



PRAGUE PROCESS  
ПРАЖСКИЙ ПРОЦЕСС

## **Quality in Asylum Decision-Making**

### **Using Jurisprudence and Multidisciplinary Knowledge for Training Purposes**

May 2016

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The Prague Process is a targeted migration dialogue, promoting migration partnerships and information exchange among the countries of the European Union, Schengen Area, Eastern Partnership, Western Balkans, Central Asia, Russia and Turkey.

This document was produced in the framework of the Pilot Project 7 on Asylum and International Protection, implemented from November 2014 until April 2016 within the Prague Process Targeted Initiative, a project funded by the European Union.

Over 20 Prague Process states, as well as various international organisations, experts and practitioners participated in the Pilot Project and contributed to the development of this document. The opinions expressed here within do not necessarily reflect the views of the European Union and its Member States, nor are they bound by its conclusions.

The electronic version of this document is available at [www.pragueprocess.eu](http://www.pragueprocess.eu)

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## Foreword

The Pilot Project 7 (PP7) - *'Quality in Decision-making in the Asylum Process – Continuous Training Using Content of Jurisprudence'* was implemented in the framework of the Prague Process Targeted Initiative (PP TI). The topic of PP7 corresponded to the specific Action 2 of Chapter VI – *'Strengthening capacities in the area of asylum and international protection'* of the Prague Process Action Plan 2012–2016. The topic was selected based on the answers provided by the Prague Process participating states to the questionnaire in preparation towards the Senior Officials Meeting in Berlin on 28-29 October 2014.

The objectives of PP7 were to focus on quality, to improve decision making in the asylum process and to create a methodology for organizing continuous national trainings. As such, PP7 drew on the previous experiences and results from the Pilot Project 4, *'Quality and Training in the Asylum Process'*, implemented between 2012 and 2014.

These Guidelines aim to assist decision makers and case workers in asylum procedures by giving practical guidance on how to develop continuous training using jurisprudence and multidisciplinary knowledge for training purposes. Meanwhile, the document does not entail detailed information regarding the overall asylum systems of the participating states.<sup>1</sup>

This publication to a great extent builds on the rich experience of the four selected PP7 experts - Judith Gleeson, Gábor Gyulai, Jane Herlihy and Judith Putzer. The Leading States' experts were Anna Bengtsson, Project leader (Sweden) and Thorsten Schroeder (Germany). The substantial inputs on behalf of the participating states and all other stakeholders engaged in the project (EASO, UNHCR and ECRE), as well as the support of the Prague Process Secretariat within ICMPD, should also be highlighted as key for the successful completion of the document.<sup>2</sup>

<sup>1</sup> Such specific information can be found in the Migration Profiles of the concerned states, which are being developed in the framework of the so-called 'Knowledge Base' (Specific Objective 2 of the PP TI).

<sup>2</sup> Before its publication, participating states were provided with an opportunity to propose changes to the text, both during the concluding seminar and via online consultation on the draft version.

## List of Acronyms

<b>BAMF</b>	German Federal Office for Migration and Refugees
<b>BMP</b>	“Building Migration Partnerships” project
<b>CEAS</b>	Common European Asylum System
<b>CJEU</b>	Court of Justice of the European Union
<b>COI</b>	Country of Origin Information
<b>EASO</b>	European Asylum Support Office
<b>EC</b>	European Commission
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>EU MS</b>	European Union Member State(s)
<b>GAMM</b>	Global Approach to Migration and Mobility
<b>ICC</b>	International Criminal Court
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICMPD</b>	International Centre for Migration Policy Development
<b>PP</b>	Prague Process
<b>PP4</b>	Pilot Project 4 on Asylum and International Protection
<b>PP7</b>	Pilot Project 7 on Asylum and International Protection
<b>PP AP</b>	Prague Process Action Plan 2012–2016
<b>PP TI</b>	Prague Process Targeted Initiative
<b>RSD</b>	Refugee Status Determination
<b>SMA</b>	Swedish Migration Agency
<b>UN</b>	United Nations
<b>UN CAT</b>	United Nations Committee Against Torture
<b>UNHCR</b>	United Nations High Commissioner for Refugees

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# 1. Introduction

## 1.1. Project Description

### The Prague Process

The Prague Process is a political initiative that emerged out of the “Building Migration Partnerships” (BMP) Ministerial Conference, which took place in Prague on 28 April 2009. At this conference, the 50 participating states<sup>3</sup> adopted the Joint Declaration on principles and initiatives for promoting close migration partnerships. The text of the BMP Joint Declaration<sup>4</sup> was prepared by the participating states with the contribution of several EU bodies and international organisations. Specifically, the Joint Declaration established the following five areas as a basis for cooperation while the last, sixth area was added after the endorsement of the Prague Process Action Plan 2012–2016<sup>5</sup> in Poznan in November 2011:

- ⇒ preventing and fighting illegal migration;
- ⇒ integration of legally residing migrants;
- ⇒ readmission, voluntary return and sustainable reintegration;
- ⇒ migration, mobility and development;
- ⇒ legal migration with a special emphasis on labour migration;
- ⇒ asylum and international protection.

The main aim of the Prague Process has been to promote migration partnerships between the states of the European Union/Schengen area, Western Balkans, Eastern Partnership, Central Asia, Russia and Turkey. Its methodology is based on three pillars: it combines policy dialogue at ministerial level with policy development at expert level and

3 Participants (50 in total): Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Kazakhstan, Kosovo (UNSCR 1244/1999), Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan, and the EC. Leading state: Poland; Secretariat: ICMPD.

4 See: [http://www.pragueprocess.eu/fileadmin/PPP/BMP\\_Joint\\_Declaration\\_EN.pdf](http://www.pragueprocess.eu/fileadmin/PPP/BMP_Joint_Declaration_EN.pdf).

5 See: [https://www.pragueprocess.eu/fileadmin/PPP/PP\\_AP\\_POZNAN\\_EN.pdf](https://www.pragueprocess.eu/fileadmin/PPP/PP_AP_POZNAN_EN.pdf).

the implementation of concrete initiatives in the framework of its Declaration and Action Plan. This approach shall ensure that the political dialogue does not decouple from the practical experience gained while “working on the ground”. It shall also guarantee that the findings of concrete projects do not get lost but are translated into general guidelines and concepts that are available for all Prague Process participating states. This document is a result of this effort.

The Prague Process is – with the exception of the important role of the European Union – a state-driven initiative, which is steered by ministries responsible for migration and led by Poland. The Core Group advises the Senior Officials’ Meetings, which constitute the decisive body of the Prague Process. The declared intention of the Prague Process is to keep the dialogue among responsible state agencies open for cooperation on the six above-listed topics. Since the dialogue emphasizes an operational approach, practical know-how and the development of joint standards are of special relevance in this respect. The website [www.pragueprocess.eu](http://www.pragueprocess.eu) serves as the main source of information on the Prague Process and its Targeted Initiative.

### The Prague Process Targeted Initiative

The Prague Process Action Plan 2012–2016 outlines 22 concrete activities in the six above-mentioned thematic areas to be implemented during that period. From August 2012 to present, Poland together with the Czech Republic, Germany, Hungary, Romania, Slovakia and Sweden, which also take the lead in the Pilot Projects of PP TI, have been implementing the EU-funded initiative “Support for the Implementation of the Prague Process and its Action Plan”, also known as the Prague Process Targeted Initiative (PP TI).

The PP TI is focused on three specific objectives: to ensure continued expert-level dialogue and targeted information exchange among states participating in the Process<sup>6</sup>; maintain-

6 This exchange is implemented through, among others, organisation of yearly Senior Officials’ and National Contact Points’ meetings.

ing, updating and improving of the Knowledge Base through the gathering of information in the form of Migration Profiles for countries in Eastern Europe, Southern Caucasus, Central Asia and Russia constitute the second main objective; finally, seven concrete pilot projects have been implemented within the framework of the PP TI, relating to the thematic areas set out in the Action Plan.

International cooperation is vital for the development of sustainable and mutually beneficial migration policies. The PP TI represents an important forum for dialogue and information exchange among decision makers in the participating states. In spite of its inter-governmental nature, the involvement of other stakeholders such as NGOs, international organisations and academia has been actively encouraged within the PP TI.

### **The Pilot Project 7 on Asylum and International Protection**

The Pilot Project 7 (PP7) was led by Sweden (Swedish Migration Agency) with the support of Germany (Federal Office for Migration and Refugees) and of the Prague Process Secretariat at ICMPD. The following states participated in PP7: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Former Yugoslav Republic of Macedonia, Georgia, Germany, Kazakhstan, Kosovo\*, Kyrgyzstan, Moldova, Poland, Serbia, Sweden, Russia, Turkey and Ukraine. A number of additional states such as Luxemburg and Norway actively participated during seminars and thus contributed to the successful implementation of the project.

PP7 entailed three seminars on selected topics relevant for case workers and decision makers in the asylum procedure. The chosen format featured formal presentations, followed by interactive sessions (i.e. case study discussions, working groups) to achieve efficient learning outcomes and encourage discussion, reflection and the exchange of good practices on assessing asylum claims in a structured way, as well as on continuous training to achieve quality.<sup>7</sup>

Invited experts from academia, courts and tribunals, as well as other important stakeholders and organisations, introduced the participating practitioners into the evolution of international asylum law over time through the jurisprudence of national and other courts (i.e. Court of Justice of the European Union, European Court of Human Rights). Meanwhile, the case study sessions introduced increasingly complex asylum cases in order to not only train decision makers in refugee status determination (RSD), but also (future) national trainers in how to engage with trainees. The overall objective was to ensure ownership and sustainability of future training activities when similar seminars are repeated in a national context to ensure a multiplying effect within the participating states. Finally, various training materials and methodologies were presented and discussed, alongside with important sources and databases for further information, parts of which are also entailed in the document at hand.

## **1.2. Scope and Structure of the Document**

This publication has been prepared primarily for the use by decision-makers and asylum practitioners across the 50 Prague Process States, as well as the wider public. While directed particularly towards the states participating in PP7, we hope that the document will inspire further dialogue and cooperation among all Prague Process participating states and also beyond. It has a focus on (future) trainers but can also be used for self-study.

The focus in these guidelines is on using jurisprudence and multidisciplinary knowledge for training purposes. However, there are decisions taken by the asylum offices (first instance decisions) that form the standing state practice in all states and are not overturned by courts. Consequently, these may also form part of case law (even if not jurisprudence per se). It is to be encouraged that national best practice decisions be collected and used for training purposes as well, thereby further

inspiring national work on quality assurance mechanisms in asylum procedures.

Written materials used during the seminars of the project are largely included in this publication. They include case studies, guidance materials of how to search databases for case law and sample PowerPoint presentations, as well as examples of other existing training materials; many also available in Russian (see for example [www.refworld.org/ru](http://www.refworld.org/ru)).

In these Guidelines, we focus on what goes to the heart of asylum processing – achieving and furthering quality in asylum decision making. However, when working in asylum procedures it is of key importance to first hold a qualitatively good interview in order to gather relevant information but also to assist the asylum seeker in presenting and substantiating his/her asylum claim. At this stage but also later, it is essential to have good Country of origin information (COI) through reports that are relevant to the specificity of the individual claim. Making a structured assessment requires to first set out the facts of the claim, then carry out a correct evidence assessment, including on credibility issues where they may arise, and to finally also undertake the future risk assessment. There are several excellent training materials, some of which are listed in this document. We recommend to also follow the Prague Process website ([www.pragueprocess.eu](http://www.pragueprocess.eu)) since additional materials relevant to asylum procedures may be uploaded.

This document consists of five main sections:

Following this short introduction, Chapter Two sets the overall framework of the document. It first briefly in five messages introduces the reasoning behind the focus on jurisprudence, its significance and various implications for decision-making and the implementation of targeted trainings. The chapter then examines the importance of the jurisprudence and case law of the European Courts, focusing especially on the Court of Justice of the European Union and the European Court of Human Rights, before also exemplifying the relevance of national courts. Finally, it also provides a background to why also knowledge from non-

legal disciplines is vital knowledge for decision makers in asylum procedures.

Chapter Three provides examples on how to use jurisprudence concretely for training purposes. The key concepts and issues relating to Convention ground membership of 'Particular Social Group', the concept of 'Internal Protection Alternative' and lastly 'Credibility Assessment as part of Evidence Assessment' are used to exemplify the practical use of jurisprudence.

Chapter Four offers examples of how to use knowledge from non-legal disciplines for improved training. This section first looks into the CREDO Methodology of multi-disciplinary approaches to credibility assessment, before shortly referring to the functioning of the human memory, thereby providing one concrete example on the importance of non-legal expertise.

Lastly, Chapter Five provides practical training tips. Readers are first briefed on what they need to consider when training adults. The following subchapter points to several key aspects that should be addressed by trainers before and after the training session. Thereafter, readers are being engaged into a discourse regarding the use of Power Point Slides for training before being introduced to some of the key training materials that we recommend for further reading and training. The final two sections provide for answers to frequently asked questions when working with jurisprudence as well as an overview of important internet sources with regards to jurisprudence.

These Guidelines are complemented by supplementary information assembled in the 'Background Information' section, providing further case studies for training and an overview of important case law. Finally, the agendas of the three seminars carried out throughout the project and various sample presentations used by experts during these events can also be found here for further inspiration.

\* UNSC Resolution 1244/1999.

<sup>7</sup> The agendas of all three seminars, as well as some sample presentations can

be found in the 'Background Information' to this publication.

## 2. Setting the Framework

### 2.1. Why Use Jurisprudence in Training?

The Guidelines will in this chapter in five messages assist in giving practical guidance on how to develop continuous training using content of jurisprudence and case law. The five messages and corresponding training issues and suggestions will be further illustrated by examples relating to three key concepts and issues in asylum and international protection law – the identification of a Refugee Convention ground, illustrated by reference to membership of a particular social group, the concept of internal protection alternative (also called internal flight, or internal relocation) and lastly how to assess credibility as part of the overall evaluation of evidence.

Using jurisprudence will help you...

- SHOW CONSTANT DEVELOPMENT OF THE LAW
- STRENGTHEN THE TRAINING MESSAGE
- IMPROVE LEGAL REASONING
- FILL THE GAPS IN LAW
- INSPIRE CASE STUDIES

Jurisprudence plays a key role in understanding how the Refugee Convention is to be applied. Further assistance is available from guidance published by UNHCR and academic literature on the Convention.

When using jurisprudence in training, care must be exercised to ensure that the jurisprudence used is well reasoned and persuasive, and that it is not aberrant or out of date. As jurisprudence is constantly evolving, it is to be expected that there will always be new decisions.

#### Show Constant Development of Law

No legal system and no legislative drafter can provide for or foresee all future problems,

issues, or social changes. The superior Courts, and in particular the international Courts, constantly develop and refine their approach to refugee law. Using jurisprudence and case law enables us to demonstrate this evolution to decision makers, showing how it adapts to evolving human rights standards, and helping us to adjust our understanding of the law, to deal with issues where no statutory or Convention guidance already exists.

If you plan your training using jurisprudential content, you will be giving your colleagues and caseworkers an invaluable tool to enable them to improve their practice continuously. Case law gives a ready-made answer to many of the burning issues we have in our current caseload. The National Courts in Europe and elsewhere, as well as international tribunals, such as the ICC, the ICTY, the ICTR and Decisions by the UN Committee Against Torture have provided further guidance over time as to how to approach issues in Refugee law and, for example, the assessment of evidence. For instance, there is now a presumption that if someone has faced serious harm in the past amounting to persecution or to torture (or inhuman or degrading treatment or punishment), s/he will have a well-founded risk of future. If a State believed that there was no future risk, the State would then have the onus of demonstrating that there is no well-founded future risk of harm. In *R.C. v. Sweden*, 41827/07, 9 March 2010<sup>8</sup>, in paragraph 56 the European Court of Human Rights (ECtHR) held that:

*“...Having regard to its finding that the applicant has discharged the burden of proving that he has already been tortured, the Court considers that the onus rests with the State to dispel any doubts about the risk of his being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeds.”*

Similar conclusions were reached under Article 16 of the UN Convention Against Torture

<sup>8</sup> The citation style followed in these Guidelines is the style used by the European Court of Human Rights (ECtHR) in Strasbourg. It is acknowledged that citation styles do differ between jurisdictions and this is the citation style we have chosen for this publication.

(UNCAT) in the case of *K.K. v. Switzerland*, CAT/C/31/D/186/2001, UN Committee Against Torture (CAT), 28 November 2003, in paragraph 6.7.: “considerable weight must be given to his allegations that he was tortured during past detention” and in the United Kingdom case of *Demirkaya v Secretary Of State For Home Department* [1999] EWCA Civ 1654 in paragraph 22, in which the UK’s Court of Appeal held that where there has been past persecution, a Court or Tribunal must identify and explain why it considers that there is a change in circumstances:

*“...if it is the opinion of the Tribunal that there has been such a significant change that the appellant is no longer at risk, it is incumbent upon them to explain why this is so. In the absence of such explanation and reasoning, it seems to me there may be a real risk [of future persecution]”*

The case law of the European Courts and the higher national Courts contains guidance and reasoning concerning the rights of prisoners, women, children, homosexuals and lesbians, health cases, and even whether the Refugee Convention’s particular social group could be extended to cover economic migration from conditions of extreme poverty (the answer to that was ‘no’). None of these matters were in the minds of the original drafters: the Refugee Convention is a flexible, living instrument which responds to society as it develops and matures.

#### Strengthen the Training Message

The decisions of European Courts and other international courts and tribunals are powerfully expressed and their reasoning may help you to convince doubters of your training message, for example, when asylum protection must be given in circumstances which seem ‘wrong’ to national caseworkers: as an example, the previously tortured individual the rest of whose evidence is contradictory and apparently lacks credibility (*R.C. v. Sweden*), or whether women are a particular social group (see *Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v.* [1999] UKHL 20; [1999] 2 AC 629; [1999] 2 All

ER 545 and *Fornah v. Secretary of State for the Home Department (linked with Secretary of State for the Home Department v. K)* [2006] UKHL 46).<sup>9</sup>

Jurisprudence tells us that case workers and national authorities may not disregard entirely documents produced only in copy form by an applicant, even some years after he left his country of origin: see *M.A. v. Switzerland*, 52589/13, 18 November 2014 at paragraph 67:

*“67. Nonetheless, neither the Federal Administrative Court nor the Swiss Government has provided any reasons why copies could not be taken into account at all in the applicant’s favour. ...the applicant was not asked to provide any information about the whereabouts of the copies by the Federal Administrative Court, because that court simply maintained that, being copies, the submissions did not have any probative value. It must furthermore be noted that during the proceedings before this Court, the applicant satisfactorily explained the manner in which he received the copies, namely by stating that he had received them by email.*

*68. The Court further notes that the applicant was deprived of additional opportunities to prove the authenticity of the second summons and the Iranian conviction before the national authorities because the Federal Administrative Court ignored the applicant’s suggestion of having the credibility of the documents further assessed. ... The applicant was hence deprived of any further method of proving that he truly was persecuted by the Iranian regime.”*

The *M.A. v. Switzerland* decision is a resounding criticism of a culture of disbelief of documentary evidence, which is all too common among caseworkers and sometimes also judges.

In November 2012, in response to a request for a preliminary ruling from the High Court of Ireland, the Court of Justice of the European Union (CJEU) stated that the right to be heard (as part of right to good administration, see article 47 of the EU Charter of Fundamental Rights) is a fundamental right in the sense that the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested (*M.M. v. Minister for Justice, Equality and Law*

<sup>9</sup> See chapter 3.1. on Particular Social Group.

*Reform and others*, C-277/11, 22 November 2012)<sup>10</sup>. The High Court in Ireland asked the CJEU questions related to the specificity of the Irish procedure<sup>11</sup> concerning whether an asylum seeker who had first been heard in the proceedings related to refugee status also had a right to be heard again in subsequent proceedings regarding whether he was entitled to subsidiary protection.

The Court stated that:

*“The right to be heard in all proceedings, which is affirmed by Articles 41, 47 and 48 of the Charter of Fundamental Rights of the European Union, must apply in all proceedings which are liable to culminate in a measure adversely affecting a person and must be observed even where the applicable legislation does not expressly provide for such a procedural requirement. Consequently, that right must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System. When a Member State has chosen to establish two separate procedures, one following upon the other, for examining asylum applications and applications for subsidiary protection, it is important that the applicant’s right to be heard, in view of its fundamental nature, be fully guaranteed in each of those two procedures.”*

(see paras 74, 82, 85, 86, 89, 91, 95, operative part)

This judgment, although it deals with the particular Irish procedure (where asylum proceedings and subsidiary protection proceedings are separate), nevertheless makes an important broader point as to fair trial, illustrating that when deciding on whether to read any judgment in depth, it is essential to look at all key words as indicators. In the *M.M* judgment key words, the very last key phrase (easy to overlook, if reading too speedily) was – right to be heard.

Another example relates to proof of sexual orientation, which has been considered by the CJEU (in *A, B and C v Staatssecretaris van Veiligheid en Justitie*, Cases C-148/13

to C-150/13, 2 December 2014), which held that prurient questioning, ‘tests’ of homosexuality or the submission of video evidence of engaging in homosexual acts, were all incompatible with Article 4 of the Qualification Directive (2011/95/EU) and with the EU Charter of Fundamental Rights. The assessment of sexual orientation was not a question of sexual practices but of the underlying orientation. The existence of such orientation could be established only by proper questioning in an interview, based on the individual history of each applicant. The judgment gives clear guidance as to how far the caseworker may go during such interviews.

### **Improve Legal Reasoning**

Case law provides examples of good legal reasoning and will give you strong, diverse support for better reasoning in your own decision-making and in that of those you train. A timely reminder of the necessity to assess all the evidence and provide proper reasons for accepting or rejecting the evidence advanced by one or other of the parties is to be found, for example, in *Salah Sheekh v. the Netherlands*, 1948/04, 11 January 2007

*“In determining whether it has been shown that the applicant runs a real risk, if expelled, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained proprio motu, in particular where the applicant... provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government.”*

### **Fill the Gaps in Law**

Article 1A of the 1951 Refugee Convention lacked any definition of ‘persecution’. The first attempt at such definition appeared at Article 9 of the 2004 Qualification Directive, over 50 years later, with the introduction of the Common European Asylum System (CEAS), but that only seeks to define what are acts of persecution within the meaning of Article 1A,

stating that the *acts must be ‘sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights’ or be ‘an accumulation of various measures (...) which is sufficiently severe’.*

For a detailed understanding of how this works in practice, we look to international and high-level national jurisprudence to understand the extent and limits of the conduct and the level thereof which will amount to persecution in each specific case. The 1951 Convention evolves over time: it is a living instrument and now protects persons whose difficulties were not contemplated by those who drafted the Convention. For example, in *X, Y and Z v. Minister voor Immigratie en Asiel v Hoog Commissariaat van de Verenigde Naties voor de Vluchtelingen*, Joined cases C-199/12 to C-201/12, 7 November 2013, paragraph 55, the CJEU held that in the case of certain conduct which is criminalised by national legislation, to imprison individuals (lawfully under national law) is a “disproportionate or discriminatory punishment and thus constitutes an act of persecution”.

