The judge must be astute to consider the possibility that the defect in the testimony is a consequence of the vulnerable characteristic [5].
    e. Although an asylum seeker should do his or her best to substantiate the claim, the standard of proof is whether there is a reasonable likelihood, reasonable chance or possibility that there is a well founded fear. Even where a judge is doubtful as to the reliability of a particular account, it may not be possible to dismiss it altogether when put along aspects of the account or objective evidence that supports the claim.
    f. Credibility should be an assessment based on all the evidence including material aspects of the objective country evidence, rather than an item by item assessment of whether aspects of an account appears plausible to the immigration judge. Persecutory societies may not act predictably or reasonably.
    g. Medical evidence supporting the testimony must be taken into account. Where scars and injuries are assessed in accordance with the range

[5] See the Joint Guidance note referred to at footnote 6 below

options set out in the UN Istanbul Protocol, findings are the higher end of the range should be accepted as probative or diagnostic in the absence of very good reason to the contrary.

The Upper Tribunal (Immigration Asylum Chamber)

a) the functions and status of the UTIAC

44. The UT IAC came into existence in February 2010, when the provisions of the Tribunals Courts and Enforcement Act 2007 was applied to immigration tribunals. The Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal replace the former Asylum and Immigration Tribunal that had performed the dual role of first tier hearings and review of decisions. Where the AIT granted a review that was an appeal from its decision to the Court of Appeal on a point of law; where it refused it, there was a paper review (there was no oral hearing and no submissions received from the opposing party) of the decision to a judge of the High Court sitting in the Administrative Court.

45. UT IAC has at present two principal functions:
    i) it decides whether to grant permission to appeal from decisions of the FTT IAC where the decision involves a point of law;
    ii) where such permission is granted it decides the appeal and if appropriate by remake the decision including by hearing fresh evidence.

    Either party dissatisfied with the UTIAC's final decision may appeal with leave to the Court of Appeal, but now these appeals are admitted only on second appeal criteria: that is to say if there is either a point of law or practice of important principle or some other substantial reason for granting permission to appeal: see s.13 (6)(of the Tribunal Courts and Enforcement Act 2007 and the decision in PR (Sri Lanka and others) v SSHD [2011] EWCVA Civ 988 11 August 2011 There has been debate as to whether a refusal of permission to appeal to itself by UTIAC can be challenged by judicial review, given that the Upper Tribunal is a designated a superior court of record. In the case of Cart and MR (Pakistan) [2011] UKSC 28 July 2011 and the associated case from Scotland of Eba [2011] UKSC 29 , the Supreme Court concluded that it could, but only where the arguable point of law raised second appeal criteria. It remains to be seen what class of asylum case the Administrative Court or the Court of Appeal will consider meets these more stringent criteria. The present expectation is that where there has been a fair hearing few debatable cases will do so. There is increasing recognition by the senior courts that Tribunal judges are experts in their own field of immigration and asylum valuation. The decision in PR (Sri Lanka) endorses this approach and rejected applications for permission to appeal in asylum and human rights cases.

46. From the autumn of 2011, there will be assigned to the UTIAC one of the principal remaining functions of the Administrative Court, namely challenges by judicial review of a decision of a decision of the Home Office/United Kingdom Border Agency to reject representations made by a claimant as not amounting to a fresh claim within the meaning of the rules. A fresh asylum

claim is one where there is different information provided and as result of that information there is a reasonable possibility that an immigration judge would have decided the case differently. Where the Home Office, or the court on judicial review of that decision, concludes that the case is a fresh claim even if the Home Office does not accept it as valid there is a right of second appeal to the First Tier Tribunal.

.

47. There are a significant number of immigration appeals in the United Kingdom. Although numbers are reducing the FTT still deals with over 120,000 appeals of which asylum cases form about 15%. The First tier consists of over 600 judges full time and part time sitting in over 12 hearing centres in three different national jurisdictions: England and Wales, Scotland and Northern Ireland. With accumulated backlogs this gave rise to some 20,000 asylum appeals in 2010/2011 and some 25,000 applications for permission to appeal to the UTIAC in all cases, but where asylum represents a higher percentage than at the first tier, very roughly 30% or 8,000 applications. On average over the year 22% of the 25,000 applications for permission to appeal to the UTIAC are granted giving the UT IAC an appellate case load of 6,000-8,000 cases a year, when combined with cases still being remitted by the Court of Appeal. The UTIAC has a permanent judicial complement of some 35 judges, but senior members of the judiciary are able to sit in the UTIAC, and it also has the assistance of some 35 deputy members of UTIAC to assist with its case law.