### **Inspire Case Studies**

Using jurisprudence for improved training is particularly useful – it is the trainer’s ‘secret weapon’. By taking and adapting the facts of cases already decided, you have a rich factual matrix for case studies to which an ‘answer’ has already been provided in the judgment of the relevant Court: an ‘authoritative’ solution already exists. Good sources of case studies may be harvested from judgments of the Court of Justice of the European Union in Luxembourg and the European Court of Human Rights in Strasbourg but also from judgments of higher national courts, because they are applying the same asylum law as you are.

The United Kingdom’s country guidance<sup>12</sup> case law is a particularly fertile source of material for case studies, since it is very fully reasoned, identifying a particular fact set in a particular country, receiving large amounts of evidence,

and giving extensive, but also summarised, generic guidance in relation to that country and factual matrix. Each case stands alone, but builds on the Upper Tribunal’s previous country guidance where it exists. See for example:

BM and Others (returnees - criminal and non-criminal) (CG) [2015] UKUT 293 (IAC)

*A national of the Democratic Republic of Congo (“DRC”) who has acquired the status of foreign national offender in the United Kingdom is not, simply by virtue of such status, exposed to a real risk of persecution or serious harm or treatment proscribed by Article 3 ECHR in the event of enforced return to the DRC.*

*2. A national of the DRC whose attempts to acquire refugee status in the United Kingdom have been unsuccessful is not, without more, exposed to a real risk of persecution or serious harm or proscribed treatment contrary to Article 3 ECHR in the event of enforced return to DRC.*

*3. A national of the DRC who has a significant and visible profile within APARECO (UK) is, in the event of returning to his country of origin, at real risk of persecution for a Convention reason or serious harm or treatment proscribed by Article 3 ECHR by virtue of falling within one of the risk categories identified by the Upper Tribunal in MM (UDPS Members – Risk on Return) Democratic Republic of Congo CG [2007] UKAIT 00023. Those belonging to this category include persons who are, or are perceived to be, leaders, office bearers or spokespersons. As a general rule, mere rank and file members are unlikely to fall within this category. However, each case will be fact sensitive, with particular attention directed to the likely knowledge and perceptions of DRC state agents.*

*4. The DRC authorities have an interest in certain types of convicted or suspected offenders, namely those who have unexecuted prison sentences in the DRC or in respect of whom there are unexecuted arrest warrants in the DRC or who allegedly committed an offence, such as document fraud, when departing the DRC. Such persons are at real risk of imprisonment for lengthy periods and, hence, of treatment proscribed by Article 3 ECHR.*

The particular fact set is carefully examined in the decision and would easily be transposed into a case study. Decided cases – jurisprudence – will make your life easier here too!

<sup>10</sup> Below referenced M.M.

<sup>11</sup> The Irish law at the time did not have a single procedure but two separate proceedings first making findings on refugee status and if the applicant was not found to be a refugee, possibility of second procedure.

<sup>12</sup> CG in the citation shows that it is a country guidance case, SM (lone women - ostracism) CG [2016] UKUT 67 (IAC).

### Practical recommendations for case workers, decision makers and judges

- Develop your reasoning through reading, studying and applying case law
- Use key words, head notes and legal summaries to point you to the most useful cases
- Read a lot!
- Decision by the CJEU and ECtHR are of specific relevance, often containing very useful information. However, the information may not be obvious to find if only looking at the key words of the case. Therefore, do not stop at the key words but instead read the entire case!
- Read the practitioners' and academic blogs and commentary to find out what others think are the most important cases and for what reason. This is a shortcut to understanding judicial reasoning and how new cases fit into the body of developing jurisprudence. Subscribe to newsletters on case law (see Chapter 5).
- Do not just reproduce the case law but also apply it to the facts!

## 2.2. Why Does the Jurisprudence of European Courts Matter?

There is no international court that has jurisdiction on asylum law and the drafters of the United Nations 1951 Convention relating to the Status of Refugees<sup>13</sup> (hereafter the 1951 Convention) did not intend that there should be one. One reason would be that the Convention had temporal limitations, which only were changed by the 1967 Protocol. It must be noted however that not all states have ratified the 1967 Protocol concerning the geographical limitations of the 1951 Convention, which means that some states still apply the 1951 Convention only on asylum seekers from European states.

The cornerstone of the international refugee protection regime is the 1951 Convention relating to the Status of Refugees. When

applying this convention and the 1967 Protocol we look to the national law where it has been transposed. However, when we start to apply the national law we need to know how an international convention should be understood when applying it and for this it is necessary to look at international law. The standard principles of treaty interpretation are found in Article 31 of the Vienna Convention on the Law of the Treaties (VCLT):

*"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the Treaty in their context and in the light of its object and purpose".*

There is no supranational court of asylum law. One was not provided by the 1951 Convention, nor is there any UN Treaty Body specialised in asylum matters. There are, however, two regional European courts that play important roles in shaping refugee and protection law in Europe, but that can also be seen as influencing international protection law<sup>14</sup>.

Since the case of *Soering v. the United Kingdom*, 14038/88, 7 July 1989, a growing number of individuals have been successful when lodging complaints against a state that has issued a decision of forced removal. This is thanks to the developing extraterritorial interpretation of the prohibition of torture, inhuman or degrading treatment or punishment.<sup>15</sup> The ECtHR has indirectly also contributed to an evolving interpretation of important refugee law concepts such as persecution and the internal protection alternative<sup>16</sup>.

For EU member states the decision to work towards a Common European Asylum System (CEAS), decided in Tampere in 1999, has brought about many changes when creating a regional legal framework for refugee protection that is EU primary legislation. Harmonisation is a goal but in practice it

<sup>14</sup> UNHCR has published *The Case Law of the European Regional Courts: the Court of Justice of the European Union and the European Court of Human Rights- Refugees, asylum-seekers, and stateless persons*, June 2015, 1st edition, see more under training manuals.

<sup>15</sup> Gábor Gyulai, *The Luxembourg Court: Conductor for a Disharmonious Orchestra?*, HHC, 2012, p. 8

<sup>16</sup> Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights (Human Rights Files No. 9)*, Council of Europe Publishing, p. 20.)

has not been achieved. The Court of Justice of the European Union is entitled to provide mandatory guidance regarding interpretation of asylum-related provisions of EU law in responses to "references for preliminary rulings" submitted by national courts<sup>17</sup>. See for example in the Grand Chamber judgment *F.G. v Sweden*, 43611/11, 23 March 2016, in which the European Court of Human Rights held that the obligation under the Refugee Convention to prevent *refoulement* engages "principles deeply enshrined in the universal legal conscience" and, taken with the provisions in particular in Articles 2 and 3 ECHR, means that national courts, when considering human rights claims, must always be alert and deal with obvious human rights points, even if not mentioned by or relied upon by the appellant.

### 2.2.1. The Court of Justice of the European Union

The Court of Justice of the European Union (CJEU) is composed of 28 Judges and 8 Advocates General. The Judges and Advocates General are appointed by common accord by the Governments of the Member States after consultation of a panel responsible for giving an opinion on the suitability of candidates to perform the duties in question. They are appointed for a renewable term of six years from among lawyers whose independence is beyond doubt and who possess the qualifications required for appointment, in their respective countries, to the highest judicial offices, or who are of recognised competence.

The Court may sit as a full court in a Grand Chamber of 13 Judges, or in Chambers of three or five Judges. The Court sits as a full court in the particular cases prescribed by the Court's Statute (proceedings to dismiss the European Ombudsman or a Member of the European Commission who has failed to

<sup>17</sup> The highest national court must seek guidance if in doubt of how to interpret a concept in an EU directive and a lower national court may seek guidance. This change was brought about by the Lisbon Treaty entering into force 1 December 2009.

fulfil his or her obligations, etc.) and where the Court considers that a case is of exceptional importance. It sits in a Grand Chamber when a Member State or an Institution which is a party to the proceedings so requests, and in particularly complex or important cases. Other cases are heard by Chambers of three or five Judges. The Presidents of the Chambers of five Judges are elected for three years, and those of the Chambers of three Judges for one year.

To ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice to clarify the interpretation of European Union law, so that they may ascertain, for example, whether their national legislation complies with that law. A reference for a preliminary ruling may also concern the review of the validity of an act adopted by the European Union's institutions.

The jurisdiction of the Court only extends to answering a question concerning EU law, not to deciding the actual case in the main proceedings; this falls under the exclusive jurisdiction of the referring court of tribunal. In other words, the CJEU is not a supranational court that decides the actual cases.

Consequences of a judgment in which the Court of Justice gives a preliminary ruling on interpretation or validity is binding on all EU member states: CJEU "conclusively determines a question or questions of [EU] law it is binding on the national court for the purposes of the decision to be given by it in the main proceedings"<sup>18</sup>. Since it is binding on the national courts it is naturally also binding on first instance, i.e. proceedings at and decisions taken by the administration.

### Why is CJEU jurisprudence relevant for non-EU Member States?

- CJEU is the only international court with a direct

<sup>18</sup> CJEU, *Wünsche Handelsgesellschaft GmbH & Co. v. Federal Republic of Germany*, C-69785, Order of 5 March 1986, paragraph 13.

competence on asylum-related issues<sup>19</sup> (ECtHR is “indirect”, through the prohibition of torture and the possible risk on deportation stage);

- CJEU judgments are directly binding on 28 European states (EU Member states);
- It interprets the most complex international set of rules based on the 1951 Refugee Convention<sup>20</sup>.

### 2.2.2. The European Court of Human Rights<sup>21</sup>

The European Court of Human Rights (ECtHR) is an international court based in Strasbourg, France. It consists of a number of judges equal to the number of member states of the Council of Europe that have ratified the Convention for the Protection of Human Rights and Fundamental Freedoms – currently 47. The Court’s judges sit in their individual capacity and do not represent any State. In dealing with applications, the Court is assisted by a Registry consisting mainly of lawyers from all the member states (who are also known as legal secretaries). They are entirely independent of their country of origin and do not represent either applicants or States.

The Court applies the European Convention on Human Rights. Its task is to ensure that States respect the rights and guarantees set out in the Convention. It does this by examining complaints (known as “applications”) lodged by individuals or, sometimes, by States. Where it concludes that a member state has breached one or more of these rights and guarantees, the Court delivers a judgment finding a violation. Judgments are binding: the countries concerned are under an obligation to comply with them.

In the European Court of Human Rights, three types of panels are used:

- Committee – three judges
- Chamber – seven judges
- Grand Chamber – 17 Judges, for the most important cases only.

The national judge of the affected country may not hear a case from his or her country alone, and will only exceptionally be invited to sit at the Committee level, but will always be part of a Chamber or Grand Chamber panel.

After a Chamber judgment has been delivered, in limited circumstances the parties may request referral of the case to the Grand Chamber, to be heard afresh there. The application for a rehearing is considered by a panel of judges of the Grand Chamber, and is granted only in exceptional cases. The referral will not be granted to challenge an admissibility decision, where there is established case law, or to reopen factual findings. The Grand Chamber will rehear cases which affect case-law consistency; those raising new issues, a serious issue of general importance, or high profile cases; cases which may be suitable for development of its case-law or which it considers suitable for clarifying the principles set forth in the existing case-law; or those where it considers it necessary to re-examine a development in the case-law endorsed by the Chamber<sup>22</sup>.

Decisions in such cases will almost always be leading cases and you should keep up with them and use them in your training<sup>23</sup>.

Most applications before the Court are individual applications lodged by private persons alleging one or more violations of the Convention. A State may also lodge an application against another State Party to the Convention; this is called an inter-State application.

Legal representation is not indispensable at the start of proceedings; anyone can bring a case before the Court directly. The assistance of a lawyer becomes necessary, however,

once the Court has given notice of the case to the respondent Government for their observations. Legal aid may be granted to applicants, if necessary, from that stage in the proceedings.

There are two main stages in the consideration of cases brought before the Court: the admissibility stage and the merits stage (i.e. the examination of the complaints). The processing of an application also goes through different phases.

An admissibility decision is usually given by a single judge, a Committee or a Chamber of the Court. A Committee decision concerns only admissibility and not the merits of the case. Normally, a Chamber examines the admissibility and merits of an application at the same time; it will then deliver a judgment.

Judgments finding violations are binding on the States concerned and they are obliged to execute them. The Committee of Ministers of the Council of Europe monitors the execution of judgments, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained.

Over the past few years the Court has developed a new procedure to cater for the massive influx of applications concerning similar issues, also known as “systemic issues” – i.e. those that arise from non-conformity of domestic law with the Convention.

The Court has introduced a procedure that consists of examining one or more applications of this kind, whilst its examination of a series of similar cases is adjourned (in other words, postponed). When it delivers its judgment in a pilot case, it calls on the Government concerned to bring the domestic legislation into line with the Convention and indicates the general measures to be taken. It will then proceed to dispose of the other similar cases.

Normally, there is only one judgment rendered by the European Court of Human Rights, but in some cases, Judges may draft an opinion

concerning a case in which they have sat, and those opinions will be appended to the judgment. They are worth reading carefully, as the Judge will normally explain why they voted with the majority (concurring opinion) or, on the contrary, why they did not agree with the majority of judges (dissenting opinion). Where there are a number of such Opinions appended to a judgment, you may be sure that the judgment is important. Where there are several dissenting opinions, you may expect the issue to arise again in a future case and you should watch for any change in the court’s jurisprudence on the point, as it has clearly been controversial during the hearing and drafting the main judgment.

- ECtHR – positive reinforcement of rights under the European Convention.
- ECtHR jurisprudence can also influence EU law and domestic legislation – another example how jurisprudence turns into ‘hard law’. One evident example is how the recast EU Qualification Directive (and thus domestic laws in the Member States) has “transposed” the guidance of the ECtHR (in the Salah Sheekh<sup>24</sup> case) on how to interpret the concept of internal protection alternative.<sup>25</sup>

### 2.3. Why Does the Jurisprudence of National Courts Matter?

Legal traditions and legal method are vital in understanding how the law is applied in a country. Europe has two main legal systems, common law and civil law, which differ in their styles of legal interpretation, though arguably less in substance than is generally thought. The principal distinction is the applicability of precedent.

Legal method commonly refers to a set of techniques used to analyse and apply the law; and to determine the appropriate weight that should be accorded to different sources

<sup>19</sup> It follows from recital 4 in EU Qualification Directive (2011/95/EU) that “The Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees.” The Geneva Convention is the same as the Refugee/ the 1951 Convention, as the same Convention is referred to using three different names.

<sup>20</sup> If the question referred to the CJEU is not on an issue covered by an EU Directive as such but to be found only in the 1951 Convention the CJEU will say that it does not have jurisdiction.

<sup>21</sup> This introduction is taken from ECtHR website: The ECHR in 50 Questions ([http://www.echr.coe.int/Documents/50Questions\\_ENG.pdf](http://www.echr.coe.int/Documents/50Questions_ENG.pdf))

<sup>22</sup> See: [http://www.echr.coe.int/Documents/Note\\_GC\\_ENG.pdf](http://www.echr.coe.int/Documents/Note_GC_ENG.pdf)

<sup>23</sup> Pending Grand Chamber cases are publicly listed by the European Court of Human Rights at <http://www.echr.coe.int/pages/home.aspx?p=hearings/gcpending>

<sup>24</sup> Salah Sheekh v. the Netherlands, application no. 1948/04, judgment 11 January 2007, ECtHR. See further in Chapter 3.

<sup>25</sup> Chahal v UK, application 22414/93, judgment of 15 November 1996, Salah Sheekh judgment (see above), Sufi and Elmi v. UK, application no. 8319/07 & 11449/07, judgment 28 June 2011, all ECtHR.

of law. However, in the application of human rights we need to understand that the legal provisions in national legislations derive from international human rights instruments. Possible differences in the effective outcome of the application of rights may be due to the legal culture and diverging legal methods.

The importance of national jurisprudence is obvious in the common law world, which operates a system of precedent, where like cases are to be treated alike and the decisions of higher courts bind those in inferior courts. Case law is nevertheless de facto equally important in the civil law system, where judges and case workers applying the broad principles provided in statutory Codes and national Constitutions may require assistance in interpretation. Even though there is no formal system of legal precedent and generally binding judicial standards in civil law jurisdictions:

- The case law of highest judicial instances is often seen as binding or strongly orientating guidance;
- Repeated, consequent jurisprudence on specific matters does influence administrative practices (if a certain decision or argument is regularly quashed on appeal, administrative authorities usually adapt their practices to reflect the case law);
- Strong and permanent divergence in judicial interpretations is usually seen as a factor weakening legal security.
- It is important in civil law jurisdictions, as in common law, that 'like cases be treated alike' that is, that cases with the same factual matrix produce the same results, wherever a protection claim is made.

### Common Law and Civil Law Jurisdictions

The differences between common law and civil law can be illustrated by considering two countries that are both member states of the European Union, and that have historically been distinguished as having different legal traditions; common law in the UK and civil law in Sweden.

In the European Union, the aim is to achieve integration and freedom of movement for people, capital, goods and services.

Migration and asylum matters were not within the competence of EU until the late 1990s, following the Tampere Agreement in 1999 to harmonize the asylum systems in Member States, with a structure now known as the Common European Asylum System (CEAS). The Court of Justice of the European Union (hereafter the CJEU) now has competence to give rulings also on the interpretation of asylum issues within the CEAS, through a 'court to court procedure' where national courts may seek guidance on how EU directives should be applied.

The Lisbon Treaty that came into force on 1 December 2009 extended the right to refer a question to the CJEU for interpretation to first instance courts. National Courts of last instance are required to make such a referral. Interestingly, the number of references varies widely between member states, which has been a concern for the EU Commission.

#### 2.4. Why does Knowledge from non-legal Disciplines Matter?

The importance of knowledge also from non-legal disciplines in order to do high quality work in the asylum procedure is, among other things, addressed through the various written results of the CREDO project. Based for example on Chapter IV of the [CREDO Manual volume 1](#) or Chapter 3 of the [UNHCR Beyond Proof report](#) (basically: without this knowledge, erroneous decisions are made on a regular basis, because of unfounded expectations and assumptions about human behaviour, distortions because of language, culture, gender, etc.).

Decision making in asylum law differ in many ways from that of other areas of law. In criminal law a case would involve the alleged perpetrator as well as the victim who are both present in the country, there is likely to be evidence of different sorts (written, medical,

photos) and the language spoken is more often than not a language all parties involved have in common and likely to be their mother tongue. In an asylum case, the question is that of a future risk assessment of a foreigner, where the issues at stake are both if there already has been persecution and more importantly if there is a risk of persecution on return. The actors of persecution, whether past or future, are obviously not present in the asylum country so cannot 'be heard' and experience shows that there is seldom much written evidence from the individual (evidence in the form of Country of Origin information would of course usually be there). Complicating factors are that the asylum seeker speaks another language and comes from another culture. That there are differences in standard if proof is therefore logical. Burden of proof does rest on the asylum seeker initially and the duty to substantiate too, but the investigative burden becomes shared since the consequences of an incorrect negative decision to expel a person might have such grave and irreparable consequences as getting the individual to suffer torture and/or get killed. The standard of proof is whether there is a reasonable possibility of persecution on return. The starting point is if there is a real risk of serious harm and then if there is a nexus, a link, to one or more of the five Convention grounds. If no nexus is found then a real risk of serious harm would in the EU require Subsidiary protection states to be granted. The cultural and linguistic barriers, among others, have led to refugee status determination (RSD) procedure involving many other disciplines, rather than just the legal discipline, in order to inform and the decision maker in making correct findings.

UNHCR has recommended a "multidisciplinary approach" to the assessment of credibility in the asylum process<sup>26</sup>. This approach is further elaborated in chapter IV of the [Credo Training Manual](#)<sup>27</sup> (volume 1, available in Russian). Whilst the legal procedures of gathering and assessing evidence for a protection claim may be clear, these happen in a cross-cultural,

<sup>26</sup> UNHCR study *Beyond Proof – Credibility Assessment in EU Asylum Systems*, May 2013.

<sup>27</sup> *Credibility Assessment in Asylum Procedures – a Multidisciplinary Training Manual*, 2013.

interpersonal, social context and there is much that can go wrong if interviewers and decision makers are not alert to what is happening.

Most often in asylum cases, almost all of the evidence decision makers have before them comes from the applicant's account. Their account relies on their memory and, therefore, decision makers must have an understanding of how memory works in order to know what it is reasonable to expect of people.

## 3. Examples of how to Use Jurisprudence for Training Purposes

### 3.1. Example A: Particular Social Group

Using jurisprudence will....

- STRENGTHEN THE TRAINING MESSAGE
- IMPROVE LEGAL REASONING
- FILL THE GAPS IN LAW
- SHOW CONSTANT DEVELOPMENT OF THE LAW
- INSPIRE CASE STUDIES

**Art 1A (2) of the 1951 Refugee Convention<sup>28</sup>:** *'As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'*

*In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national....*

<sup>28</sup> The 1951 Refugee Convention (also cited as Geneva Convention in EU Qualification Directive), the citation is Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

## Strengthen the Training Message

The genesis of the term 'particular social group' as one of five Convention grounds of persecution in Article 1A of the Refugee Convention is unhelpfully vague. The *Travaux Préparatoires* for the draft of the Refugee Convention reveal that the term was inserted in the draft almost in passing, in response to a comment by the Swedish delegate, who considered that the four other groups identified (nationality, race, religion and political opinion), and agreed to unanimously by the other representatives, did not cover all potential groups who might be at risk. That was the last time this concept appeared either obvious or easy.

The Swedish delegate would not have had in mind the risks to albinos in Tanzania or East Africa, women in Pakistan, lesbians in India, former UN interpreters in Iraq and Afghanistan, or lesbians or gay men in Iran. The concept of particular social group has adapted as European society has become more diverse and more sensitized, and claims for asylum more diverse. Caseworkers and judges need all the assistance that you – and the international jurisprudence – can give them.

## Improve Legal Reasoning

In *Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v.* [1999] UKHL 20 (*Shah and Islam*), the UK House of Lords drew on all of the international jurisprudence from Canada and the United States, in a textbook example of how to use jurisprudence for better decision making. The startlingly wide social group posited in *Shah and Islam* was 'all women in Pakistan'. The court emphasised that the group could not be defined by the persecution suffered: persecution was the consequence, not the defining factor, and the group must exist independently of that consequence.

The House of Lords was divided as to whether that wider group was made out, and indeed as to whether the appeals should be allowed (one judge dissented). Lord Hope of Craighead was persuaded that, in Pakistan at least, women

could properly be regarded as a particular social group:

*"The unchallenged evidence in this case shows that women are discriminated against in Pakistan. I think that the nature and scale of the discrimination is such that it can properly be said the women in Pakistan are discriminated against by the society in which they live. The reason why the appellants fear persecution is not just because they are women. It is because they are women in a society which discriminates against women. In the context of that society I would regard women as a particular social group within the meaning of Article 1A(2) of the Convention."*

In the 2014 edition of *The Law of Refugee Status*<sup>29</sup>, Hathaway and Foster argue that this ground should not be artificially limited, and that the size of the group is not relevant, having regard to the breadth of the other Refugee Convention groups. It is desirable for a wide definition of the social group to be used, with the persecution more narrowly defined, to avoid the risk of defining the group by the persecution feared.<sup>30</sup>

## Fill the Gap

Particular social group, the most difficult of the five Convention grounds, has been difficult to define because the drafters of the Refugee Convention left a gap in the law: what exactly was a 'particular social group' which required protection? How should it be identified?

In *Canada v Ward* [1993] 2 SCR 689 the Canadian Supreme Court, headed by Justice La Forest, and aided by an intervention from UNHCR, considered whether a terrorist organisation, the Irish National Liberation Army (INLA), constituted a particular social group, giving its members access to protection from refoulement to the United Kingdom from Canada. The Supreme Court set out (below) what it considered to be the test for membership of a particular social group, before concluding that terrorists from the INLA did not qualify.

<sup>29</sup> *The Law of Refugee Status* James C. Hathaway, Michelle Foster, Cambridge University Press, 3 Jul 2014, Chapter 5.9.

<sup>30</sup> If a particular social group were to be defined by the type of persecution members of that group may be fearing if returned it would mean circular reasoning is used – so it cannot be the persecution feared that defines the group, it needs to be something else.

*"In distilling the contents of the head of "particular social group", account should be taken of the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. A good working rule for the meaning of "particular social group" provides that this basis of persecution consists of three categories:*

*(1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence."*

## Training

When designing training on this subject, it is worth emphasising the elements of *defence of human rights and anti-discrimination*. Participants may be asked to suggest examples in all three categories: those with an innate, unchangeable characteristic (albinos, persons with red hair or blue eyes, and so on); those whose human dignity requires them to be able voluntarily to associate (LGBTI<sup>31</sup> individuals, for example); and those associated by a former voluntary status (such as persons who have acted as interpreters, drivers etc for UN forces and may be regarded as collaborators).

Later cases have emphasised that the group need not be internally cohesive (*Shah and Islam*) and that the perceived member of a group need not even have the characteristic ascribed to him or her, if the risk is created by their being so perceived (*SW (lesbians - HJ and HT applied) Jamaica CG* [2011] UKUT 251 (IAC)).

## Show Constant Development of the Law

It has taken time for countries to come to a broad consensus that LGBTI or SOGI (Sexual Orientation and Gender Identity) based claims fit with Convention ground particular social group. LGBTI claims often do not fit into any of the other four Convention grounds and were not explicitly referred to by the drafters of the Refugee Convention, nor is there any provision for them in the EU Qualification Directive. Article 1A and the equivalent provision in the Qualification Directive are not limited to risk arising from actions, but also from perception, meaning that a person may be perceived to hold or have a certain political

<sup>31</sup> LGBTI is acronym for Lesbian, Gay, Bisexual, Transgender, Intersex

opinion, religious belief or sexual orientation, regardless of whether the individual actually does or does not.

In *Shah and Islam*, Lord Steyn approved what he described as 'an impressive judgment' by the New Zealand Refugee Status Authority in *Re G.J.* [1998] 1 N.L.R. 387, drawing on the case law and practice in Germany, The Netherlands, Sweden, Denmark, Canada, Australia and the United States, "... that depending on the evidence homosexuals are capable of constituting a particular social group with the meaning of Article 1A(2): see pp. 412-422. This view is consistent with the language and purpose of Article 1A(2)" and further that it was not necessary for a particular social group to be internally cohesive, if its members were externally perceived as a group against which the society in which it existed discriminates at the level of persecution.

Discreet behaviour might keep a person safe in a country, which persecutes members of a particular social group: however, one cannot be required to live one's life always hiding one's sexual identity. In *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* Joined cases C-199/12 to C-201/12, 7 November 2013 (*X, Y and Z*), the CJEU held that *[w]hen assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation in order to reduce the risk of persecution and make return a safe option.*<sup>32</sup>

In *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, Joined cases C 148/13 to C 150/13, 2 December 2014 (*A, B and C*), the Court of Justice in Grand Chamber considered how a person's sexual orientation should be proved, emphasising that it was not a question of what exactly the person got up to in bed with their sexual partners (and certainly not a situation where a requirement to produce videos of them doing so was either appropriate in the

<sup>32</sup> The UK Supreme Court had in 2010 made the same findings in *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31

light of their human dignity, or even probative of such orientation!). Rather, the examining country was entitled to interview applicants for asylum, when the sexual orientation allegation was made, following the procedures laid down in the Directive. A, B and C paras 70-71 below:

70 Moreover, it must be observed that the obligation laid down by Article 4(1) of Directive 2004/83 to submit all elements needed to substantiate the application for international protection 'as soon as possible' is tempered by the requirement imposed on the competent authorities, under Article 13(3)(a) of Directive 2005/85 and Article 4(3) of Directive 2004/83 to conduct the interview taking account of the personal or general circumstances surrounding the application, in particular, the vulnerability of the applicant, and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant.

71 Thus, to hold that an applicant for asylum is not credible, merely because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution, would be to fail to have regard to the requirement referred to in the previous paragraph.

The Court of Justice gave guidance about avoiding stereotyping notions of homosexuality and approaching each case individually.

Article 4(3)(c) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding, ... the statements of that applicant and the documentary and other evidence submitted in support of his application being subject to an assessment by those authorities founded on questions based only on stereotyped notions concerning homosexuals.

Article 4 of Directive 2004/83, read in the light of Article 7 of the Charter, must be interpreted as precluding, in the context of that assessment, the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum.

Article 4 of Directive 2004/83, read in the light of Article 1 of the Charter, must be interpreted as precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or, yet, the production by him of films of such acts.

Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding, in the context of that assessment, the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution.

In X, Y and Z the Court of Justice, assisted by submissions from the European Commission, the Netherlands, Germany, France, Greece and the United Kingdom, also considered the position of LGBTI and SOGI<sup>33</sup> people in countries which have criminal laws forbidding homosexuality or certain sexual practices affecting homosexuals.

The Court considered the provisions of the CEAS as set out in Articles 9 and 10 of the Qualification Directive and held that (1) where such criminal provisions exist, they are supportive of a finding that homosexuals are a particular social group; (2) criminalisation of homosexuality alone is not sufficient - there must be evidence that the laws are used to imprison [or otherwise persecute] individuals for homosexual acts; and (3) that in assessing risk on return, Courts and Tribunals may not require the person at risk to conceal their homosexuality on return, or to 'exercise reserve' in its expression. From X, Y and Z:

1. Article 10(1)(d) of Council Directive 2004/83/EC of 29 April 2004 ... must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.

2. Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.

## Inspire Case Studies

Any or all of the above cases can form a basis for effective case study. One approach which may be useful is to remember that all (potential) particular social groups should be treated in the same way. The facts of a leading case on the position of women, or on sexual orientation, can be adapted to, for example, albinism in Tanzania. This may be particularly useful where the particular social group in question is controversial in your country, or just to make the group you are training think more widely about the approach to be taken. You may then use the case on which you based the exercise to help trainees to discuss the outcomes they predicted and to compare their reasoning with that in the decided cases. It is sometimes useful to add additional facts to the factual matrix, perhaps part way through the exercise, in this way finding a simple way of conducting two case studies in a short time.

### Training:

Ideas for issues and questions that you might find useful to raise in training may be found in the text above, and we also suggest that some of the following could be interesting to discuss and use for training purposes:

(a) An interesting way of getting a lot of interaction and discussions going is to divide a group of trainees into two or three groups and give them instructions as to the positions to be taken: one group should be instructed to make a positive finding (that the person is a refugee and that the nexus to Convention ground is to particular social group); another is directed to make a negative finding (that the person is not a refugee because the requisites are not there for making a finding of membership of a particular social group; and the third (if used) is directed to find that a different Convention ground is applicable. Each group is to provide reasons for adopting the position assigned.

(b) Is there more room for finding evolution in human rights on a broad scale when assessing the Convention ground particular social group than when assessing other grounds? You can ask the trainees to give reasons for adopting either position: If yes, why? If no, why?

(c) Does the approach to assessment of one Convention ground also influence the assessment of another ground? If yes, why? If no, why?

(d) Are the four named Convention reason groups (race, religion, nationality, and political opinion) simply specific examples of particular social groups?

Particular social group thus provides a fertile ground for broadening discussion and for analysing how the Convention reasons should be approached and reasoned.

### CASE A

Ms Shafiqua who is a national of Afghanistan applies for asylum in your country. She comes from a well-known family in Kabul. She was married to her cousin at the age of 14. She did have school education after being married. She flees to your country with her family - like everybody, who could manage to escape due to the violence taking over their home country.

She then claims that that she had for years been in love with another man. She is not willing to reveal any details of her affair. Only that she had known him for a long time. She tries to divorce her husband after some time in your country by filing a divorce application with the local civil court.

If she would return she claims that she is fearing: Revenge from her family (honour killing by the hand of her brother). She fears societal repression because of being divorced. She fears punishment under Sharia law because of the extra-marital relation and claims that her children would be separated from her and that her husband's family would get sole custody.

Do you find that she is at risk of serious harm? If so, is there a link to a convention ground?

If you find that she is at risk of persecution could you argue that she may live elsewhere meaning where her family may not find her?

### CASE B

Ms. Amira applies for asylum in your country. She is a Hazara woman who never had school education. She left her country with her husband and her four children because of the poor situation in their home province Ghazni.

She comes in traditional clothing to your interview wearing the veil. At the interview, you notice that she does not answer your questions without first being in eye contact with her husband. She avoids looking at you but in some moments you have the feeling that she is trying to catch your attention.

Substantially she is telling you that she just came along together with her husband because he had “problems”. She does not know anything of those problems. When being asked how she feels in the host country, she starts smiling in a very shy and quiet way: “I can do shopping on my own, and yes, I take part in language courses. For the first time in my life, I have the chance of being a student and I am so much enjoying it!”

You ask her how come she is wearing a veil. She answers in a shy but smiling way: “I know, I should not ... but I am too old to change ... but I will try to ...and in your country I have learned here that women have rights. I also really wish for my son and also for my three daughters to have possibility to go to school like children in your country do.”

*Training: ask participants on issue of interviewing more than one person at the same time, and if the female is (able) to tell you all she may want to tell. Consider discussing if it is the veil that is a core issue here or if it may be women's possibilities of accessing education, of in society walking with/without a male presence etc.*

### 3.2. Example B: Internal Protection Alternative

Using jurisprudence will....

- STRENGTHEN THE TRAINING MESSAGE
- IMPROVE LEGAL REASONING
- FILL THE GAPS IN LAW
- SHOW CONSTANT DEVELOPMENT OF THE LAW
- INSPIRE CASE STUDIES

#### Strengthen the Training Message

The concept of internal protection alternative<sup>34</sup> is not derived directly from the wording of Article 1A of the 1951 Refugee Convention. Rather, it follows logically from the need to show that the person seeking asylum can show a Refugee Convention reason why he is unwilling to avail himself of the protection of his country of nationality or former habitual residence. International protection is available only where national protection is not sufficient, and it follows, therefore, that

<sup>34</sup> The internal protection alternative is also called internal flight or relocation alternative.

the finding must be that there is nowhere in the country of origin where the applicant could safely relocate and have sufficiency of protection and also reasonably be expected to go, see more on this below.

Art 1A of the 1951 Refugee Convention: ‘... owing to well-founded fear ... outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ..., is unable or, owing to such fear, is unwilling to return to it.’

The individual must first establish a risk in his/her home area at the level of persecution, and then the next question is if there is insufficient protection from State or non-State actors of protection<sup>35</sup> ‘elsewhere’ in the country of origin (internal protection alternative; also referred to as called internal flight/relocation) before international protection is available (can be granted). International protection is *surrogate protection* as can be understood from its very wording – protection that is necessary (meaning: freedom from infringement with human rights), but that only comes into play if national or local protection is not there.

National jurisprudence has drawn on this concept with different premises and seen the development of quite divergent practices.

In their *Global Consultations*, UNHCR found that ‘there has been no consistent approach taken to the notion of IPA/IRA/IFA by States Parties; a number of States apply a reasonableness test; others apply various criteria.’ It was considered ‘timely to take stock of the different national practices with a view of offering decision makers a more structured analysis to this aspect of refugee status determination.’<sup>36</sup>

Such a ‘structured approach’ is to be found by analysing national and international juris-

<sup>35</sup> The case law is evolving on this question, as well as on non-state actors of protection - on how and if this possibly can be construed.

<sup>36</sup> Summary Conclusions: internal protection/relocation/flight alternative, in *Feller/Türk/Nicholson* (ed.) *Refugee Protection in International Law*. UNHCR's *Global Consultations on International Protection* (2003).

prudence and by ‘filtering’ underlying common criteria, thereby identifying tracks of arguments, which are compatible with the principles governing the interpretation of international treaties [Cf Art 31 VCT<sup>37</sup>].

#### Improve Legal Reasoning

In international jurisprudence, principal ideas have developed in a series of leading cases. In particular, the ECtHR, has used Article 3 ECHR to bring into human rights law the principle of *non-refoulement* and has dwelled on various aspects of the sufficiency of ‘local’ or national protection.

In *Chahal v. the United Kingdom*, application no. 2241/93, 15 November 1996, the issue at stake was *inter alia* under which circumstances the applicant – being at risk in Punjab – would be safe elsewhere in India. In that specific case, the ECtHR found that the applicant was not safe anywhere in India. The applicant was found to be a well-known supporter of Sikh separatism (a ‘Sikh militant’). Hence, it was necessary to evaluate the risk to Sikh militants at the hands of security forces in India generally, outside his home area in the Punjab.

*‘The Court has taken note of the Government's comments relating to the material contained in the reports of Amnesty International. Nonetheless, it attaches weight to some of the most striking allegations contained in those reports, particularly with regard to extrajudicial killings allegedly perpetrated by the Punjab police outside their home State... The 1994 National Human Rights Commission's report on Punjab substantiated the impression of a police*

<sup>37</sup> “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

*force completely beyond the control of lawful authority. The Court is persuaded by this evidence, which has been corroborated by material from a number of different objective sources, that, until mid-1994 at least, elements in the Punjab police were accustomed to act without regard to the human rights of suspected Sikh militants and were fully capable of pursuing their targets into areas of India far away from Punjab. [...] Moreover, the Court finds it most significant that no concrete evidence has been produced of any fundamental reform or reorganisation of the Punjab police in recent years. [...] Although the Court is of the opinion that Mr Chahal, if returned to India, would be most at risk from the Punjab security forces acting either within or outside State boundaries, it also attaches significance to the fact that attested allegations of serious human rights violations have been levelled at the police elsewhere in India. In this respect, the Court notes that the United Nations' Special Rapporteur on torture has described the practice of torture upon those in police custody as “endemic” and has complained that inadequate measures are taken to bring those responsible to justice [...].’*

This judgment not only shows that the concept of internal protection alternative has to be applied on an individual basis (in this case, with reference to the applicant’s high political profile) but also that the risk from all possible agents of persecution must be considered: not only State agents but also non-State agents and ‘rogue’ agents of the State.

Once a persecutory risk in the home area has been found, the crucial issue is whether the State is willing and/or able to provide for protection elsewhere in that State, outside the home area.

In its judgment in the case of *Hilal v. the United Kingdom*, 45276/99, 6 June 2001, similarly, the applicant was an opposition party activist who was at risk in his home area of Zanzibar. The question was whether he was at risk of persecution or serious harm in mainland Tanzania on internal relocation from Zanzibar. Again, due to structural flaws, the Court found that the police could not be relied on as a safe-guard against arbitrary acts by non-State agents and that the applicant would be at risk of serious harm under Article 3 ECHR.

This judgement– even more than the *Chahal* judgement – highlights that in order to

show that internal protection is available, the Government of the receiving state must demonstrate that even if the original source of persecution persists in the home area, there is a safe area in the country of origin where the person can be expected to go. The Court must consider the possibility of additional dangers elsewhere in the country of origin, at the date of hearing (whether new or longstanding), particularly in any area of internal protection which is identified and relied upon by the government of the receiving state.

The issue of links to actors of protection and sufficiency of protection from the legal system of the country of origin was considered in a judicial review decision of the Irish Refugee Appeals Tribunal in *A.O. v Refugee Applications Commissioner*, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Attorney General and Ireland (Respondent) and Human Rights Commission (Notice Party) No. 2009 1194 JR: *“When relying on internal relocation a thorough assessment of all available evidence must be undertaken, including personal circumstances pertaining to the applicant.”*

And again recently, a decision of the Conseil d'État (Council of State) in France, on appeal from the Cour Nationale du Droit d'Asile (CNDA):

**Council of State, 11 February 2015, No. 374167:**

*“The Council of State annulled the decision of the CNDA, stating that before finding the existence of a reasonable possibility for the applicant to find internal protection in another region of her country of origin, the Court should have looked into which part of the Algerian territory the applicant could, in all safety, access, settle, exist and lead a normal family life without the fear of being persecuted or being exposed to the risk of serious violence from her ex-husband.”*

**Fill the Gap**

Since the concept of internal protection is not mentioned in the text of the 1951 Refugee Convention, assistance as to the criteria to be applied – substantial and procedural– must

be derived from national and international jurisprudence. The following cases show how the law has been developed by the Courts.

*Salah Sheekh v. the Netherlands*, 1984/04, 11 January 2007, concerned a young Somali man, a member of the minority Ashraf ethnic group. Within its judgment, the Strasbourg Court set out and developed the criteria to be deployed when taking internal protection into account. The Court even referred to ‘guarantees’ of safety elsewhere in the country of origin – and identified the core procedural issue: namely, who is bearing the burden of proof when it comes to applying the internal protection criteria. The *Salah Sheekh* judgment has been very influential in shaping decision making and onward development of the concept of internal protection. Later jurisprudence cases adopt and build upon the reasoning in *Salah Sheekh*.

*“In terms of internal protection, the Court noted that Article 3 does not preclude Contracting States as such from placing reliance on this concept in the assessment of an individual claim.”*

*[...] However, the Court considered as a precondition for relying on an internal flight alternative ‘certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if, in the absence of such guarantees, there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment’. [...] The Court then had to address the question of whether there would be a real risk of a violation of Article 3 if the Applicant had to go to other areas of Somalia. The Applicant’s previous treatment in Somalia can be classified as inhuman within the meaning of Article 3. The Court found that the situation had not undergone such a substantial change for the better that it could be said that the risk of the Applicant being subjected to this kind of treatment anew has been removed or that he would be able to obtain protection from the authorities. Overall, bearing in mind the fact that the Applicant was part of the Ashraf minority, the Court found that removal to Somalia would result in an Article 3 violation.”<sup>38</sup>*

<sup>38</sup> Summary of the judgment from EDAL Database [<http://www.asylumlawdatabase.eu>], visited on 1 May 2016.

The Court, thus, identified as main criteria (guarantees to be fulfilled!):

- Freedom of movement to the area of internal protection
- Gaining admittance there and being able to settle
- Overall (stable and reliable) freedom in the internal protection area from serious harm amounting to a breach of the person’s rights under Article 3 ECHR.

These findings were reiterated in *T.I. v. the United Kingdom*, 43844/98, 7 March 2000.

In *Sufi and Elmi v. the United Kingdom*, 8319/07 and 11419/07, 28 November 2011, the ECtHR again considered the concept of internal protection, setting out the criteria to be fulfilled. The Court’s conclusions were as follows:

*“In conclusion, the Court considers that the situation of general violence in Mogadishu is sufficiently intense to enable it to conclude that any returnee would be at real risk of Article 3 ill-treatment solely on account of his presence there, unless it could be demonstrated that he was sufficiently well connected to powerful actors in the city to enable him to obtain protection.”*

*Nevertheless, Article 3 does not preclude the Contracting States from placing reliance on the internal flight alternative provided that the returnee could travel to, gain admittance to and settle in the area in question without being exposed to a real risk of Article 3 ill-treatment. In this regard, the Court accepts that there may be parts of southern and central Somalia where a returnee would not necessarily be at real risk of Article 3 ill-treatment solely on account of the situation of general violence. However, in the context of Somalia, the Court considers that this could only apply if the applicant had close family connections in the area concerned, where he could effectively seek refuge. If he has no such connections, or if those connections are in an area which he could not safely reach, the Court considers that there is a likelihood that he would have to have recourse to either an IDP or refugee camp.*

*If the returnee’s family connections are in a region which is under the control of al-Shabaab, or if it could not be accessed except through an al-Shabaab controlled area, the Court does not consider that he could relocate to this region without being exposed to a risk of ill-treatment unless it could be demonstrated that he had recent experience of*

*living in Somalia and could therefore avoid coming to the attention of al-Shabaab).*

*Where it is reasonably likely that a returnee would find himself in an IDP camp, such as those in the Afgooye Corridor, or in a refugee camp, such as the Dadaab camps in Kenya, the Court considers that there would be a real risk that he would be exposed to treatment in breach of Article 3 on account of the humanitarian conditions there.”*

This judgment evaluated the effectiveness of certain non-State actors of protection in providing further aspects concerning internal protection, for example under which conditions family members living in other areas of bonds could offer sufficient protection; the same applies to the country, or question if local (non-state) agents would equate State protection, such non-State actors could provide sufficiency of protection for the appellant.

A recent decision of the Polish Board of Refugees deals with, again, the issue of burden of proof, having regard to the standard of living that the applicant would be able to achieve in the internal protection area:

*“The statement that the applicant can relocate within his country of origin is based solely on general information on Ukraine, without paying attention to his personal circumstances and conditions in the places he could be expected to settle in.”*

*In the decision, there is no reference to the applicant’s age, occupation, family situation, employment and housing opportunities, as well as his registration and the level of assistance he could benefit from if returned. The burden of proof to show that the personal circumstances of the applicant are not sufficient to counter a refusal of international protection on the basis of the internal protection alternative lies with the State authority.*

*The main question is whether the applicant can be sure that he will obtain assistance allowing for certain standards of living. The state assistance is significant here, as the applicant has no family or friends in the part of the country of origin under control of Ukrainians.”*[Decision of the Refugee Board no RdU-326-1/S/2015 from 14 August 2015].

## Training

When doing training on this subject, it is recommended to emphasize that:

States are under no duty to decline recognition of refugee status to asylum-seekers who are able to avail themselves of an 'internal protection alternative'.

*"Because refugee status is evaluated in relation to conditions in the asylum seeker's country of nationality or former habitual residence, and because no explicit provision is made for the exclusion from Convention refugee status of persons able to avail themselves of meaningful internal protection, state parties remain entitled to recognize the refugee status of persons who fear persecution in only one part of their country of origin."<sup>39</sup>*

When it comes to the assessment of internal protection – unlike in the case of the exclusion clauses under Art 1 F of the Refugee Convention – receiving States are not under an international obligation to "filter out" persons who have access to local protection. However, as part of showing that the person does not need international protection, it is for the receiving State to demonstrate and/or 'guarantee' that the person concerned has recourse to local protection, and to identify in what area of the country of origin that protection can be found, and whether it is accessible to that individual on return.

A structured approach is important: a risk of persecution or serious harm in the home area must be established before the question of internal protection can arise. If there is no risk, relocation to another area is not necessary. Assessment is needed on whether the person concerned has family in the country of origin, with whom he could live upon return. Note what the Swedish Migration Court of Appeal found on this:

*"When assessing the availability of an internal protection alternative the possibilities for the applicant to live together with his/her family in the country of origin should be taken into account. This applies even if the applicant's family are not seeking asylum in Sweden. However, first a need for international protection needs to be established."*

[Sweden - Migration Court of Appeal, 11 May 2010, UM 6397-09].