48. Part of the rationale of UTIAC was to prevent delays ion the appellate process that a system or appeal, review and remission back gave rise to. There is a broad aspiration that UTIAC will deal with an asylum case with 10 working days of an application for permission to appeal and determine substantive appeals within 22 weeks of the grant of permission.

49. The Upper Tribunal does not publish all its decision other than to the parties. Only a small proportion of cases (perhaps 100 per annum) are publicly reported at www.judiciary.gov.uk/media/tribunal-decisions/immigration-asylum chamber and also available on www.bailii.org. The criteria for reporting and the rationale for this system have been set out in a recent Presidential Guidance Note 2011 No 2[6]. All Guidance notes from a Chamber President and the Senior President of Tribunals Practice Direction are currently available at www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/immigration-and-asylum/upper/rules-and-legislation[7].

b) country guidance cases in UTIAC

50. One class of reported case, is an asylum case that is designated as a country guidance case. Country guidance was a system developed by the former AIT

[6] The following other presidential guidance notes may be of interest to those who wish to understand the work of the UT: Joint guidance note 2010 /2 on Child, vulnerable adult and sensitive appellant; 2011/1 Per mission to Appeal to the Upper Tribunal;

[7] The senior President on Tribunals is presently a Court of Appeal judge Sir Robert Carnwath and he is empowered by the statute to issue Practice Directions.

and applied to the UT IAC by a practice direction from the Senior President on Tribunals in 2010. There are some 323 cases on the web site as country guidance cases, a few dating back to 2000. 8 cases were added in 2010 and 11 so far in 2011. They cover a period range of countries and can be accessed by country, chronology or by search words in the heading.

51. There has been some debate both within the United Kingdom and outside it, as to whether a system of country guidance cases is just, effective and useful. In the United Kingdom an academic study "Administrative Justice and Asylum Appeals" by Robert Thomas (2011) Hart Publishing at chapter 7 has reviewed the system and found it to be useful, albeit with some aspects that might need re-fashioning. Shortly after this review, UTIAC convened a seminar of users, experts (including Dr Thomas) immigration and senior judges, to discuss issues of concern. There was consensus that a country guidance system was necessary and expedient, but issues were raised about the delay in getting country guidance promulgated; the extent that country guidance can be issued where one party wishes to withdraw the appeal or not debate certain aspects of the evidence; whether country guidance cases remain on the UT's web site past their useful date; whether is always clear as to the issue that it is seeking to give guidance on. More generally, other observers have been concerned whether a system resembling one of factual precedent is a just way of determining asylum appeals, as opposed to purely individualised determinations in each case.

52. A country guidance case is normally identified at a case management stage of an appeal to the UT where the country in question has given rise to significant numbers of appeals. Three or four cases are normally chosen to be representative of a problem and because it is recognised that some appeals will be concede or withdrawn before the guidance can be given. Important cases such as those arising from Zimbabwe, Iraq, Afghanistan, Iran, Somalia, are likely to attract the attention of experienced representatives on both sides. The legal services authorities may well grant funding for country experts to report. Although the UT has explored the possibility of either competing or joint experts [8], UKBA tends not to instruct its own experts critical of human rights compliance in a foreign country and tends to prefer to rely on its country information reports supplemented where appropriate from country visits and material supplied from consular representatives.

53. The UT asks both parties to present the fullest possible background information that it list as an appendix to an appeal. It may specifically invite UNCHR to participate in an appeal when it has issued guidance in a country that is disputed or whose application to a class of appellants is disputed. The UT will identify the issues on which the guidance will be given in case management hearing but sometimes this place later. The summary of the guidance is set out in a preamble to the determination and the issue on which the case is guidance is there identified. Country guidance cases are normally

[8] See for example the discussion in HM (Iraq) above.

decided by panels of UIT judges, and the views and experience of colleagues in similar cases may be sought before the final decision is promulgated.