## Show Constant Development of the Law

Towards a structured approach: UNHCR has issued *Guidelines on International Protection*:

<sup>39</sup> The Michigan Guidelines on the Internal Protection Alternative at: [www.refworld.org/docid/3dca73274.html](http://www.refworld.org/docid/3dca73274.html)

*"Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1952 Convention and/or the 1967 Protocol relating to the Status of Refugees.* The Guidelines are based on State practice on the internal protection alternative:

*"UNHCR Guidelines are reflecting what is actually state practice: the guidelines are a follow up to the Handbook, and since the handbook was written on request by states in the ExCom, and is reflecting to a very large extent what is state practice (including 'good, standing state/administrative practice' as well as (higher) courts judgments".*

The UNHCR Guidelines list a range of criteria that should be met:

### I. The Relevance Analysis

*a) Is the area of relocation practically, safely, and legally accessible to the individual? If any of these conditions is not met, consideration of an alternative location within the country would not be relevant.*

*b) Is the agent of persecution the State? National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available.*

*c) Is the agent of persecution a non-State agent? Where there is a risk that the non-State actor will persecute the claimant in the proposed area, then the area will not be an internal flight or relocation alternative. This finding will depend on a determination of whether the persecutor is likely to pursue the claimant to the area and whether State protection from the harm feared is available there.*

*d) Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation? This would include the original or any new form of persecution or other serious harm in the area of relocation.*

### II. The Reasonableness Analysis

*a) Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there."<sup>40</sup>*

<sup>40</sup> UNHCR Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, pp 5-6.

## Training

Raise awareness that there is:

- A two-step analysis to be made in each case
- No risk of the original persecution, no risk of any new harm AND
- The reasonableness test is met (making sure that the claimant can lead a **relatively normal life** without facing undue hardship, including personal circumstances, past persecution, safety and security, respect for human rights and economic survival).

To discuss: What is "relatively normal"? What is the meaning of **undue hardship**? Should that be measured by the standards of the country of origin or by an "international" standard?

The legislation of the EU builds on State practice and on the UNHCR Guidelines:

*Article 8 of the EU Qualification Directive 2011/95/EU, therefore, allows to make a finding that the person is not in need of international protection if he or she:*

- has no well-founded fear of being persecuted or is not at real risk of suffering serious harm
- OR: he or she has access to protection by competent agents as defined by Art 7 of QD
- AND: if he or she can safely and legally travel to and gain admittance to that part of the country
- AND: can reasonably be expected to settle there.

It is important that assessment of all relevant facts can only be made relying on and using current and updated documentation as stated by a recent Polish judgement:

*"The risk of persecutions should be assessed only on the basis of the current state of affairs or a prognosis of the situation in the foreseeable future, based on documented facts and not on general hypothesis regarding potential changes with no probability assessment."<sup>41</sup>*

<sup>41</sup> Judgement of the Voivodeship Administrative Court in Warsaw from 1 October 2015 no IV SA/Wa 685/15 annulling the decision of the Refugee Board on refusing refugee status, subsidiary protection and tolerated stay permit.

As regards the "reasonableness test", guidance again can be found in jurisprudence:

*"The asylum authority considered Kabul as an alternative for internal protection, which was rejected by the Court since the Applicant had no family ties and employment in Kabul, which is getting overpopulated and residents are threatened by terrorist attacks."<sup>42</sup>*

## Training

It is the last criterion set out by the Qualification Directive that involves a whole range of questions concerning basic human rights: e.g. on possible access to housing; to possible income etc.

According to the rules set out by the Qualification Directive, the personal circumstances of the applicant have to be taken into account (e.g.: specific vulnerability but also a possible family network providing help). How could you assess this in practice?

Also take into account who the relevant actors of protection could be: the State, but also non-State entities or private agents, like clans, family members? Does this equate to State protection?

### Inspire Case Studies

**In a training session you could therefore raise a range of open questions and topics:**

How to make sure that decision makers do not use internal protection alternative as a "short cut" to refuse claims without thoroughly examining an individual's situation?

Identify any "agents of protection", whether State agents or non-State agents, and the sufficiency of the protection they can offer [see Art 7 QD]

Identify the "agents of persecution", whether State agents or non-State agents, whom the applicant fears. What specific questions arise where the persecutor is a non-State agent, e.g. in cases of gender-related claims (domestic violence; claims based on sexual orientation – see the previous section)?

**In a training situation you could prepare case studies that include some of the following issues:**

- Is it, for example, just sufficient to be free from persecution in the designated area or should

<sup>42</sup> Hungary - Administrative and Labour Court of Budapest, 28 June 2013, R.Y (Afghanistan) v Office of Immigration and Nationality (OIN), 17.K.31893/2013/3-IV

there be required more than that? And what? And to which extent?

- Is it sufficient to have – theoretically – a place where to go to or is it also required that traveling there is secure? How to establish “road security”?
- Is it required that basic human rights / humanitarian standards are met – access to housing, the availability of basic medical treatment, education for the applicant’s children, security for oneself/family members?
- Who has the burden of proof that there is an internal protection alternative?
- Who could be regarded as “agents of protection”? Only the State or also non-State entities? And under which pre-conditions?
- Are there particular issues to be taken into consideration if persecution stems from a non-State agent?
- How does the particular situation of the person concerned (“vulnerability”) come into play?

#### CASE 1

A woman comes to your country together with her husband and five-year-old daughter and seeks asylum. Their country of origin has 30 million inhabitants of which ten million live in two large cities. They claim that the daughter is at risk of being forcibly put to undergo female genital mutilation (FGM) which the parents are opposed to. Both parents have university degrees and the mother comes from a family where FGM is not practiced. She has not undergone FGM herself. In their country the law penalizes the practice of FGM but due to it being old customs it still happens to tens of thousands of girls per year, predominantly rural areas in the north of the country which is where the family lives. The girl’s paternal grandmother thinks it is necessary to do it otherwise the child will be ungovernable and unmarriageable. The parents state that they cannot watch over their daughter all the time and are afraid that she might be forced to undergo FGM under influence of grandmother and that even if there is a law against it the authorities are weak. The parents are unwilling to return and live elsewhere in their country of origin although they now live and work in a city in your country.

Does the girl qualify for refugee status? Or for subsidiary protection? And if so, could she and her family be expected to seek an internal protection alternative in their country of origin?

#### CASE 2

An Afghan national aged 17 years applies for asylum in your country. He is of Hazara origin and comes from the central (mountainous) province of the country. His parents sent him abroad because of militia (Taliban) were trying to recruit young men to fight for them against the central government. The Taliban are very active in the provinces bordering on his province and five young men from his village of 30 families have been forcibly recruited. The applicant who is illiterate has never been outside his home province before and has now lost contact with his family.

Do you think he qualifies for refugee status? Or for subsidiary protection? And if so, could he be expected to seek an internal protection alternative in his country of origin?

#### CASE 3

Same facts as above, except that the Afghan national is a 25 year old man in good health. A possible deportation flight will land in Kabul (nearest airport) which is some eight hours drive on badly kept roads that are on occasion not safe due to Taliban stopping cars.

#### CASE 4

A woman aged 30 years who is a national of Afghanistan applies for asylum in your country. She comes from a well-known family in Kabul. She was married to her cousin at the age of 14. She did have school education after being married. She flees to your country with her family - like everybody, who could manage to escape due to the violence taking over their home country. She then claims that that she had for years been in love with another man. She is not willing to reveal any details of her affair only that she had known him for a long time. She tries to divorce her husband after some time in your country by filing a divorce application with the local civil court but the divorce does not go through.

If she would return she claims that she fears: Revenge from her family (honour killing by the hand of her brother). She fears societal repression because of being separated from her husband. She fears punishment under Sharia law because of the extra-marital relation and claims that her children would be taken from her and that her husband’s family would get sole custody.

Upon return, do you find that she would be at risk of serious harm? If so, is there a link to a convention ground?

If you find that she would risk serious harm (either recognising her as a refugee or finding subsidiary protection grounds) how would you think regarding a possible internal flight alternative?

#### CASE 5

A boy aged 17 years old is a national of India and applies for asylum in your country. He identifies himself as a

homosexual male. He is from Jodhpur in Rajasthan, he fled his home city on grounds that he fears for his life after being outed by a family friend; he was disowned by his family and had received death threats if he were to return by one of his cousins. His father is the Home Minister of the City Police in Jodhpur and is very well known and respected in society. His whole family is based in Jodhpur and he has lived his entire life in the city. Homosexuality is illegal in India, but prosecutions for consensual sexual acts between males are relatively rare in Jodhpur.

If he were to be returned the applicant claims that he would face a real risk of being killed by family members due to the disgrace he has brought onto the family. He claims that his father’s network extends far beyond Jodhpur; that he is well known to many of the Home Ministers in other regions and even if he were to live a discrete life he would eventually be identified as the Home Minister’s son.

Do you think he qualifies for refugee status? Or for subsidiary protection? If so could he be expected to seek an internal protection alternative in his country of origin? What are the procedural aspects that should be taken into account in this case?

### 3.3. Example C: Credibility Assessment as part of Evidence Assessment

Using jurisprudence will....

- STRENGTHEN THE TRAINING MESSAGE
- IMPROVE LEGAL REASONING
- FILL THE GAPS IN LAW
- SHOW CONSTANT DEVELOPMENT OF THE LAW
- INSPIRE CASE STUDIES

#### Strengthen the Training Message

Credibility assessment is part of evidence assessment. In the 1951 Refugee Convention there is no specific reference to making findings on credibility, other than understanding that a person does not ‘have a well-founded fear of being persecuted’ unless this fear is indeed well-founded, i.e. a (sufficiently) credible story of a present *ex nunc* risk of being persecuted.

On a regional level, we find that in the recast

EU Asylum Procedures Directive it is stipulated that the ‘assessment of an application for international protection is carried out on an individual basis’ and that applications must be examined and decisions taken objectively and impartially. It is for the asylum seeker to substantiate the claim for international protection as soon as possible. So initially the burden of proof is on the asylum seeker. However, this may change in a case where the asylum seeker has been able to show that he was previously tortured. The jurisprudence on this issue shows us that the burden of dispelling any doubts of a risk of such treatment recurring, if he is expelled to the country of origin, shifts to the receiving State.

The training message can be strengthened by using jurisprudence to show the developments in cases of possible past persecution and/or torture:

On initial burden of proof, the Court in Strasbourg in *R.C. v. Sweden*, 41287/07, 9 March 2010, in paragraph 50 found that “when information is presented [by the respondent State] 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”.

However it continues in paragraph 52 to find that “the applicant’s basic story was consistent throughout the proceedings and that notwithstanding some uncertain aspects, such as his account as to how he escaped from prison, such uncertainties do not undermine the overall credibility of his story”.

#### Improve Legal Reasoning

The standard of proof is one of the most difficult issues when assessing an asylum claim and it is therefore important to always have this in mind when coming across issues of credibility and how much these impact the overall claim for asylum. There is no supranational Court on asylum but in assessing possible international protection needs there are regional Courts that deliver judgments that are binding - the CJEU on EU member states and the ECtHR

de facto on all 47 states that form part of the Council of Europe (as previously stated asylum claims are not part of ECtHR jurisdiction, but an individual claim from a rejected asylum seeker, facing forced deportation may trigger a finding of risk of violation of ECHR and thus showing the extraterritorial scope of non-derogable rights and especially the absolute character of article 3 ECHR).

The ECtHR has several times made findings on this, and emphasizes the essential point, that Article 3 of the European Convention on Human Rights (ECHR) absolutely prohibits expulsion to face a risk of torture or inhuman or degrading treatment or punishment, and that the receiving State's international protection obligations will prevent removal in such circumstances, irrespective of the authors of the risk, the context of the risk or the conduct of the applicant – see *N. v. Finland*, 38885/02, 26 July 2005, at paragraphs 166-167:

166. As the protection which is therefore to be afforded to the applicant under Article 3 is absolute the above finding is not invalidated either by the nature of his work in the DSP or by his minor offences in Finland.

167. In these circumstances, and having assessed all the material before it the Court concludes that sufficient evidence has been adduced to establish substantial grounds for believing that the applicant would be exposed to a real risk of treatment contrary to Article 3, if expelled to the DRC at this moment in time. Accordingly, the enforcement of the order issued to that effect would violate that provision for as long as the risk persists.

The ECtHR held in *Nachova and Others v. Bulgaria*, 43477/98 and 43579/98, 26 February 2004, at paragraph 147, that “the distribution of the burden of proof is intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.” In *N. v. Sweden*, 23505/09, 20 July 2010, paragraph 53 the Court held 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 their credibility”.

In a recent case that is not in relation to an asylum claim but on expulsion related to threats to national security, the ECtHR held that placing the burden of proof excessively on the applicant hinders a thorough examination of the merits of the claim in *M. and Others v. Bulgaria*, 414116/08, 26 October 2011, paragraph 127. This was also previously held in relation to the Convention refugee asylum claim, in *M.S.S. v. Belgium and Greece*, 30696/09, 21 January 2011, paragraph 389.

In *R.C. v. Sweden* (see above) the ECtHR makes a strong finding on how the burden of proof can shift on issues of past torture:

“Having regard to its finding that the applicant has discharged the burden of proving that he has already been tortured, the Court considers that the onus rests with the State to dispel any doubts about the risk of his being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeds.”

### Fill the Gaps in Law

‘Credibility assessment is where we all go wrong’, say some lawyers and NGOs that are active as legal counsel for asylum seekers. Likewise, when cases are overturned by a Court on appeal it is not seldom that the judges have made different findings regarding credibility issues in the case, this time in favour of the asylum seeker - or at least found the claim to be sufficiently consistent and credible as to warrant international protection as in *N. v. Finland*. This is corroborated in the study undertaken as part of the CREDO project<sup>43</sup> – in a research study done by UNHCR called *Beyond Proof*.<sup>44</sup>

Among the UNHCR's observations from this research, variations in the three Member States under review were apparent in practically all aspects of the credibility assessment. These discrepancies could be indicative of wider variations and challenging issues across the EU

43 The CREDO project - Towards Improved Asylum Decision-Making in the EU was launched in 2011 by the Hungarian Helsinki Committee in partnership with UNHCR, the International Association of Refugee Law Judges and Asylum Aid (UK).

44 <http://www.refworld.org/docid/519b1fb54.html>

Member States. UNHCR acknowledges the margin of discretion which is afforded to decision-makers in the assessment of evidence. However, the assessment of credibility must not be a lottery between EU Member States or within the states' national asylum systems. Credibility assessment cannot be reliant on an individual decision-maker's subjective approach, assumptions, impressions and intuition. For this reason, more consistent, transparent and principled approaches are needed, based on law and good practice, in relation to credibility assessment in asylum procedures in Europe.<sup>45</sup>

The *United Nations Committee Against Torture (UNCAT)* is the body that monitors implementation of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties.<sup>46</sup> The Convention against torture (CAT) prohibits the same ill treatment as is prohibited in the European Convention (ECHR) and it is therefore also useful to study the reasoning in UNCAT decisions. The Articles prohibiting torture are numbered the same in both Conventions and are sometimes referred to as the ‘common Article 3’ (Article 3 in CAT and ECHR respectively).

UNCAT comprises 10 experts who serve in their personal capacity and are nominated and elected as persons of high moral character and with recognized competence in the field of human rights.<sup>47</sup> A majority are from non-legal professions. UNCAT can thus draw upon multi-disciplinary expertise in several fields of knowledge concerning human rights.

Training should include not just decisions from Courts, but also UNCAT decisions: the multi-disciplinary membership of UNCAT supports the focus in these Guidelines on also using knowledge from non-legal disciplines.<sup>48</sup>

### Show Constant Development of the Law

Credibility assessment is part of evidence assessment. In the 1951 Refugee Convention there is no specific reference to making findings

45 *Beyond Proof*, p. 251

46 <http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx>

47 <http://www.ohchr.org/EN/HRBodies/CAT/Pages/Membership.aspx>

48 See section below called ‘Inspire Case Studies’ where real cases from UNCAT have complemented by psychological expertise.

on credibility other than understanding that a person does not ‘have a well-founded fear of being persecuted’, unless this fear is indeed well-founded, which means that the applicant has given a credible account of a risk of being persecuted or suffering serious harm if returned now to the country of origin. On a regional level, the recast EU Asylum Procedures Directive stipulates that the ‘assessment of an application for international protection is carried out on an individual basis’ and also that applications must be examined, and decisions made, objectively and impartially.

In *M.M. v Ireland* (see above) at paragraph 65, the Court of Justice held that “it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application”. The Court finds at paragraph 66 that “A Member State may also be better placed than an applicant to gain access to certain types of documents”.

Further the Court finds that the right to be heard stipulated in Article 41 (2) of the EU Charter represents a fundamental principle of EU law, the right to defence, requiring the authorities in the receiving State to examine ‘carefully and impartially all the relevant aspects of the individual case’. Classic asylum law is that the burden of proof to substantiate the claim for asylum rests on the asylum seeker alone, but under European Union law there is a shared duty to cooperate, as stated by the Court of Justice in *M.M.*

It is not the asylum seeker as a person who has to be credible, but the asylum story - the relevant and most crucial parts of it - that needs to be found sufficiently credible.

### Inspire Case Studies

Any or all of the above cases can form a basis for effective case study. One approach which may be useful is to draw on your national cases and apply the jurisprudence on them for making case studies that are then not fictive but indeed reflect real cases.

Here are some real cases from UNCAT where we are citing the operative parts of the decisions. Each case is complemented by additional psychological information, considered useful for both decision making and training purposes (i.e. when drafting case studies or group exercises). Such psychological knowledge should be seen as equally important as is country of origin information when assessing an asylum case (see also Chapter 4).

Case 1: *Tala v. Sweden*, CAT/C/17/D/43/1996, UN Committee Against Torture (CAT), 15 November 1996

(Political [oppositional] activist – alleged past torture – future risk of persecution and torture upon return – medical evidence from Centre for Torture and Trauma Survivors).

Issues raised: Can the applicant be expected to give the full story of his claim the day he arrives in the receiving country? To which extent are internal inconsistencies/contradictions of relevance for the credibility of the claim (credibility of the applicant) – especially inconsistency between the earlier and the later?

Main reasoning of the Committee:

*“The State Party has pointed to contradictions and inconsistencies in the author’s story, but the Committee considers that complete accuracy is seldom to be expected by victims of torture and that the inconsistencies as exist in the author’s presentation of the facts do not raise doubts about the general veracity of his claims, especially since it has been demonstrated that the author suffers from Post-Traumatic Stress Disorder (PTSD).”*

### Psychological considerations:

The comment of the Committee that *“complete accuracy is seldom to be expected by victims of torture”* raises the question of whether complete accuracy is to be expected from anyone. This would be an interesting area to discuss in training, drawing on chapter V, Memory and Credibility Assessment, of the Credo Training Manual vol. 1.

See case 2 for further comments on inconsistencies in memories of traumatic events. Memory consistency in someone with PTSD is complicated – but possibly explained

when we have an understanding of one theory of the difference between normal (autobiographical) memories and traumatic memories.

Case 2: *Kisoki v. Sweden*, CAT/C/16/D/41/1996, UN Committee Against Torture (CAT), 8 May 1996

9.1. The issue before the Committee is whether the forced return of the author to Zaire would violate the obligation of Sweden under Article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.2. Pursuant to Article 3, paragraph 1, the Committee must decide whether there are substantial grounds for believing that Ms. Kisoki would be in danger of being subject to torture upon return to Zaire. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to Article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; specific grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

9.3. In the instant case, the Committee considers that the author’s political affiliation and activities, her history of detention and torture, should be taken into account when determining whether she would be in danger of being subjected to torture upon her return. The State party has pointed to contradictions and inconsistencies in the author’s story, but the Committee considers that complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author’s presentation of the facts are not material and do not raise doubts about the general veracity of the author’s claims.

### Psychological considerations:

Further to the reconstructive nature of general memory, dealt with in Case 1<sup>49</sup>, there is an experimental psychology study, which illustrates what happens to memories of traumatic events, giving rise to inconsistencies. A study of refugees in the UK demonstrates (in line with very many studies in the general population) that the central details of a traumatic event are better remembered than peripheral details, so that when applicants are interviewed (or give written accounts) on different occasions, those peripheral details are more likely to change. Only the applicant can say what is central and what is peripheral. The full report of the study<sup>50</sup> is available at <http://csel.org.uk/resources/herlihy-scragg-turner-2002-bmj>, and this is the paper that decision makers should cite. For training purposes, there is a longer explanation of the study<sup>51</sup> at <http://csel.org.uk/resources/should-discrepant-accounts-given-by-asylum-seekers-be-taken-as-proof-of-deceit>.

You should also note that, when the participants for this study were divided by whether they had higher or lower levels of PTSD symptoms, it was the ones with highest levels of symptoms, plus a longer delay between interviews, who were the most inconsistent in their accounts. Discussion in the training context of the implications of this for decision-making procedures could be useful to help decision makers to be aware of some of the dangers of relying solely on inconsistencies in memory.

Case 3. *V.L. v. Switzerland*, CAT/C/37/D/262/2005, UN Committee Against Torture (CAT), 22 January 2007

*“The State party has argued that the complainant is not credible because the allegations of sexual abuse and the medical report supporting these allegations were submitted late in the domestic proceedings. The Committee finds, to the contrary, that the complainant’s allegations are credible. The complainant’s explanation of the delay in mentioning*

49 See Chapter V, Credo training manual Vol.1

50 Herlihy, J., Scragg P, and Turner S. (2002). Discrepancies in autobiographical memories-implications for the assessment of asylum seekers: repeated interviews study. *British Medical Journal* 2002 Feb 9; 324 324-7

51 Herlihy, J. & Turner, S.W. (2006). Should discrepant accounts given by asylum seekers be taken as proof of deceit? *Torture* Vol. 16(2) pp. 81-92

*the rapes to the national authorities is totally reasonable. It is well-known that the loss of privacy and prospect of humiliation based on revelation alone of the acts concerned may cause both women and men to withhold the fact that they have been subject to rape and/or other forms of sexual abuse until it appears absolutely necessary. Particularly for women, there is the additional fear of shaming and rejection by their partner or family members. Here the complainant’s allegation that her husband reacted to the complainant’s admission of rape by humiliating her and forbidding her to mention it in their asylum proceedings adds credibility to her claim. The Committee notes that as soon as her husband left her, the complainant who was then freed from his influence immediately mentioned the rapes to the national authorities in her request for revision of 11 October 2004. Further evidence of her Psychological state or Psychological “obstacles,” as called for by the State party, is unnecessary. The State party’s assertion that the complainant should have raised and substantiated the issue of sexual abuse earlier in the revision proceedings is insufficient basis upon which to find that her allegations of sexual abuse lack credibility, particularly in view of the fact that she was not represented in the proceedings.”*

*The Committee notes that the State party has at no time challenged the authenticity of the medical and Psychological reports on the author’s case. In the Committee’s view, those reports lend considerable weight to his allegation that he was tortured during the interrogations he underwent in a military camp. According to the medical report, Mr. Falcon Ríos bore numerous scars from cigarette burns on various parts of his body, and scars from knife wounds to both legs. The conclusion of the reporting physician was that “the marks on the patient’s body are compatible with the torture that he states he suffered”.*

### Psychological considerations:

Two key psychology papers help to understand the finding that people generally have difficulty disclosing rape and other forms of sexual violence.

Firstly Bögner et al., 2007<sup>52</sup> interviewed 27 claimants about their substantive immigration interview in the UK. Half of the group had established histories of torture with no sexual component and half of the group had experienced sexual violence as part of their torture. Comparing the two, those with a history of sexual violence were significantly more likely to report high levels of shame, post-traumatic stress disorder symptoms,

52 Bögner, D., Herlihy, J. and Brewin, C. (2007). The impact of sexual violence on disclosure during Home Office interviews. *British Journal of Psychiatry* 191 pp.75-81

particular avoidance symptoms and dissociation. The sexual violence group also reported, finding it significantly more difficult to disclose their experiences in the immigration interview, compared to the tortured-without sexual violence group.

The second key paper, Bögner et al., 2009<sup>53</sup>, is a report of qualitative interviews of the same 27 people. This paper is useful for training as it includes many examples given by the participants. It also gives further references to papers on the difficulties of disclosing personal experiences in legal settings.

Encourage trainees to keep an eye on <http://csel.org.uk/resources/topic-disclosure> for any new research on disclosure in the asylum process.

Case 4. *Falcon Ríos v. Canada*, CAT/C/33/D/133/1999, UN Committee Against Torture (CAT), 17 December 2004

*“The Committee notes the State party’s point that the Refugee Protection Division concluded that the complainant’s testimony contained significant gaps. However, it also notes that, according to the psychologist’s report, the complainant displayed “great Psychological vulnerability” as a result of the torture to which he had allegedly been subjected. The same report states that Mr. Falcon Ríos was “very destabilized by the current situation, which presents concurrent difficulties”, and that he was “bruised, weakened by the torture he had undergone and events associated with trauma”. In the Committee’s view, the vagueness referred to by the State party can be seen as a result of the Psychological vulnerability of the complainant mentioned in the report; moreover, the vagueness is not so significant as to lead to the conclusion that the complainant lacks credibility.”*

### Psychological considerations:

An important psychological concept in the understanding of this case is “Overgeneral memory”, which is explained and demonstrated in Graham et al., 2014<sup>54</sup>, available at <http://csel.org.uk/resources/graham-herlihy-brewin-2014-jbtep>. Essentially, when we are dep-

53 Bögner, D., Brewin, C. & Herlihy, J. (2010). Refugees’ Experiences of Home Office Interviews: A Qualitative Study on the Disclosure of Sensitive Personal Information. *Journal of Ethnic and Migration Studies* 36(3) pp.519-535

54 Graham, B., Herlihy, J. & Brewin, Chris R. (2014). Overgeneral memory in asylum seekers and refugees. *Journal of Behavior Therapy and Experimental Psychiatry* 45 375-380

ressed, we are more likely to have difficulties remembering specific details about events in the past. This has also been shown with post-traumatic stress disorder (PTSD), and this paper shows how it applies to asylum seekers with posttraumatic disorder symptoms.

You may have cases where the asylum seeker may suffer from PTSD, and then you need to take into consideration the impact of PTSD symptoms, noting that someone might be experiencing a number of these, particularly following torture, whether or not they have been formally diagnosed.

## 4. Examples of how to use Knowledge from non-legal Disciplines for Improved Training

### 4.1. The CREDO Methodology – A Multidisciplinary Approach to Credibility Assessment

#### Why is multidisciplinary learning of key importance?

- Proper decision making in asylum procedures may require the expertise of a psychologist, anthropologist, linguist etc. While asylum professionals cannot be trained in all relevant disciplines, these gaps can be filled to some extent through multidisciplinary training tailored to this specific situation.
- Such multidisciplinary training enhances all areas of learning, including knowledge, skills and attitude – compared to typically knowledge-focused standard training programmes.
- The CREDO methodology provides for a multidisciplinary learning approach that raises the awareness of decision makers regarding various potential distortion factors, highlights possible credibility indicators and equips them with tools to ensure an improved assessment on credibility issues.

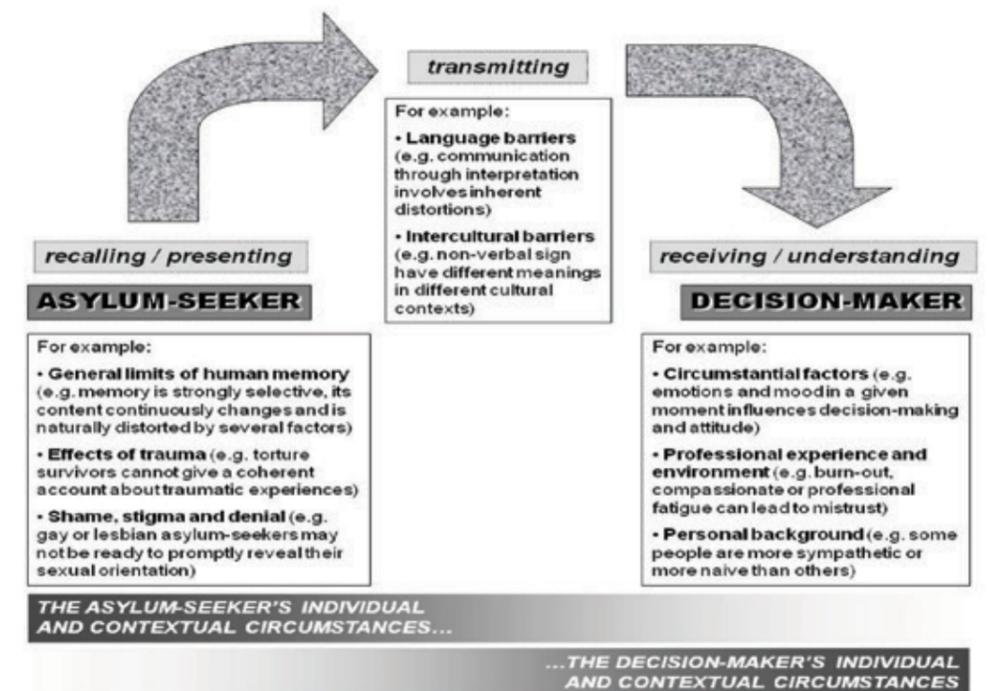
→ The CREDO Manual<sup>55</sup> provides the basic, indispensable information in an easily understandable form and can be applied both for self-study and for trainers to prepare their own training programmes/sessions. It can also serve as a basic starting point for identifying more in-depth material.

The credibility of asylum applicants often proves decisive on whether international protection is eventually being granted or not. UNHCR defined credibility in refugee cases as follows: “Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.”<sup>56</sup> Assessing the credibility of the applicants asylum story remains among the greatest challenges for decision makers.

Asylum seekers can rarely provide for a wide range of (written) evidence and verifying the authenticity of this evidence may represent

another important challenge. In spite of the increasing availability of up-to-date Country of Origin Information (COI), which helps assessing cases of asylum seekers from distant places and contexts, the importance but also complexity of the personal interview cannot be emphasised enough:

*“[T]he information presented by the applicant (which serves as basis for credibility assessment) has to be recalled and presented; transmitted; as well as received and understood by the decision-maker. Recalling and presenting may be seriously distorted by the inherent limits and characteristics of human memory, the impact of trauma, shame or other difficulties. Transmission is often distorted by linguistic and cultural barriers. Receiving and understanding may be distorted by the circumstantial, professional and personal characteristics of the decision-maker. Any of these distorting interferences can result in a subjective, biased or legally wrong credibility finding.”<sup>57</sup>*



Graph: The asylum seeker’s and the decision maker’s individual and contextual circumstances<sup>58</sup>

55 The CREDO manual is the first initiative of its kind, thereby representing a starting point and ‘work in progress’ to be further improved and complemented in the future. Nonetheless, its two volumes offer a number of useful exercises and questions for reflection. As the manual builds upon other existing training material, its content can also be easily adapted to the concrete training needs. The manual can thus be used for self-study and face-to-face training. Please also see chapter 5.

56 UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, Para. 11

57 CREDO training manual, p. 60

58 CREDO training manual, p. 58

Decision makers should be equipped with knowledge and skills to make a holistic structured approach on credibility, allowing for more objectivity and reducing the number of potentially wrong decisions. They need to be fully aware of the risk of being subjective or biased in their assessment on credibility. The individual and contextual circumstances of both the applicant and the decision-maker play a vital role in this regard:

*„Trauma, shame, stigma or denial seriously limits this ability [to recall and present information relevant for credibility assessment], but a number of other individual elements (age, gender, education, profession, religion, etc.) have a significant impact on this process as well. The decision-maker's circumstances, experiences and mind set influence the manner in which she/he receives and evaluates the information provided by the applicant. The cultural and linguistic barriers between the asylum-seeker and the decision-maker may significantly distort key information in the process of transmission. (...) This means that credibility assessment (and asylum decision-making) is far more than a legal question. Without proper consideration and use of scientific achievements from other fields, there is a risk that the process and its results will become flawed.“*<sup>59</sup>

While these distortion factors may seem discouraging, multidisciplinary learning can significantly reduce the potential for errors and allow for the set credibility indicators and related guiding principles to be properly applied. The UNHCR also emphasises the need for a multidisciplinary approach:

*“To take into account the applicant's individual and contextual circumstances, the decision-maker needs to cross geographical, cultural, socio-economic, gender, educational, and religious barriers, as well as take account of different individual experiences, temperaments and attitudes. These factors and circumstances span many disciplinary fields, including neurobiology, psychology, gender and cultural studies, anthropology, and sociology. Consequently, it is necessary that the whole credibility assessment is*

*duly informed by the substantial body of relevant empirical evidence that exists in these fields.“*<sup>60</sup>

Multidisciplinary learning touches upon specific issues such as language and interpretation, gender, sexual orientation etc. It targets three different domains, namely knowledge (cognitive abilities), skills (psycho-motor abilities) and attitude (affective abilities).<sup>61</sup> Moreover, intercultural competence is key to managing an effective communication with asylum applicants from different cultural, ethnic or social background. Becoming familiar with the concepts of culture, multiculturalism, interculturality and ethnocentrism can be very useful in this respect.<sup>62</sup>

As highlighted earlier, jurisprudence indicates how to apply the law – but the same goes for multidisciplinary contextual knowledge as well. Just reading the law on making credibility or evidence assessment will not enable decision makers to apply it properly - unless they also take into consideration what is known about the functioning of human memory, the limits of interpretation, the psychology of decision-making, the impact of gender on behaviour etc. Trying to apply the law without considering the real-life context – especially in such a complex area of law as asylum procedures – might lead to incorrect legal conclusions that can have a serious and detrimental impact on the individual. It may potentially be leading to a breach of the country's international obligations not upholding the principle of *non-refoulement*.

## 4.2. The Functioning and the Limits of Human Memory

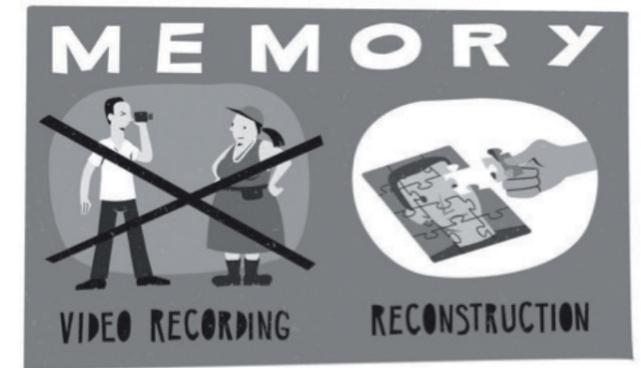
Once the decision makers have collected all available evidence, they have to decide on what they accept as the facts of the case. In asylum cases almost all of the evidence decision makers have before them comes from the applicant's account. This account, however,

relies on their memory. In order to understand what is possible or reasonable to expect of people in this regard, decision makers must have at least an outline understanding of how memory works.

We have found that the best way to deliver multi-disciplinary training is by a decision-maker or lawyer and a psychologist (or other specialist) co-presenting the material. This way the expertise is brought in from an in-depth understanding of the non-legal discipline, whilst it is kept relevant and focused on decision making by the legal, administrative or judicial co-presenter. This approach applies equally, of course, to other disciplines such as psychology, gender studies, social anthropology or any other non-legal discipline deemed necessary for high quality training. If it is not possible to engage a co-presenter, the trainer can draw on the Credo Training Manual (volumes 1 & 2). For example Chapter V of volume 1 concerns Memory.

This part of the training can start by firstly encouraging people to draw on examples of memory in their own lives. We all have memories – and we can easily understand in this way. However, to go beyond a simple *'ah yes memory is difficult'* response, it is important to structure the learning into learning the different types of memory and the different mechanisms of memory that are relevant to protection decisions, so that the learning can be integrated into a structured methodology of credibility assessment (as recommended by UNCHR in their report “Beyond Proof”). The following training notes give an example of how you might start a session teaching about aspects of memory relevant to asylum decision makers.

Start your session on memory with the following slide, and stress that we now understand that memory is not a fixed recording of an event, but is always a reconstruction, in the present moment.



Show the following slide, showing how Autobiographical Memory is formed from combining sensory memories of particular episodes (e.g. the tastes and smells of a dinner) and the facts (e.g. Berlin is the capital of Germany) to make an Autobiographical Memory of “eating dinner in the capital of Germany”. Try to think of your own examples that you can explain comfortably. Summarise that Autobiographical Memory is a bringing together (reconstructing in the present moment) of episodic, sensory memories, with semantic, factual memory. Stress that it is reconstructed in the present moment, according to the needs of the conversation (draw trainees' attention to the picture at the bottom of the slide).



**Remind trainees of the relevance:**  
Autobiographical Memory is the type of memory relied on for evidence in asylum claims.

Having established what Autobiographical Memory is, have trainees discuss in pairs, or small groups the following question: Why do we, as human beings, have autobiographical memory? Why have we evolved such ability? What is it for? Give them at least 5 minutes to consider this and come up with some ideas.

59 CREDO training manual, p. 57

60 UNHCR, Beyond Proof, p. 56

61 CREDO training manual, p. 60-61

62 CREDO training manual, p. 105.

Then you could present the following slide to explain the functions of autobiographical memory:

**Why do we remember?**

- Memory for events in our lives
  1. Self function – who am I?
  2. Directive function – what shall I do?
  3. Communicative function – sharing
- So memory has to be...
  - Selective
  - Updateable
  - Adaptable to social context

The following text is taken from *Just Tell Us What Happened To You*. We recommend you refer to the paper for a fuller explanation of these points.

*“Autobiographical memory serves three broad functions. First, it is important in developing, maintaining and nurturing social bonds. Therefore, the purpose of autobiographical remembering for the asylum process is quite distinct in function from the social retrieval of autobiographical remembering in everyday life. Second, autobiographical memory has a directive role as the past is used to guide present thought, feeling and behaviour. Pillemer (1998, 2003) suggests autobiographical memory episodes play strong directive roles in people’s lives in several different ways such as anchors for personal values, as originating events for chosen life directions and turning points that redirect one’s life path. Previous events are thus, updated or reinterpreted in the light of new information and recalling events in order to understand what caused them. Given this, it seems likely that in the case of asylum seekers, autobiographical memories will be regularly updated and refined as the meanings and causes for past events are considered. Third, autobiographical memory assists in the definition and expression of self and in the experience of personhood. Autobiographical memory is important for who I am now, if and how I have changed, and how I have stayed the same over time, that is, to maintain a biographical identity. Therefore, autobiographical memories are especially valuable when the individual faces adverse conditions that challenge the self (such as trauma, torture, persecution, re-locating, etc.). Memories can be modified and refined to maintain and protect the self. In the asylum process, it is essential to understand how these functions of autobiographical remembering may be interacting, how memories may*

*have been (and will continue to be) regularly updated and refined, and how this may influence how people present their claims, rather than to expect an exact, consistent account.”<sup>63</sup>*

Try and think of examples for these three different functions, to illustrate your presentation of these points.

The Credo training manual has many engaging and relevant examples of research showing the different ways in which autobiographical and other types of memory used in asylum claims will change. You could use these to create slides to explain them, or use the exercises in the manual, which help trainees to experience some of the points (an ideal form of learning!).

It is also important – especially in the asylum context – to be aware of how the construction of memories differs across cultures. Use the paper *Just Tell Us What Happened to you* and the Credo training manual for sections on memory and culture.

The following text, explaining the model, is taken from *“What do we know so far about Emotion and Refugee Law”* (see references in boxed text).

*In addition to autobiographical memories of adverse experiences, there may also be traumatic memories. When recounting a normal event, we are able voluntarily to retrieve a verbal narrative, with a beginning, middle and end, and a sense of being in the past. This narrative is updateable, should new information become available.*

*However, traumatic memory has some quite different attributes. This is a sensory ‘snapshot’ of the traumatic moment – perhaps just the sound of screams, the image of a face, or a feeling of pain; it is without narrative structure and, crucially, does not have a sense of being in the past but is ‘re-experienced’, as if it were happening in the present. These memories are not available for updating. They are not voluntary, as normal memories, but triggered, by external or internal cues (such as the sight of someone in uniform, a pain, or a feeling of guilt).*

<sup>63</sup> Herlihy, J., Jobson, L. and Turner, S. (2012). *Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum*. Applied Cognitive Psychology 26.

Make the point here that when an interviewer asks an asylum claimant for details of their experiences, they cannot be sure whether they are evoking a normal autobiographical memory, or a ‘traumatic memory’.

For training purposes, please see chapter 3 where case law is cited and then comments are made on the reasoning but from a non-legal perspective, drawing from science and research in psychology.

#### Sources:

See the website of the Centre for the Study of Emotion and Law – [www.csel.org.uk](http://www.csel.org.uk) – where you can find short summaries and download original research papers relating memory and other psychological processes to the asylum process. All of the following papers are available on the website.

On psychology and the asylum process:

*What do we know so far about Emotion and Refugee Law?*<sup>64</sup>

A paper written for lawyer readers, showing different aspects of psychological research which can be applied to the asylum process for higher quality decision-making.

On Memory:

*Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum*<sup>65</sup> – a review of the research literature on autobiographical memory, applying it to the asylum process. The paper is written for non-specialists and also includes a section on the Psychological literature on deception.

*Refugee status determinations and the limits of memory*<sup>66</sup> – a paper written by a lawyer relating many studies of memory (especially semantic memory) to credibility assessment.

How to use and cite academic papers: There is a brief guide to using academic papers in your decision making at <http://csel.org.uk/resources/using-academic-research>

On disclosing traumatic experiences:

The impact of sexual violence on disclosure during Home Office interviews<sup>67</sup>

<sup>64</sup> Herlihy, J. & Turner, S. (2013). What do we know so far about emotion and refugee law? Northern Ireland Legal Quarterly, 64(1), 47–62

<sup>65</sup> Herlihy, J., Jobson, L. and Turner, S. (2012). *Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum*. Applied Cognitive Psychology 26: 661–676

<sup>66</sup> Cameron, H. E. (2010). Refugee status determinations and the limits of memory. International Journal of Refugee Law, 22(4), 469–511

<sup>67</sup> Bögner, D., Herlihy, J. and Brewin, C. (2007). The impact of sexual violence

and the report of the qualitative findings of the same study,

*Refugees’ Experiences of Home Office Interviews: A Qualitative Study on the Disclosure of Sensitive Personal Information.*<sup>68</sup>

## 5. Training Tips

### 5.1. How do adults learn?

The art of being an effective trainer involves understanding of how adults learn best. Contrary to children, adults learn by adding new knowledge to already existing knowledge. This means that adults sometimes must change their views and behaviour. Learning is a “change of state” from the “present state” where we are comfortable with our thoughts, feelings and behaviour to a desired state with new thoughts, feelings etc. This change of state is not always a positive one for the trainee. Therefore, this is our first challenge as a trainer. We must be aware of how adults learn and be prepared to meet the different types of reactions that can occur. The best way to meet the reactions is to show in practice that you as a trainer are able and willing to use this knowledge in action. You can do that by for example acknowledging the reactions, explaining that this is a normal reaction, changing their views into positive ones and motivating them.

#### Learning domains – the KSA model

A traditional and commonly used classification distinguishes three learning domains in general, namely knowledge, skills and attitude (the KSA-model).<sup>69</sup> The following table summarises the main characteristics of these three types of learning (or the three elements

on disclosure during Home Office interviews. British Journal of Psychiatry 191 pp.75-81

<sup>68</sup> Bögner, D., Brewin, C. & Herlihy, J. (2010). Refugees’ Experiences of Home Office Interviews: A Qualitative Study on the Disclosure of Sensitive Personal Information. Journal of Ethnic and Migration Studies 36(3) pp.519-535

<sup>69</sup> This model is based on the work of Benjamin Bloom (an American educational psychologist) in the 1950s. Even if a number of different models have been elaborated in recent decades (many of them on the basis of KSA), KSA has been selected for the purposes of this manual for its simplicity and wide acceptance.

of any competence), using as examples some of the key knowledge, skills and attitudes you as a trainer will generally need in order to effectively carry out your job:

<b>LEARNING KNOWLEDGE</b>	Cognitive abilities - "I know"	Remembering, structuring, understanding, evaluating information and data; awareness	<ul style="list-style-type: none"> <li>• Be an expert or be well-prepared on your topic (law, jurisprudence, multidisciplinary framework, etc.);</li> <li>• Know how adults learn;</li> <li>• Know the expectations of the group;</li> <li>• Know various training methods, etc.</li> </ul>
<b>SKILLS</b>	Psycho-motor abilities - "I know how to do it"	Expertise or practiced ability in the manual manipulation of things or verbal actions	<ul style="list-style-type: none"> <li>• Know how to use a computer, the internet, a projector, etc.;</li> <li>• Have a readable hand-writing on a white-board or a flip-chart;</li> <li>• Be able to speak loudly, clearly and self-confidently;</li> <li>• Manage time and communication flows properly;</li> <li>• Be able to deal with intercultural barriers in practice, etc.</li> </ul>
<b>ATTITUDE</b>	Affective abilities - "I know why to do it"	Learned capacity to act consistently in a given situation; psychological, mind-set	<ul style="list-style-type: none"> <li>• Preserve your motivation and be aware of your mission as a trainer;</li> <li>• Have an engaging style and be able to motivate your public;</li> <li>• Be credible and self-confident as an expert and/or trainer;</li> <li>• Give the impression of an interesting person with a good sense of humour, etc.</li> </ul>

As you can see, all these abilities are indispensable. You can be the greatest expert of your topic and know all the jurisprudence by heart, but you will never be a successful trainer if you are not able to speak clearly, use a computer or have the courage to stand and speak in front of several people. Also, you may be the most motivated and engaging trainer, your training may fail if you are not sufficiently prepared on the topic, or if you always significantly run out of time.