54. When a Country Guidance case is issued, the point on which the guidance is given should be followed by subsequent judges unless there is new evidence not considered by the Country Guidance panel, or some new aspect of the issue has emerged. An unexplained failure to follow an applicable country guidance case, is likely to result in an error of law leading to grant of permission to appeal. The UT is not bound by its own case law, although it would be expected to follow it in the absence of good reason to do so. It can in any event designate any appeal as a future country guidance case to reconsider the issue where there is good reason to do so, notably a change of material circumstance in the country in question or fresh evidence becoming available. Decisions remain on the website as a reported case unless it is overruled or criticised by the Court of Appeal or replaced by a fresh country guidance case on the issue[9]. On balance it has been thought inappropriate to administratively remove old country guidance cases. If there is a case for them to be revisited they will be in the normal appellate process.

55. The aims of the Upper Tribunal include the achieving of consistency across the United Kingdom first tier centres in the determination of common issues, and ensuring high standards in the jurisprudence reflecting the UK's international obligations and reducing the workload of the Court of Appeal and beyond to a few select cases of true general importance and controversy.

56. The Country Guidance system is seen as an useful tool to give effect to these ends, and also an important means of securing access to justice in what I have described at the outset as the age of austerity. Not every appellant from a country giving rise to frequent appeals will have access to the most experienced advisers and advocates or the best experts or be able to access less well known information reports or items of comparative jurisprudence. A quick search on the Tribunal's web site should reveal where there is any guidance on the issue, what the guidance says, the objective information relating to the guidance and in the case of contest why the Tribunal preferred one view to another. Such information ought to enable the appellant to know whether or not there are reasonable prospects of success in an appeal, if a different outcome to existing country guidance is sought what has to be done by way of putting fresh credible material before the judge. I do not regard the Country Guidance system as a straitjacket preventing judges doing justice ion the merits of the individual appeal; it is not in my view a factual precedent which literally understood would mean it is binding on the judge irrespective of the particular evidence in the case. It is designed to focus the individual inquiry by reference to what is already known and assessed to be the case, and requires the parties and the decision maker to engage with the previous decisions, the evidence and the reasoning.

[9] See for example the criticism of the UT in PO (Nigeria) [2011] EWCA Civ 132 for failing to identify clearly and succinctly the issue that it was giving guidance on, the decision is to be remade but other aspects of the guidance have been saved pending re-determination.

57. To this extent, the system if not markedly different from the UNHCR's guidelines on particular cases of vulnerability, or the Strasbourg Court's approach in setting out general assessment arising from particular problems in countries: see for instance see application 25904/07 NA v United Kingdom 17 July 2008 (where considerable reliance was placed on and support was given to a Country Guidance decision of the AIT) and the admissibility decision in 38851/09 NM v United Kingdom).

Conclusions

58. I would recognise that to be effective the system to be able to generate decisions within weeks and months and not years. Sometimes, however, it is appropriate to wait until an important decision from the higher courts or Strasbourg is promulgated, although increasingly (and appropriately it is suggested) the Strasbourg courts waits on the national guidance to be issued before considering the matter for itself: see the present delay in Iraq cases pending a challenge to the CA in HM (Art 15 (c) (Iraq) [2010] UKUT 331 IAC.

59. If, however, the UT's decisions on country guidance cases are carefully evaluated and expressed, comprehensive, based on the best contemporary available evidence and responsive to changes in the country concerned, they can perform a valuable service to the litigating parties, the UK judiciary and may perhaps assist other jurisdictions grappling with similar questions. Then together with the principles forged over years of experience and through the collective experience of judges at conferences such as these we can see: transparency in how we work and what the product of our case law is, fairness in the assessment of credibility, independence from the executive in protecting rights, using expert experience of the case law and the country information to assist the litigant and ensure consistency of approach to common problems. Together these measures are designed to promote access to justice at a time of real financial constraint.