The same applies to any learning process. Formal education and professional training in the field of asylum (or law in general) often concentrates on knowledge, while skills and attitude-development do not always receive the attention they deserve. To be a successful trainer, you are recommended to equally concentrate on each of the three domains, when designing a training programme. Here is a non-exhaustive list of teaching objectives related to the three areas of learning at a workshop focusing – as an example – on the gender-related aspects of asylum:

<b>KNOWLEDGE</b>	<ul style="list-style-type: none"> <li>• Understand the concept of gender and gender equality, as well as the difference between sex and gender;</li> <li>• Know the obligations under EU law, domestic law, as well as international recommendations/soft law that should shape relevant policies and practice;</li> <li>• Know the relevant international and domestic jurisprudence;</li> <li>• Know what is gender-based persecution and what the relevant specific considerations are;</li> <li>• Know how gender may shape memory, language, demeanour, etc.</li> </ul>
<b>SKILLS</b>	<ul style="list-style-type: none"> <li>• Learn to recognise the gender element and learn to use the concept of gender in practical cases;</li> <li>• Learn to use gender-neutral and/or gender-sensitive terminology when necessary;</li> <li>• Learn to conduct an asylum interview and work with an interpreter in a gender-sensitive manner; etc.</li> </ul>
<b>ATTITUDE</b>	<ul style="list-style-type: none"> <li>• Get to know your own assumptions and stereotypes related to gender and learn to minimise their eventual negative impact on your work;</li> <li>• Understand the importance of this issue and the key role gender-related abilities have in being an asylum professional; etc.</li> </ul>

The learning domain does not always determine the style of teaching. Transmitting knowledge can happen in any form, from lectures through case studies, home assignments, games and role play. Developing skills usually require practical exercises, while attitude-development often happens through creative activities that involve human stories or links with trainees' own life, for instance. Nevertheless, there is always a great variety of applicable methods.

The timing of a training activity can also determine its particular KSA focus. For example, doing a practical case study *after* the knowledge-focused session will primarily contribute to skills development – participants learn how to apply what they have learned to a "real" case, in practice. Doing a similar exercise *before* transmitting the knowledge basis will have its main impact on attitude: it will increase participants' interest in the topic and

their motivation to learn, and it will confront them with their own relevant experiences (or the lack thereof) in a potentially challenging manner.

It is always useful to specify different KSA learning targets before a training session.

### **Learning styles – multiple intelligences**

As adult learners have different learning styles, it is of great importance to assess these prior to initiating any educational session. The way you choose to train your colleagues has a significant impact on the outcome of the training and possibly on their views on the gained knowledge.

Different individuals prefer different ways to learn. One way to look at this is to presume that trainees favour different senses, which is why different training methods should be

employed, including visual tools, the use of concrete examples or interactive sessions, allowing the trainees to explain themselves either orally or in written. Some prefer to learn by doing a test, an experiment, a role-play or a demonstration, by holding an interview, study visit etc. Use variations!

Probably the best way to understand these differences and the diversity of learning methods is using the theory of multiple intelligences. This theory – developed in 1983 by Dr. Howard Gardner, professor of

education at Harvard University – suggests that “intelligence” is far more than what is traditionally measured by IQ testing. Instead, Professor Gardner proposed seven<sup>70</sup> different types of intelligence to describe a broader range of human potential in children and adults. We are all “stronger” on certain types of intelligence, and “weaker” on others. Jobs or tasks also differ as to the specific types of intelligence they require. All types of intelligence correspond to learning methods that are preferred by and work better in those “strong” on the particular type of intelligence.

Traditional education models, as well as IQ testing, mainly concentrate on linguistic and logical-mathematical intelligence, while other forms have long been treated as secondary in formal education. Also, experience shows that teaching methods related to linguistic intelligence usually dominate training courses and seminars for those working in the field asylum, or even law in general (meaning that teaching is mainly based on words, textual information, slides and frontal lecturing).

Keep in mind that regardless of the composition of the group of trainees, all groups are mixed as to which types of intelligence participants are “stronger” on, and – consequently – which learning methods work effectively for them. This means that when designing a training programme and selecting methods it is always recommended to aim for a variety of diverse methods, corresponding thus to all potential learning preferences in the room. For example, when designing a workshop, seminar or course, it can be useful to have at least one of each of the following methods:

TYPE OF INTELLIGENCE	USUALLY STRONG IN...	TYPICAL PROFESSIONS	PREFERRED LEARNING METHODS
<b>Linguistic intelligence</b> (“word smart”)	auditory skills, explaining and understanding ideas using language, story-telling, poetry, writing instructions, etc.	journalist, lawyer, teacher, translator, editor, poet	reading, listening, giving a presentation, pleading (e.g. moot court), reporting back to plenary after group work, etc.
<b>Logical-mathematical intelligence</b> (“number smart”)	analysing problems, detecting patterns and trends, calculations, detecting link between cause and effect, structuring information, abstraction, etc.	engineer, banker, accountant, statistician, scientist, information technology	experiments, logic games, puzzles, using computer or other electronic devices, drawing up mind-maps or logical schemes, etc.
<b>Spatial intelligence</b> (“picture smart”)	creating and using visual images, pictorial imagination, linking images with feelings, orientation in space and using maps, etc.	sailor, photographer, graphic or interior designer, architect, cartographer	drawing, using pictures and charts, designing structural models, arrange objects in space, using multimedia and mind-maps, etc.
<b>Bodily-kinaesthetic intelligence</b> (“body smart”)	eye and body coordination, using demeanour to express feelings, manual skills, sports, dance, etc.	athlete, dancer, sign-language interpreter, nurse, surgeon	touching, modelling, role play, using equipment and objects, constructing, moving while studying, etc.
<b>Musical intelligence</b> (“music smart”)	music and rhythm, linking sounds with feelings, recognising audio patterns, using foreign languages, etc.	musician, composer, acoustic engineer, interpreter, DJ	listening, using audio tools and multimedia, using music to enhance the learning process, etc.
<b>Interpersonal intelligence</b> (“people smart”)	relating to others, interpreting communication and behaviour, understanding interpersonal relations and group dynamics, leading groups, convincing others, etc.	public relations, advertising, human resources, mediator, trainer, politician, psychologist	learning through interaction, group activities, games, interactive case studies, role play, etc.
<b>Intrapersonal intelligence</b> (“self smart”)	self-knowledge, self-assessment, understanding one’s role and limits, spirituality, creativity, ability to change, etc.	artist, scientist, actor, philosopher, novelist, poet	independent learning, self-study, individual assignments or research

<sup>70</sup> Note that since the creation of this model additional types of intelligence have been added to the original list, but for the sake of simplicity here we stick to the original list of seven.

METHOD	...WHICH WILL WORK WELL FOR THOSE “STRONG” ON
Pictures or photos to demonstrate key ideas	Spatial intelligence
Short video film to introduce a problematic or to present a case study	Spatial, linguistic and musical intelligence
creating and using visual images, pictorial imagination, linking images with feelings, orientation in space and using maps, etc.	drawing, using pictures and charts, designing structural models, arrange objects in space, using multimedia and mind-maps, etc.
Solving a case study or filling in a quiz alone	Intrapersonal intelligence
Solving a case study or filling in a quiz in group	Interpersonal intelligence
Exercise (can be both for ice-breaking or for “content”) where participants have to get up from their seats and move around the room (for example to express their opinion by standing up or sitting or by moving closer to one or another corner of the room)	Bodily-kinaesthetic intelligence
Drawing a mind-map or structuring information in a visual scheme	Logical-mathematical and spatial intelligence
A group has to put elements of a key definition or conclusion (written on separate papers) in order on a longer table or line of chairs, with each participant receiving one piece of paper	Spatial, linguistic, interpersonal and bodily-kinaesthetic intelligence
Use noise or music during a case study (e.g. to increase tension or to demonstrate a certain mood or situation)	Musical intelligence
Ask participants to relate their own life experiences to the topic discussed (e.g. have you ever lived a cultural shock while travelling abroad?)	Intrapersonal intelligence
Use statistics, charts and/or maps to demonstrate a phenomenon and ask participants to identify the relevant patterns	Logical-mathematical and musical intelligence

Thus you can make sure that each participant will find activities that fit her/his personally preferred learning methods.

There are a large number of useful resources on multiple intelligences freely available on the internet in various languages.

## 5.2. Before and after the training sessions

### Expectations

Even if the group you are going to train is quite homogeneous, the individual expectations may differ substantially. That is why it is so important how the preliminary information about the course/training is provided and how any complementary material is written. Both will have an impact on the trainees' expectations. From the trainer's point of view, it is crucial that these expectations are realistic and in line with what you can offer. If you very carefully planned the introduction to the course and the trainees already from the beginning feel that this will be interesting, this will increase their motivation. Giving practical examples of the relevance the knowledge could have from the trainee's point of view can be very helpful in this respect.

It is always useful to obtain some general knowledge of the educational background and work experience of participants before the training starts. This can be obtained easily by asking explicit information from the organisers, and/or by using dedicated ice-breaking exercises (e.g. asking participants to stand up, or to move one corner of the room, if they are lawyers by training, if they have more than 10 years of experience, if they speak Spanish, if they have already met a refugee, etc.). This will help you understand what you can expect from the group and what knowledge and skills you can find among your trainees that you can build upon during the sessions.

### A safe and pleasant learning climate

The personal qualities of a trainer are of course crucial in creating a safe learning climate. This requires respect and empathy towards the trainee and reassurance that all questions are important and serious. Moreover, it is helpful to stimulate communication and encourage contact between the trainees. Peer-to-peer discussions may generate new thoughts and

ensure that the gained knowledge applies to the daily work. Any teacher who can make a learner believe that he/she is capable of learning a skill/knowledge has already met an important goal of the teaching/learning experience.

Keeping in mind how important first impressions are for future relationships, we recommend the use of games or "ice-breakers". Make sure all participants can somehow show who they are, what they know and what they want to learn. Keep trainees active by first setting some ideas and concepts that are familiar to them, thus allowing to build upon their personal experiences. Moreover, using examples that relate to their lives or work (rather than abstract ones) may convince trainees of the necessity of a particular learning activity. People learn by "doing". Get feedback and act upon it quickly.

Make sure that everyone feels free to intervene and tell their opinion. This may be particularly challenging...

- ⇒ among participants who are used to conservative, frontal teaching methods and are afraid to expose their opinion publicly;
- ⇒ in a group where a strong hierarchical order exists;
- ⇒ in a very diverse group, where professionals with conflicting views or roles equally participate (which can otherwise be a very enriching experience!);
- ⇒ in a multilingual context, where interpreters' services are used, or where participants can well understand the language of the training, but do not necessarily speak it perfectly.

Make sure you address these challenges properly. Participants' feeling of safety can be enhanced for example by:

- ⇒ explicitly ensuring them about their freedom to talk and their "non-accountability" for what they say behind the doors of the training room;

- ⇒ specifically preparing the interpreters before the training;
- ⇒ using group work in smaller groups rather than plenary discussions;
- ⇒ asking the group to formally adopt a few rules in the beginning of the training (e.g. "I will respect others' views", etc.);
- ⇒ using role play and ask participants to change their usual role (e.g. the decision-maker should play the asylum-seeker, the NGO lawyer should play the judge, etc.), etc.

A pleasant learning environment also requires time. Make sure you leave enough time for discussions, group work, ice-breaking and don't put too much on your plate. Be aware of cultural differences: discussions and debates tend to be – on an average – longer and more heated in some contexts than in others.

Enough time means also enough time for breaks. People need to eat, have enough water, coffee, tea, etc., use the bathroom, smoke, etc. to be able to concentrate during the sessions, and they also need this time to socialise, which is an equally important element of all training activities.

### At the end...

...of the training you might help your participants to reflect on the following:

- ⇒ How do you plan to apply the new knowledge?
- ⇒ Which of the gained knowledge can you directly apply in practice and in which way?
- ⇒ What problems do you expect in using the new knowledge?
- ⇒ Will you be able to transmit any part of what you have just learned to your colleagues?

Discussing these questions will help participants remain motivated and understand how useful the training was. It will also help you get prepared for follow-up or other future training activities.

This has been just a small appetizer of the endless list of practical and methodological advices that trainers can benefit from. Instead of extending the list further on (which would fall beyond the scope of this publication), let's see one particularly challenging issue, where wide-spread standard practices are far from what educational science would suggest as effective methods: visual support.

## 5.3. Visual support for training

Most trainers prefer to have some sort of "visual support" for their training. Looking at the multiple intelligences model it is easy to understand why. Traditional teaching methods have been for centuries dominated by oral communication (lectures), which only stimulates one or two types of intelligence. Using today's technological achievements it is usually easy to complete this main channel of transmitting information with visual support. A computer and a projector are nowadays part of the standard equipment of most training facilities and handling them does not require any specific skill. Hence, the apparently unbreakable popularity of PowerPoint and textual slides.

### The "tyranny" of textual PowerPoint slides

The vast majority of university educators, trainers and conference speakers use PowerPoint and textual slides all over the world. Projecting textual slides during presentations and lectures have become a sort of indispensable element of professionalism. Experience shows that trainers and lecturers seldom "dare" to use alternatives or to leave out slides totally. At the same time, the utility of using standard textual slides is – as a minimum – questionable, for a number of reasons:

- ⇒ With a lot of textual information projected on slides the attention of trainees must be constantly divided between two sources of information. If the content provided by the two sources (the trainer's

speech and the slides) is different – which is somewhat inevitable – most participants will not be able to properly follow both channels of information in parallel, which inevitably leads to frustration and a feeling of losing important details.

- ⇒ Purely textual slides stimulate exactly the same type of intelligence as the trainer’s talk, namely linguistic intelligence. This means that this method does not have a significant added value from the multiple intelligences point of view and does not really diversify the channels through which information is transmitted.
- ⇒ Presenting all information on textual slides provides trainees with the content in a standardised form, “saving” them from the effort of immediately digesting, filtering and summarising the information in their own way, with their own words. This may decrease participants’ personal involvement in the learning process, meaning less room for critical thinking and creativity, as well as a lower level of emotional engagement. All these factors are reported in research as contributing to effective learning, and are particularly crucial for developing skills and attitude (beyond pure knowledge transfer).
- ⇒ With older projectors, using textual slides requires a darker training room (often excluding natural light coming from outside). This contributes a lower activation level and performance, and can be particularly dangerous following the lunch break. Also, you as a trainer may remain “in the shadows” and participants may face difficulties in seeing you.

But why do then most trainers and teachers use textual slides? First, because “this is what everybody does”. It is true that it requires some creativity and courage to do something unusual as a trainer, but at the same time – based on the author’s long-standing experience – it is always highly appreciated. Second, because it is often thought that

any alternative would be much more time-consuming to prepare. This is not true – finding a few good pictures, selecting some keywords, writing up a hand-out document or check-list, or using Prezi does not require more time than typing in several textual slides. Finally, textual slides often seem inevitable when there is no standard written resource material (a training handbook, academic literature, etc.) that would provide trainees or students with the necessary complex background information, where they can look for additional details and clarify unclear points. While this is obviously an important consideration, it still does not make textual slides indispensable. With the same energy and time invested, you can write up a few-page textual summary (a check-list, a “key issues & debates” document, etc.) that can be distributed to participants before, during or after the session (depending on the preferred pedagogical impact), and still use your projector for something else.

Practice shows that not only textual PowerPoint slides are unreasonably overused, but often they are used incorrectly as to their form and content. Here are five “golden rules” – based on what psychology and educational science knows about learning today – to overcome this situation. It is important for all trainers to find their own style: some of you may feel comfortable to introduce an element of humour in your teaching (something that can significantly enhance learning, if used properly), while others may consider this alien from their personality and skills. Some of you may be strong on finding useful visual illustrations, others may be better in drawing up charts. In any case, the following five rules will help you use slides (and other forms of visual support) to enhance the effectiveness of your teaching.

**First rule: slides should only be used when really necessary**

Believe or not, slides are not indispensable! Interesting and effective training sessions can be held by using alternative modes of visual support. Alternatives include:

- ⇒ Hand-out documents: Check-lists, one-pagers, tables and charts can be useful to have at hand during the sessions, and even more useful to take home after the training. Such hand-outs can be particularly valuable for case studies, jurisprudence citations, written testimonies longer than a few sentences and content summaries at the end of each module or session. All this is easier

to read from a paper than from a screen. Distributing check-lists and/or one-page summaries (here is an example from the CREDO project) can be especially effective, as participants can keep them handy (e.g. stick them on the wall in their office, etc.) and regularly consult them in their daily work – which they would hardly do with slides or longer, textual documents.

 <b>CREDIBILITY ASSESSMENT IN ASYLUM CASES BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY</b>		
<i>CHECKLIST</i>		
<b>FUNDAMENTAL PRINCIPLES</b>	BEING LESBIAN, GAY, BISEXUAL, TRANS OR INTERSEX IS...	NOT A DISEASE
		NOT A CHOICE
		NOT A LIFESTYLE
		CURRENT IDENTITY
		A HUMAN RIGHT
<b>PRACTICES PROHIBITED UNDER EU LAW</b>	NO ASSESSMENT BASED ON STEREOTYPES	
	NO QUESTIONING ON SEXUAL PRACTICES	
	NO ADMISSION OF EVIDENCE SHOWING SEXUAL ACTIVITIES	
	NO “TESTS” (MEDICAL, PSYCHIATRIC, PSYCHOLOGICAL, TEMPLATE)	
	NO REJECTION OF CREDIBILITY JUST BECAUSE OF LATE DISCLOSURE	
<b>STANDARDS FOR PROPER CREDIBILITY ASSESSMENT</b>	THE <b>DSSH MODEL</b> – HELPS YOU EXPLORE THE APPLICANT’S PAINFUL “JOURNEY”	DIFFERENCE
		STIGMA
		SHAME
		HARM
	CREATE A <b>SAFE SPACE</b>	TRUST, SECURITY, CONFIDENTIALITY
		TIME
		AWARENESS OF THE POSSIBILITY OF PROTECTION
	FIND THE <b>RIGHT WORDS</b>	INTERCULTURAL COMPETENCE
		CHOOSING THE RIGHT INTERPRETER
	FOCUS ON <b>MATERIAL FACTS</b>	THE DSSH MODEL CAN SHOW YOU WHICH ELEMENTS ARE MATERIAL
		AWARE OF ALL LIMITATIONS AND DIFFICULTIES TYPICAL FOR GENDER-RELATED CASES
	USE CREDIBILITY INDICATORS WITH GREAT <b>CAUTION</b>	AWARE OF THE IMPACT OF STIGMA AND SHAME ON THE ABILITY TO TALK
AWARE OF THE DIFFICULTY OF SELF-IDENTIFICATION IN CERTAIN CASES		
AWARE OF THE LIMITS OF COUNTRY INFORMATION		
BE AWARE OF AND WORK ON YOUR OWN <b>STEREOTYPES AND LIMITS</b>		

- ⇒ Flipchart, white/black/green board: These traditional methods may seem out of fashion, but they can be useful for a number of different training activities. Their great advantage is that they are not static – text written on a board or flipchart can easily reflect new ideas coming up in the discussion, as well as it strengthens participants' feeling of being actively involved in the learning process, rather than just passively watching and listening. Flipcharts can be easily combined with post-its used for interactive exercises (e.g. for grouping or classifying ideas coming from participants) and already used papers can be stuck to the wall to keep them visible for participants during the rest of the session. Smartboards (already available in some training facilities) offer of course numerous additional possibilities. The main risks of these methods are linked to visibility: not all trainers are able to write in a way that is readable from the last row, while colour markers are notorious for not functioning properly when they are most needed (make sure you try them before the training). Be aware of the time needed to write on a board or a flipchart.
- ⇒ Alternative programmes: A number of freely available alternatives to PowerPoint exist and allow trainers to colour up their sessions with visual information, using the same technical devices they would use for textual PowerPoint slides. A particularly popular alternative is Prezi, the main advantage of which is that it allows for more dynamic, non-linear structuring of visual information. By simply browsing the internet for "alternatives to PowerPoint" you will find various useful hints.
- ⇒ Short films, audio-visual materials: Personal testimonies, short reports or interviews, excerpts from documentaries, etc. can be extremely powerful, as they stimulate a number of different types of

intelligence (spatial, linguistic, musical, etc.) at the same time, and they can be emotionally much more engaging than most other forms information-transfer. Nowadays an infinite variety of short films and animations are freely available on the internet in various languages, while several international organisations, NGOs, research centres and media actors specifically produce educational materials on various issues related to asylum or migration. Watching and discussing a short film can be an effective alternative to lecturing. It also allows the trainer to have a short rest, which is especially important during longer training courses. It is always recommended to have off-line versions of audio-visual materials, as internet connection, even if available in the training facility, may be failing or slow any time. Carefully checking sound systems before the training is also a must in these cases.

- ⇒ Also, don't be afraid of not using any visual support, if appropriate. Certain types of activities – such as ice-breakers, warm-up sessions, feed-back sessions, interactive exercises, brain-storming, introductory discussions, etc. – do not necessarily require slides or any alternative thereof. The great (and often forgotten) advantage is that you will have the full attention of participants.

Despite the gradually more frequent use of alternatives, PowerPoint slides are still popular and can be useful in a number of settings. It is nonetheless important to respect the...

### **Second rule: slides are for trainees, not for trainers**

When preparing your presentation, always keep in mind that slides are not your visual support, but the illustration of your training aimed at enhancing participants' attention and the effectiveness of the knowledge-transfer. You may glance at the lap top or computer screen to see where you stand in your presentation and what trainees see, but

don't read from slides, unless – exceptionally – you explicitly quote text from there (e.g. a short citation from a judgment). Continuously looking at your screen makes you lose the eye contact with your public and gives the impression that you are not sufficiently prepared on the content. Even worse is reading from the slide projected on the wall or white board, as it inevitably involves turning your back to your audience. If you need textual notes for your presentations, you are advised to print or write them on paper, for example.

### **Third rule: slides should be focused and limited**

Slides are there to strengthen your message, not to provide a full transcription of what you say. If you want to provide more information in writing, use hand-outs (see previous point). Remember, that you are the protagonist of the learning process, and you should be in the centre of visual attention, not the screen. If you put everything on the screen, your added value as a trainer will be limited ("why should I pay attention to the trainer if I can read everything?").

Slides should reflect the essential of what you want to say, for example:

- ⇒ The topic you are talking about (thus the slide helps trainees know where we are in the training programme);
- ⇒ The main content points, meaning a few (maximum four) keywords or very short statements;
- ⇒ The question or dilemma you want to discuss with the group; or
- ⇒ A visual, statistical, geographic, etc. illustration of your main point.

Very short (e.g. introductory) case studies can also be presented on slides; provided that they can be presented with little information (longer case studies are recommended to be distributed on hand-out documents).

In any case, unless you quote (a short text!) from for example a judgment, avoid full sentences and use keywords and expressions. Moreover, the number of slides should be realistic in light of the length of the training: e.g. for a 90-minute session do not prepare 70 textual slides, as you will clearly not be able to go through the half of them.

### **Forth rule: slides should be structured**

A clear and easy-to-follow structure can significantly enhance the learning process in all aspects, and a well-structured visual support can contribute to this. Presenting in an introduction the main issues that are going to be discussed will help participants have realistic expectations regarding the training content. Regularly referring back to this structure (e.g. showing the "table of contents" slides whenever jumping from one topic to another, highlighting the upcoming topic) shows participants where they stand in the learning process, as well as it gives an idea what can still be expected. Showing the same slide at the end of the session or the seminar will strengthen participants' impression that they learned a lot.

Individual slides should also be structured, which means using numbered and bullet-pointed lists, instead of plain text, and leaving enough space between key messages. It is crucial to present information in a logical order, but this does not necessarily mean from up to down and from left to right. Key messages can be presented as steps of a stairway, levels of a pyramid, concentric circles or elements of a mind-map or flow-chart.

### **Fifth rule: slides should be interesting and attractive**

In order to have a real added value and to keep participants' attention at a high level, slides should be visually interesting and attractive. Plain (e.g. black and white purely textual) slides are seldom capable of stimulating various types of intelligence or of inciting an emotional response, seriously limiting their impact on learning. Instead of re-writing your

speech on your slides, a good alternative is to use pictures, photos, illustrations, charts, diagrams, infographics, caricatures and maps as much as possible. Using these visual elements has a number of advantages:

- ⇒ They can stimulate various types of intelligence. While words mainly focus on linguistic intelligence, these visual support materials work effectively with those strong on spatial and logical-mathematical intelligence.
- ⇒ Pictures usually have a stronger emotional impact than text, thus contributing to an effective learning process, especially to attitude development. Scientific literature proves that images are much better remembered than textual information.
- ⇒ Humour can also be an effective support to learning, caricatures are very often well-remembered. Pay attention though, as humour can be really inappropriate in various contexts, and jokes, caricatures, etc. should never be disrespectful.
- ⇒ Being regularly exposed to plain, “boring” textual slides, the majority of trainees around the world seem to highly appreciate such alternatives, resulting in high approval rates.
- ⇒ These elements can be very well combined with text (e.g. pictures combined with keywords, charts summarised with a title, etc.).

Always consider intercultural differences – some pictures or symbols have different meanings in different cultural contexts.

Feel free to use your own pictures, while getting pictures, maps and charts from public sources on the internet has also become an easy option in recent years. Be aware of any potential copyright limitations, though.

Visual attractiveness is not less important when using text either. Instead of the traditional black text on white background, try

to use alternatives. Here are some practical hints:

- ⇒ The text should be readable from the last row as well. Use standard, easy-to-read fonts and large letters.
- ⇒ Use a consistent style, e.g. don't use more than two fonts and/or letter sizes (e.g. one for titles, one for text).
- ⇒ Use colours, but don't exaggerate, i.e. don't use too many or too harsh colours (unless it has a specific purpose), and don't use a different set of colours on each slide.
- ⇒ Be aware that some colours may have a meaning in themselves (e.g. red = prohibition, exclamation, wrong answer, heat, etc.; green = right, correct, go ahead, peace, etc.). The use of colours should be consistent with the message.
- ⇒ Italics are often difficult to read for some, try to avoid them.
- ⇒ Don't overuse capital letters, they may give an impression that you are “shouting”.

Finally, as practical demonstration, here are some diverse examples of slides on language-related difficulties in asylum procedures:

**LANGUAGE-RELATED DIFFICULTIES IN ASYLUM INTERVIEWS**

Linguistic diversity is extremely complex. Languages cannot be considered as monolithic constructions. There are different languages that are mutually intelligible, while some languages have dialects that are not intelligible. The qualification as language, language variety, dialect, etc. depends more on political will and traditions than on objective linguistic indicators. Intelligibility is very often asymmetric “in favour of” the language variety considered as standard, used in mass media and/or given higher socio-cultural value.

A number of individual and contextual circumstances determine an asylum-seeker's ability to properly understand and speak a specific language variety. These include education, gender and living environment. When choosing the right language and interpreter for the asylum interview all these factors must be duly considered, otherwise there is a high risk of language-related distortions in the communication and credibility assessment process.

An unfortunately very typical slide. Too much text, too much information on one slide and no structure whatsoever. Visually boring, with no challenge to any type of intelligence beyond the linguistic one. This slide has no added value; it may actually decrease the effectiveness of the learning process, diverting participants' attention from the trainer and the discussion, and causing frustration (“I could not read it all, I've surely missed some important details”).

**LANGUAGE-RELATED DIFFICULTIES IN ASYLUM INTERVIEWS**

- Linguistic diversity is extremely complex. Languages cannot be considered as monolithic constructions.
- There are different languages that are mutually intelligible, while some languages have dialects that are not intelligible.
- The qualification as language, language variety, dialect, etc. depends more on political will and traditions than on objective linguistic indicators.
- Intelligibility is very often asymmetric “in favour of” the language variety considered as standard, used in mass media and/or given higher socio-cultural value.
- A number of individual and contextual circumstances determine an asylum-seeker's ability to properly understand and speak a specific language variety. These include education, gender and living environment.
- When choosing the right language and interpreter for the asylum interview all these factors must be duly considered, otherwise there is a high risk of language-related distortions in the communication and credibility assessment process.

Another very typical example. This slide is stronger on structure, but it still has too much text and too much information. The use of full sentences is unnecessary. Visually it's equally boring as the previous one, plus letters are definitely too small to be properly seen in larger training rooms. This slide has no real added value either.

**LANGUAGE-RELATED DIFFICULTIES IN ASYLUM INTERVIEWS**

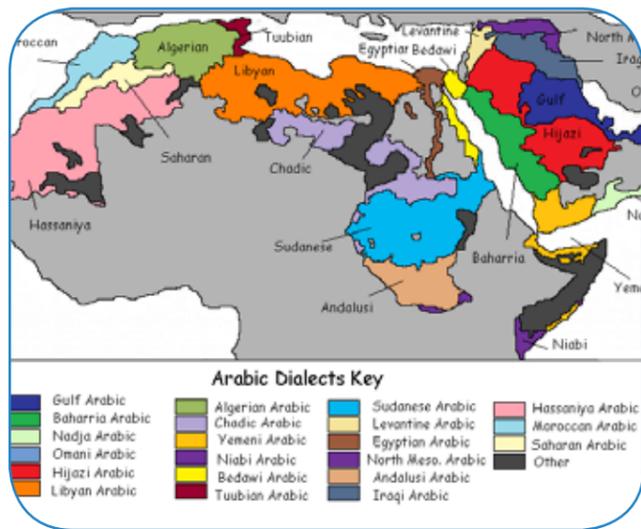
- Linguistic diversity – Languages ≠ monolithic constructions
- There are different languages that are mutually intelligible, while some languages have dialects that are not intelligible
- Language vs. dialect: depends more on politics than on objective linguistic indicators
- Asymmetric intelligibility: in favour of the standard language variety considered “standard”
- Education, gender, living environment, etc. may determine ability to understand and speak a specific language variety
- **Consider these factors to avoid the risk of language-related distortions in the communication and credibility assessment process!**

This slides looks visually more interesting at first sight (at least there are different colours and fonts), but visual elements are used inconsistently. Why linguistic diversity and language vs. dialect is underlined, while other main issues aren't? The “advice” in the last bullet-point looks like yelling at trainees, plus it is not visually logical to use a different left margin here. The slide is visually unpleasant (for instance it uses three fonts and letter sizes) and still presents too much information. At least, there is less text, and full sentences have mostly been replaced with shorter forms.

**LANGUAGE-RELATED DIFFICULTIES IN ASYLUM INTERVIEWS**

1. Linguistic diversity
2. Mutual intelligibility – Language vs. dialect
3. Asymmetric intelligibility
4. Individual circumstances determining language skills
5. Risks & solutions

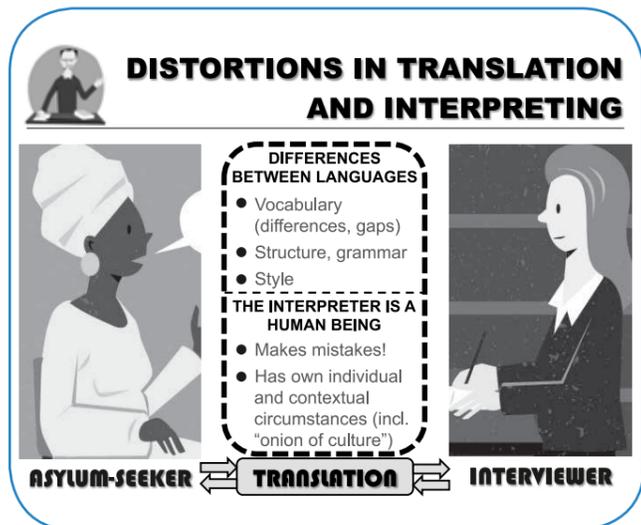
This slide finally has the right maximum amount of textual information. It provides trainees with the “menu”, i.e. showing what is going to be discussed during the given session. Using a numbered list instead of plain text or bullet-points strengthens the feeling that “we are learning something concrete”, as well as they help memorisation (“the five main topics we discussed were...”). Nevertheless, the slide is still boring and visually poor, which limits its added value. Why not to present each of the five topics on a different slide, each of the titles accompanied by a picture or a map?



This is a summary slide, useful for closing your session. It stimulates various forms of intelligence, including linguistic (through words), logical-mathematic (through structure) and spatial (through pictures). It sums up a probably much longer discussion and gives participants a feeling that they learned something concrete that they will be able to use in their daily work. The slide is slightly heavy and has a lot of information; therefore it should be on the screen for enough time so that participants can properly digest the entire content.



Humour or soft irony can be appropriate in some settings, and this slide will definitely help your trainees remember how important it is to consider the individual and contextual characteristics of interpreters at asylum interviews. It also shows a good combination of a picture with (short!) text, transmitting the message equally effectively to those stronger on linguistic and spatial intelligence.



## 5.4. Existing Training Materials

When preparing for (continuous) training as part of in house professional development, it can be very helpful knowing about and re-using already existing training materials. In this chapter, we provide an overview of existing training materials, including those developed precisely for re-using in trainings.

### 5.4.1. The CREDO Project

The CREDO project<sup>71</sup> - *Towards Improved Asylum Decision-Making in the EU* was launched in 2011 by the Hungarian Helsinki Committee in partnership with UNHCR, the International Association of Refugee Law Judges and Asylum Aid (UK). CREDO delivered three different outputs.<sup>72</sup>

- Beyond Proof, UNHCR research report;<sup>73</sup>
- A training manual<sup>74</sup>: *Credibility Assessment in Asylum Procedures – a Multi-disciplinary Training Manual*<sup>75</sup>, on credibility assessment for practitioners;
- *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive - Judicial criteria and standards*, developed by the International Association of Refugee Law Judges (IARLJ) as partners in this project.

Note: the CREDO training manual *Credibility Assessment in Asylum Procedures – a Multi-disciplinary Training Manual*<sup>76</sup> is a tool to use for training purposes or for self-study. It is very user friendly and contains many exercises apart from drawing knowledge from legal and non-legal disciplines.

### 5.4.2. The European Asylum Support Office (EASO)

EASO is an agency of the European Union that plays a key role in the concrete development of the Common European Asylum System (CEAS). It was established with the aim of enhancing practical cooperation on asylum

matters and helping Member States fulfil their European and international obligations to give protection to people in need. EASO considers training a key practical tool and develops and provides common training in order to support the enhancement of quality and harmonisation in the area of asylum.

EASO's work on quality focuses on implementing a CEAS of high quality. It facilitates the exchange of information among Member States, allowing for the identification and sharing of good practices, quality tools and mechanisms, as well as specific initiatives. In its work on quality, EASO also focuses on particular issues, including unaccompanied minors and other categories of vulnerable persons.

### EASO Training Curriculum

The training materials<sup>77</sup> developed by EASO, in close cooperation with EU Member states, are of excellent value also for states outside of the EU that already have asylum legislation, often closely mirroring the EU asylum acquis or that are in the process of amending their legislation to mirror this. The EASO training materials are useful to show how good practice application of the law in the national asylum process should be implemented.

The EASO Training Curriculum<sup>78</sup> now comprises close to 20 modules that are examples of using blended learning, whereby self-study during an online phase is combined with interactive assignments and monitoring and then followed by an intensive two-day face-to-face session of content related training. There are Handbooks developed on most of the modules, representing a useful tool after having completed the training.

There are three core modules: Inclusion, Interview techniques and Evidence Assessment. All three exist in a Russian language version and have been used in projects run by

<sup>71</sup> Funded by the European Refugee Fund 'Community Actions' of the European Commission

<sup>72</sup> All are available in Russian, see [www.refworld.org/ru](http://www.refworld.org/ru)

<sup>73</sup> See: <http://www.refworld.org/docid/519b1fb54.html>

<sup>74</sup> This manual was used in working groups in seminars in this project and copies were provided for participants.

<sup>75</sup> Two pilot training seminars, involving first instance decision-makers, judges, and other legal practitioners, were done, further contributing to the development of the HHC manual and the UNHCR research.

<sup>76</sup> <http://helsinki.hu/wp-content/uploads/Credibility-Assessment-in-Asylum-Procedures-CREDO-manual.pdf>

<sup>77</sup> <https://easo.europa.eu/about-us/tasks-of-easo/training-quality/training/>

<sup>78</sup> In April 2016 8 257 asylum officials have been trained including 746 participants to train-the-trainers' sessions.

or in cooperation with EU member states, as well as in projects run by EASO and UNHCR.

In the former Pilot Project 4 (PP4) of the Prague Process Targeted Initiative, we successfully used the EASO module on Inclusion, covering criteria for refugee status, subsidiary protection status, as well as crucial aspects of assessing who is in need of international protection. In PP4, 15 national trainers from seven countries were trained. These trainers then trained many more colleagues during their national trainings.

### EASO Quality Tools

The EASO Quality Matrix<sup>79</sup> launched in 2012 is an initiative through which EASO aims to comprehensively map the EU member states practices in implementing the common legal framework and to identify examples of good practice, quality tools, projects and initiatives. EASO is developing practical tools within the EASO Practical Guides Series. Among these are: Practical Guide on Evidence Assessment<sup>80</sup>, including a template for use in individual cases (both exist in Russian, see Prague Process website) and a tool for Identification of Persons with Special Needs (IPSN tool; where a descriptive folder can be found in Russian on the Prague Process website).

### EASO Training Curriculum for Courts and Tribunals

EASO is working towards creating professional development materials for Courts and tribunals<sup>81</sup> in conjunction with representatives of courts and tribunals from the Member states and associated countries and also in cooperation with judicial training institutions, judicial associations, the Commission, other EU agencies, UNHCR and other relevant actors.

Professional development materials have been created on:

<sup>79</sup> <https://easo.europa.eu/about-us/tasks-of-easo/training-quality/quality/>

<sup>80</sup> <https://easo.europa.eu/about-us/tasks-of-easo/training-quality/quality/>

<sup>81</sup> <https://easo.europa.eu/about-us/tasks-of-easo/training-quality/courts-tribunals/>

- ⇒ Article 15(c) Qualification Directive (2011/95/EU) – A Judicial Analysis [DE] [EN] [ES] [FR] [IT]
- ⇒ Article 15(c) Qualification Directive (2011/95/EU) – Judicial Trainer’s Guidance Note [EN]
- ⇒ Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) - A Judicial Analysis [EN]
- ⇒ Introduction to the Common European Asylum System (CEAS) for courts and tribunals - A Judicial Analysis ( Produced by IARLJ Europe under contract to EASO)

Development has begun on further materials related to:

- ⇒ Ending international protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) – A Judicial Analysis;
- ⇒ Qualification for International Protection (Directive 2011/95/EU) – A Judicial Analysis (Produced by IARLJ-Europe under contract to EASO);
- ⇒ Evidence and credibility assessment in the context of the Common European Asylum System (CEAS) – A Judicial Analysis (Produced by IARLJ-Europe under contract to EASO).

Materials will also be developed on other relevant topics, including Access to Procedures Governing International Protection and the Non-Refoulement Principle – A Judicial Analysis (to be produced by IARLJ-Europe under contract to EASO), Reception and the Dublin Regulation etc.

These materials can also be of use to first instances, since they also contain some general training tools to illustrate how to conduct an efficient professional development meeting. The Judicial Trainer’s Guidance Note documents also suggests different practical case examples or scenarios that may be used, using jurisprudence for training purposes.

### 5.4.3. United Nations High Commissioner for Refugees (UNHCR)

#### The Case Law Manual of the European Courts<sup>82</sup>

This manual is of particular importance since it is a thematic guide<sup>83</sup> to the case law of the ECtHR and of the CJEU that is of relevance to refugees, asylum-seekers and stateless persons. It summarizes and analyses the key case law on each issue covered, with the aim of providing a quick reference for legal practitioners who need to familiarize themselves with the relevant rulings of the CJEU on EU law, and/or with the relevant rulings of the ECtHR on the European Convention on Human Rights (ECHR). It provides links to both the full judgments and to legal summaries, which is especially user-friendly for trainers looking for what cases to use but also for self-studying purposes.

UNHCR has developed many training materials<sup>84</sup>. It is useful to look at the website on refugee status determination where you find all relevant legislation, UNHCR handbooks and guidelines on international protection and many other useful tools and documents: <http://www.refworld.org/rsd.html>

There is a link list of “Tools and Useful Documents” that can be useful for training purposes or self-study. What can also be particularly useful for training are also some core items such as the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*<sup>85</sup>, the 10 Guidelines on International Protection (particularly the Guidelines on Religion Based Claims, on Internal Flight Alternative, and on claims to Refugee Status based on Sexual Orientation and/or Gender Identity).

<sup>82</sup> *The Case Law of the European Regional Courts: the Court of Justice of the European Union and the European Court of Human Rights - Refugees, asylum-seekers, and stateless persons*, June 2015, 1st edition. See: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=558803c44&skip=0&query=caselawcase-law-manual>

<sup>83</sup> It will be available in Russian.

<sup>84</sup> Some is primarily designed for UNHCR staff doing Refugee Status Determination; RSD is done by UNHCR in some countries that have an emerging asylum legislation and process.

<sup>85</sup> <http://www.refworld.org/docid/4f33c8d92.html>

### Quality Assurance Tools

Since working on Quality assurance mechanisms and training go hand in hand, we also list the following tools and checklists that have been developed in the context of quality assurance projects run in Central and Eastern Europe, such as ASQAEM and FDQ.<sup>86</sup> The purposes of these tools are to introduce the various elements for establishing and maintaining a high quality asylum system in line with international and European Union law.

- Asylum System Quality Assurance and Evaluation Mechanism (ASQAEM) – Checklist, UN High Commissioner for Refugees (UNHCR), February 2010
- Building In Quality: A Manual on Building a High Quality Asylum System, UN High Commissioner for Refugees (UNHCR), September 2011

### 5.4.4. European Council on Refugees and Exiles (ECRE) and Dutch Council for Refugees

ECRE and the Dutch Council for Refugees in October 2014 published a booklet on practical guidance on how to utilise the standards of the EU Charter of Fundamental Rights effectively.<sup>87</sup> It targets legal practitioners, NGO’s, immigration officials as well as the judiciary. The booklet seeks to provide an overview of secondary legislation relevant in the context of the asylum procedure. The latter is assessed in light of the Charter and other relevant fundamental rights and principles as well as the case law of both the CJEU and the ECtHR. It may be used for training purposes as well as self-study and is very user friendly while also containing much reference to case law.

<sup>86</sup> <http://www.refworld.org/qualityassurance.html>

<sup>87</sup> <http://www.ecre.org/component/content/article/63-projects/324-frame.html>

## 5.5. Working with Jurisprudence: Frequently Asked Questions

This section aims to give some training tips on what we call 'Frequently Asked Questions' (FAQ's). They provide excellent assistance on certain training issues but also for self-study. We briefly illustrate some important issues that can be helpful when talking about jurisprudence, making citations etc.

### What is jurisprudence?

- Jurisprudence is the theory and practice of the law as expressed in the reported, and in particular, the leading or guidance cases, of senior Courts and Tribunals around the world;
- A repository of legal analysis and knowledge on the interpretation of difficult points;

Working with the judgment: *ratio decidendi*<sup>88</sup> and judicial guidance

- Discussion: may help clarify the correct approach;
- *Ratio decidendi*: Paragraphs in judgment where legal conclusions drawn and/or interpretative guidance given;
- Binding or persuasive?

Jurisprudence in decision writing: "Unpacking" the judgment

- Not all paragraphs in a judgment are jurisprudence;
- Judgments will set the scene, explaining law, procedural processes, facts asserted and believed, and parties' submissions;
- Discussion section;

- Guidance given;
- Individual decision

### Majority opinion

Judges involved in the same case may have different opinions. The majority opinion is the law decided by the case: it is the decision of most or all of the judges, and contains the reasoning which you should rely on when applying the decision. Not all courts have the tradition of exposing the reasons for dissent by judges on the panel. For example, in CJEU rulings, the Court speaks with one voice and the reasons for dissent are not set out. In the judgments from the ECtHR in Strasbourg, you may sometimes find a dissenting opinion and there may also be a concurring opinion.

### What is a concurring opinion?

A concurring opinion is an opinion by one or more judges of the court that agrees with the final outcome of the majority opinion, but uses different reasoning to reach that outcome or desires to emphasize a particular point. Concurring opinions are found after the disposition of a case, but are not written in all cases. They may be helpful in understanding how the Court reached its decision.

### What is a dissenting judgment?

Dissenting judgments or dissenting opinions are written by a judge(s) who disagrees with the decision reached by the majority of the court. A dissenting opinion given by a judge or judges identifies points (one or several) where that judge disagrees with the majority decision, and sets out his reasons for disagreeing.

The dissenting opinion is interesting – although it is not binding, sometimes the reasoning in a particular dissent may be picked up by that Court in a later decision and approved. However, unless that happens, you should not follow it: it is the majority opinion, which is the binding legal precedent.

### What is an Advocate General's Opinion?

The Advocate General is appointed to assist the judges of the CJEU in developing their reasoning in the light of the Court's existing case law and relevant international jurisprudence. An Advocate General is a highly experienced lawyer working for the CJEU who delivers an Opinion (which reads rather like a draft judgment) for the judges to consider when reaching their own decision. The Advocate-General's Opinion is published but is not binding either on the judges of the court or on EU Member states.

Since the CJEU is a collegial Court and publishes a single judgment at the end of each case, with neither concurring nor dissenting opinions, the study of the Advocate General's Opinion may assist in understanding the wider reasoning behind the findings of the Court. This is especially the case since it often contains references relevant to the questions in the preliminary reference, to human rights decisions by the ECtHR in Strasbourg (showing the interaction between the jurisprudence of the two European Courts), to leading decisions of other Member States, and to academic research and other sources of legal doctrine. Country of Origin information reports might also be analysed, see e.g. in the NS & ME judgment on issue of transfers to Italy decided under the Dublin Regulation III (that regulates what country must process the individual asylum seekers claim; see also principle of first country of asylum).

### Tips on what is still considered 'good law' by ECtHR

Since the application of the law constantly evolves, it is useful to know that you may discern what the ECtHR in Strasbourg itself considers still to be good law by focusing principally on Grand Chamber judgments. As part of its analysis of the legal background to any judgment, the ECtHR will summarise the judgments they consider most relevant, with appropriate quotations, indicating what they consider still to be 'good law'. By contrast,

judgments, which are no longer mentioned, may be such in which the reasoning is now regarded as inadequate, out of date, or less reliable: 'bad law'.

### Why do we suggest that you read 'broadly'?

The reason we suggest you read beyond the judgments containing the exact key words on topics and issues you are looking for is that Courts sometimes also make statements on matters with which they are not directly concerned in the present case (*obiter dicta*<sup>89</sup>). While not binding, *obiter dicta* may be an indication of where the Court is heading on that point, and may later be followed by a decision in which the same point is at stake: they are an indication of the direction in which the legal wind is blowing.

Also, in both civil and criminal law jurisdictions, the judge is presumed to know the law and it is the judge's task to ensure that s/he does know it (*jura novit curia*), which requires a lot of reading of updated and current case law. Working at first instance, it is equally advisable for decision makers and caseworkers to study the same updated case law - whether within a specialised legal unit in order to then share with all, or by following newsletters and then engaging in reading entire judgements when found necessary.

Advocates General assist the Court of Justice. Under Article 252, second para., TFEU: 'It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement'. His opinion 'is not binding on the Court, but will be considered with very great care by the judges when they make their decision. It is printed, together with the judgment, in the law reports', T. C. Hartley, *The Foundations of European Community Law* (Clarendon Press, 3rd ed., 1994), 60.

The Advocate General's opinion 'tends to be a comprehensive and thoroughly reasoned account of the law governing all aspects of the case. The style

<sup>88</sup> "Reasons for the decision"

<sup>89</sup> Latin for a word said "by the way", that is, a remark in a judgment that is "said in passing"

and content of the AG's opinion are virtually always more readable than those of the Court's judgments, and often shed light on the meaning of an obscure judgment', P. Craig and G. de Burca, *EU Law: Texts, cases and materials* (Oxford University Press, 3rd ed., 2003), 94. In this case, as in many others, it is a useful complement to the Court's decision.<sup>90</sup>

### **How to draft a legal summary to use in training**

Drafting legal summaries will go a long way in assisting consistent work on quality assurance in the asylum procedures by making decisions and judgments more easily available. A good template for a concise, useful summary is available online at the EDAL database.<sup>91</sup> The requirements used by EDAL in their case summaries are the following:

- Ensure the wording is clear and succinct throughout the case summary and that the summary is structured and organised;
- Avoid long-winded constructions, for example, 'Justice X held the opinion that...' or 'The court considered if...';
- Avoid using Latin terms;
- Avoid terminology and legal phraseology that is country specific e.g. UK and Irish case summaries should be as accessible to those familiar only with civil law systems;
- Use the phrase 'applicant from country x';
- Use phrase 'the applicant' rather than 'Mrs. X';
- Use positive statements and avoid passive statements where possible;
- Ensure consistency and accuracy in describing the case and person involved as an application, appeal etc. and an applicant, appellant etc.
- Completely anonymise the summary by removing all references to the applicant's name, address and the name or address of persons with whom they are staying or otherwise associated;

### **Who are Britain's Law Lords?**

The United Kingdom Supreme Court is the final appeal jurisdiction for all courts in the United Kingdom but also some in the Commonwealth. Its members all take the title Lord, and together were called 'Law Lords' when they were members of the House of Lords. Since the new Supreme Court came into being, the correct way to refer to them is as 'Judges of the Supreme Court'.

### **5.6. Where to look for relevant jurisprudence on the internet?**

The following subchapter on online sources will present the sources that were used when writing the guidelines and suggest websites that can be useful when preparing to organise training. The core of this information relates to finding jurisprudence. It may be especially emphasized that regularly reading newsletters on new jurisprudence is of great help as well as following law blogs that not only will assist in extremely quickly linking to a new judgment but also on providing their comments to what precisely is new in the judgement, thereby showing (new) developments in application of law.

The two courts, ECtHR and CJEU, offer databases of their own. These are very useful when searching for case law. The ECtHR database is called HUDOC and the CJEU database is called Curia. Below the two databases will be described at greater length and it will also be described how to use the two databases.

#### **HUDOC**

The HUDOC database (link can be found in the table below) is the case law database of the ECtHR. It provides free access to ECtHR case law Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the case law information note and legal summaries. The database is available in four

languages, English, French, Russian and Turkish. For a new user the help page offers a great deal of help. On the help page one can find not only manuals and tutorials but also videos on how to use the database. These also offer explanations on search fields, filters and other search tools.

The easiest way to search for a case law in the HUDOC database is to enter the application number into the search field. One example of application number is "1948/04" which is the number for *Salah Sheekh v. The Netherlands*. It is also possible to hit the "advanced search" link and there type the application number into the field called application number. Under document collections there are a list of different types of documents that can be search for. In order to find a specific document just tick the box next to that type of document. Judgements from the chamber and the grand chamber are default settings, if decisions or communicated cases are wanted tick the boxes next to those options.

It is also possible for the user to find cases using the search field. In that search field the user can search using a single word, a phrase, case title, state or a Boolean phrase. A Boolean phrase is a phrase which includes terms or conditions for the specific search. If a user would like to find cases regarding asylum but not on migrants it is possible to write "asylum NOT migrants" and therefore excluding hits that has the word "migrants" in them. To make it simpler for the user to perform a Boolean search it is possible to hit the arrow in the right side of the search field. That will expand and show different search fields offering six search possibilities: this exact word or phrase, all of these words, any of these words, none of these words, near these words or Boolean search.

After a search has been made the results will appear in the main frame. Now even after the search has been made it is possible to narrow the search by ticking the boxes to the left in the filters field. It is possible to use more than one filter in order to narrow the search even further. In the filters field there is also a list of keywords available to specify the search even more. Only a few keywords are displayed

but by clicking on the link called "More..." an extended list of keywords will be shown. As with the filters the user can tick more than one box to increase the chances of finding what the user is searching for.

When a search has been done the cases are listed in the main frame. For each case in that list information is provided, e.g. application number, what languages the case is available in etc. There is also a link to press release and one to case details. For more significant cases a legal summary is available. The summary comprises a head note, a short presentation of the facts and the law with emphasis on points of legal interest.

To see what languages that are available the user can click on "case details" under each search result and then click on "language versions". There it will be shown what official languages (English and French) the documents are available in. If there are any translations of the case law into non-official languages this will also be shown and if there is any other translations on third-party internet sites there will be links to them as well.

#### **Curia**

The Curia case law database provides free access to CJEU case law. The search engine of the database is available in all official EU languages. By using the Curia search engine the user can search for information in all documents related to concluded and pending cases by the Court of Justice, the General Court and the Civil Service Tribunal.

It is possible to search for case law directly when entering the Curia home page. There, the user can find a quick search form. If the user instead is in need of a more comprehensive search form or perhaps the help section, the user will have to click the link on the left called "case law" and then the sub-link called "Search form". This will direct the user to the actual Curia search engine.

To the left of the search engine there is a link called "Help", and clicking on that link will

<sup>90</sup> "The Court knows the law"

<sup>91</sup> <http://www.asylumlawdatabase.eu>

open a new window with a PDF file in which information about the search engine and its functions can be found. Next to all search field there is a red button with a question mark. Clicking on that will direct the user to the help file and to the right paragraph in that file. Up in the right corner of the webpage there is a language option. It is possible to switch language at all time.

As in the HUDOC data base the easiest way to find a case is to enter its case number into the search field called "Case number". If the user for some reason only has a part of the case number it is possible to search for by just entering those numbers and then scroll through the result in order to find the right case. It is also possible to search for the name of the parties using the field called "Name of the parties".

By using more than one field, the user can narrow down the search results. Next to most of the fields (on the right), there is a small window icon. Clicking on that will open a pop-up window that offers a list of different filter options. By ticking the boxes next to the filters that are preferred and then choose between the options "At least one of the chosen values" or "All of the chosen values" and then hitting "enter" the user may add and use filters in different ways. For example, this can be used when search for a specific subject matter. The user can click the windows icon and then choose between different subject matters. This will produce an alphabetised list of selected documents related to the legal questions dealt with in the decisions.

If the user instead wants to do a more general search, this can be done in the "Text" field. When the search has been done the Curia search engine offers a possibility to list the results in different ways.

It is worth noting that as a default the Court of Justice, General Court and Civil Service Tribunal are chosen. If only one instance is of interest then the other needs to be unticked. This option can be found at the top of the page and next to it there is also an option to

choose between all cases, pending cases or closed cases.

On the Curia website, two other sections can be of interest. First, the digest of the case law, which offers a systematic classification of case law summaries on the essential points of law stated in the decision in question. These summaries are based on the actual wording on the decision and are written so that they are as close as possible to the actual decision.

The other section is national case law database. This external database can be accessed through the Curia website and offers relevant national case law concerning EU law. The database offers case law collected from member states courts and/or tribunals. This external database is available in both English and French.

#### UN bodies

- UNCAT
- UNHCR

#### Specialised international research engines and resources on case law

⇒ EDAL, [www.asylumlawdatabase.eu/en](http://www.asylumlawdatabase.eu/en);

The European Database of Asylum Law (EDAL) is an online database containing case law from 19 EU Member States interpreting refugee and asylum law as well as from the CJEU and ECtHR. EDAL summarises relevant case law in English and the Member State's national language and provides a link to, and/or pdf. of, the full text of the original judgment where available;

⇒ Refworld (UNHCR); [www.refworld.org](http://www.refworld.org); In Russian: <http://www.refworld.org/ru>; At the top choose Jurisprudence, then Case law; possible filters etc are there to narrow down search. Publisher (e.g. various Courts), Country and Topics respectively or joined as filters.

⇒ The Refugee Law Reader (both in Russian

and English); [www.refugeelawreader.org](http://www.refugeelawreader.org) Contains a lot of Case law and also core readings on topics, primarily for academia but works well also for decision makers.

⇒ World Legal Information Institute <http://www.worldlii.org>

There are also examples of publications (UNHCR, academic, etc.) which collect and digest a wider range of (national) jurisprudence on a certain issue, here is one example: <http://www.refworld.org/docid/4f13c5f02.html>

#### National jurisprudence databases

⇒ **Austria** – Legal information system <https://www.ris.bka.gv.at>

⇒ **British and Irish** Legal Information Institute <http://www.bailii.org>

⇒ <http://www.cnda.fr/Ressources-juridiques-et-geopolitiques/Actualite-jurisprudentielle/Selection-de-decisions-de-la-CNDA> + <http://www.rw-cce.be/fr/arr>

⇒ <http://www.poderjudicial.es/search/>

⇒ **France** – CEREDOC COI information [www.cerdoc.fr](http://www.cerdoc.fr) Cour nationale du droit d'asile and judgments from the CNDA and Conseil d'Etat, also monthly newsletters

⇒ **Germany** – [asyl.net](http://www.asyl.net) + [dejure.org](http://www.dejure.org) + [Federal Administrative Court](http://www.federaladministrativecourt.de) (summaries in English)

⇒ **Belgium** – [Council of Alien Law Litigation website](http://www.councilofalienlawlitigation.be)

⇒ **Italy** – [ASGI](http://www.asgi.it)

⇒ **Netherlands** – [Raad Van Staat website](http://www.raadvanstaat.nl) + Regional court websites

⇒ **Poland** – [Central Administrative Database](http://www.centraladministrativedatabase.pl)

⇒ **Sweden** – [Lifos](http://www.lifos.se)

⇒ **Switzerland** – [Federal Administrative Tribunal](http://www.federalestribunal.ch)

#### The two European Courts

##### i. CJEU (Luxemburg)

- Court of Justice of the European Union (CJEU) <http://eur-lex.europa.eu>
- Curia Home page <http://curia.europa.eu/>
- Curia Help page <http://curia.europa.eu/common/juris/en/aideGlobale.pdf#>
- Curia Search form <http://curia.europa.eu/juris/recherche.jsf?language=en>

##### ii. ECtHR (Strasbourg)

- European Court of Human Rights (EN) <http://hudoc.echr.coe.int/eng>
- European Court of Human Rights (RU) <http://hudoc.echr.coe.int/rus>
- Glossary of the European Convention on Human Rights [http://www.coe.int/t/dgi/hr-natimplement/source/documentation/Glossary\\_rus\\_web.pdf](http://www.coe.int/t/dgi/hr-natimplement/source/documentation/Glossary_rus_web.pdf)
- Useful Fact Sheets on topics relevant for asylum decision makers: <http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets>

##### b. Law reports

- British and Irish Legal Information Institute <http://www.bailii.org>
- World Legal Information Institute <http://www.worldlii.org>

##### c. Case law

- European Database of Asylum Law (EDAL) <http://www.asylumlawdatabase.eu>

- Refworld.org- Jurisprudence – Case law [http://www.refworld.org/type,CASELAW,,,,,0.html](http://www.refworld.org/type/CASELAW,,,,,0.html)  
International Association of Refugee Law Judges (IARLJ), <http://www.iarlj.org>

### **i. Newsletters and journals containing Case Law**

It is strongly advisable to subscribe to these two newsletters below, the first one is weekly; the second one is quarterly and features the benefit of also having pending cases in their lists. It will send you latest case law right into your mailbox. It is also advisable to follow the journals, among them International Journal of Refugee Law (IJRL by Oxford University Press) that also has selected Case law that they make available in summary form.

- Elena weekly update (ECRE, NGOs) <http://www.ecre.org/topics/elena/elena-weekly-legal-update.html>
- NEAIS newsletter <http://cmr.jur.ru.nl/neais>
- International Journal of Refugee Law, <http://ijrl.oxfordjournals.org/>

### **ii. Blogs and commentary<sup>92</sup>**

- EDALs journal (blog) <http://www.asylumlawdatabase.eu/en/journal>
- Free Movement <https://www.freemovement.org.uk/>
- Refugee Council <http://www.refugeecouncil.org.uk>
- Oxford Public International Law <http://opil.ouplaw.com/page/refugee-law>

<sup>92</sup> This is a list with some blogs out of many that could be mentioned. Blogs will be very quick indeed to comment on recent case law, some in just a few hours. Blogs are naturally only the voice of the individual blogger. However, since some have posts from academics and/or lawyers involved in litigation they can be useful as a quick update and/or 'second opinion' on what is new and how in the evolution in international protection law, and also an indication of arguments which may be run by lawyers appearing for applicants in hearings in the coming weeks and days.

- United Kingdom Immigration Law Blog <http://asadakhan.wordpress.com>
- Steve Peers (Professor of Law), EU Law analysis <http://eulawanalysis.blogspot.se/>

- <http://europeanlawblog.eu/>

- <https://nsitaropoulos.wordpress.com/>

### **iii. Twitter feeds**

- @EDAL\_EU
- @ECHR\_HUDOC
- @ECHR\_PRESS
- @Refugees (UNHCR)
- @EUCourtPress
- @BAILII (British and Irish case law)
- IOM @IOM\_news
- @StevePeers (Professor of Law)
- Centre for the Study of Emotion and Law @CSEL\_UK
- Refugee Council @refugeecouncil

### **Using blogs and identifying jurisprudence**

Blogs can help you keep up to date and help in your training preparations. One reason is the speed at which the blog post is written and uploaded and the comments made by the blogger, often including wider citations, which assist you in evaluating very good input on the precise new law created by this judgment. The analysis of a particular judgment or decision can be both academically and practically insightful. It can set the legal weight to be given to case in context and can also explain the judgment, and for what it is an authority. The blog post case's impact both at a domestic but also European or international level. Also the title is written to give quick information on what it is about, and the commentary may indicate what arguments academics and advocates consider may be run before you, either to extend or contain the legal guidance the judgment purports to give:

A judgment that has since been cited worldwide, *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC<sup>93</sup> 31, is described below in a blog post called 'Future behaviour and the Refugee Convention'. It states in one sentence what the case is about and it also cites the operative part of the judgment in *extenso* (paragraph 82 per Lord Rodger).

Copied from this blog: '*HJ (Iran) establishes that where a person would in future refrain from behaving in a way that would expose them to danger because of the risk of persecution that behaviour brings, that person is a refugee.*'

In other words it is about the decision maker in the asylum process not being able to presume discreet behaviour on the part of an asylum seeker for him or her to not attract persecution upon return.

<https://www.freemovement.org.uk/future-behaviour-and-the-refugee-convention/>

EDAL database on same judgment: <http://www.asylumlawdatabase.eu/en/case-law/uk-supreme-court-7-july-2010-hj-iran-v-secretary-state-home-department-2010-uksc-31>

**Gábor Gyulai (Hungary)** has been working in the field of asylum since 2000. After two years of working with the UNHCR, he joined the Hungarian Helsinki Committee ([www.helsinki.hu](http://www.helsinki.hu)), where he currently works as the director of the refugee programme and as an international trainer. Gábor's research and advocacy work has been mainly focusing on evidentiary and credibility assessment, country information, gender and intercultural issues in asylum cases, as well as nationality and statelessness. He has conducted research and published a number of studies and articles on these issues while also being a reputable international trainer (with hundreds of training sessions conducted to asylum professionals on various continents).

**Dr. Jane Herlihy (United Kingdom)** is a consultant clinical psychologist and the director of the Centre for the Study of Emotion and Law, an independent research centre which undertakes, supervises and disseminates high-quality applied Psychological research with the aim of informing and improving the quality of legal decision-making ([www.csel.org.uk](http://www.csel.org.uk)). She has been writing and conducting Psychological research into the decision-making process in refugee status claims since 2000. She worked previously in a clinical role in the Refugee Service of the Traumatic Stress Clinic. She is an associate academic member of the International Association of Refugee Law Judges and an Honorary Lecturer at University College, London.

**Judge Judith Putzer (Austria)** has been working as a Judge specialized in international protection and asylum law since 1998. She has vast experience in training, having worked, amongst others, as a short-term expert in the framework of various Twinning and PHARE projects on asylum law (substantial, procedural and institutional issues). She has been a presenter on refugee law in numerous international seminars since 2003. She is the author of the main book on asylum law in Austria ("*Asylrecht*", 2011, Manz Verlag). She is a member of the International Association of Refugee Law Judges (IARLJ).

## **THE AUTHORS**

**Judge Judith Gleeson (United Kingdom)** has over 20 years of experience in migration and asylum law. She has been an Upper Tribunal Judge at the Asylum and Immigration Chamber of the United Kingdom since 2010. In 2014, she was nominated by EASO to advise the Moroccan Government on draft asylum, trafficking and migration laws. She has been chairing the UTIAC Research and Information Committee since 2010 and has been a Judicial Member of the Special Immigration Appeals Commission since 2005. She is a member of the International Association of Refugee Law Judges (IARLJ).

<sup>93</sup> UKSC is the United Kingdom Supreme Court.

## Leading state representatives:

**Anna Bengtsson (Sweden)**, Leading state representative for the Swedish Migration Agency, is currently the Pilot Project 7 leader. Anna has worked in the field of asylum since 1988 at the Swedish Migration Agency, in reception as well as in refugee status determination, for UNHCR in Asia and at the Migration Court of Stockholm for seven years where she headed the training in asylum law and trained nationally at the Judicial Academy. She holds a Master of Laws and a Bachelor's degree in Political Science (international politics). She has been a trainer nationally and internationally in asylum law for 15 years including at the Law Faculty of Uppsala University. Her focus in work has been on interviewing skills and on jurisprudence as part of informed decision making and training.

**Thorsten Schröder (Germany)** was the project manager for the co-leading state of the Pilot Project 7 in the Prague Process. He works for the Federal Office for Migration and Refugees (BAMF) since 2013. In 2014, he joined the unit responsible for voluntary returns and international projects. One of his focuses is statistics. He graduated as "Diplom Verwaltungswirt (FH)" (a German degree in public administration at a college of higher education) and as "Diplom Sozialwissenschaftler" (social sciences).

**Yvonne Bengtsson (Sweden)**, litigation officer at the Swedish Migration Agency, is a very experienced national and international trainer and didactic expert.

## Prague Process Secretariat:

**Alexander Maleev** was the Pilot Project 7 project officer within the Prague Process Secretariat at the International Centre for Migration Policy Development (ICMPD) in Vienna. In his position, he contributed significantly to the editing of this publication. Alexander holds a Master in Social and Cultural Anthropology (University of Vienna), as well as in EU Administrative and Political Science from the College of Europe in Bruges. He has worked on migration issues since 2005 and joined ICMPD in 2011.

# Background Information

## A. Case Studies for Training

Below you will find examples of cases that we used in break out sessions in a Pilot Project 7 seminar. They have an integrated approach, providing helpful information that goes beyond (the usual) Country of Origin Information (COI), including also research-based Psychological elements.

The cases consist of the asylum seeker's story as it was recorded during the interview. As part of the asylum process, a caseworker would usually prepare for the interview by reading COI to learn the context of the story and assess possible human rights abuses occurring in the country of origin. Such preparation is needed to conduct a professional interview. It allows listening to the asylum seeker and identifying the valid questions to follow up on parts of the story. As already highlighted, the RSD process may also require additional sorts of knowledge and skills. The application of a multidisciplinary approach is increasingly recognized in this context, especially concerning credibility assessments as part of the evidentiary assessment stage.<sup>94</sup>

### CASE A

A woman called D who is 30 years of age comes to your country and seeks asylum. In her country X she has been active for a political party by attending meetings and occasionally handing out leaflets produced by the party that lost the elections and were ousted from government two years ago. Her father and two brothers are known members of the party and have during the past two years been questioned by the authorities on several occasions and then released, on each occasion. She is an accountant by profession and has also assisted the office of her political party with accounting work in her spare time. The former president (her party leader) has gone underground after suspicions on corruption and charges were raised by the current government.

<sup>94</sup> Such multidisciplinary approach has been advocated by UNHCR amongst others.

The applicant D claims that she has been summoned to the police station during last year. She is not sure how many times or how many days but says that it was more than three times. Interviewed on why she was summoned she says it was not clear and on question of what happened at the police station she says she would be kept for two – three days and then released. When asked to describe the police station she answers it was a normal police station and volunteers no additional information to describe it, not location or interrogation content. She is repeatedly asked to provide additional information but does not do so. Due to a back log situation at the asylum office the case is not decided. The woman has not been significantly involved with the branch of her political party in your country, although she has produced a photograph of her standing on the Embassy steps with a placard criticising the current government.

18 months after claiming asylum a written submission is sent to the asylum office where she claims to have been sexually assaulted at the police station. A report from a psychologist whom she had been seeing for the past 16 months describes her initially seeking treatment for depression and sleep problems. In the course of treatment she says that she was repeatedly brutally raped and in other ways sexually assaulted all through days and nights at the police station. She names officers that were the perpetrators. She is very ashamed of having experienced this and the psychologist is the only person that she has told. It is noted in the accompanying notes that the psychologist has kept from every meeting with her that she is advised to inform her legal counsel but that she refuses to do so until after 14 months of treatment.

The asylum office finally manages to recruit extra staff and the newly appointed case worker drafts a negative decision that is agreed and signed by the decision maker. The decision states that the applicant has despite being given many chances to tell her story during the asylum interview not come forward with any detail. The report from the psychologist cannot be taken into account as

it is based only on what the applicant told the psychologist. It is also noted that the report is submitted at a very late stage, 18 months after the interview and 24 months after A entered the country.

## Psychological Information

### Disclosure of sexual violence:

Psychology research has found that following sexual violence, people are very likely to be experiencing high levels of shame (an emotion which makes one feel unworthy, wanting to hide). It has been linked to people not disclosing important information - even when it is important to do so.

Below are summaries of two examples of papers linking difficulty disclosing sexual violence and the asylum process.

1. The impact of sexual violence on disclosure during Home Office interviews. *British Journal of Psychiatry* 191 75-81 Bögner, D., Herlihy, J. and Brewin, C. (2007).

Background: Late disclosure or non-disclosure during Home Office interviews is commonly cited as a reason to doubt and is commonly cited as a reason to doubt an asylum seeker's credibility, but disclosure may be affected by other factors.

Aims: To determine whether and how sexual violence affects asylum seekers' disclosure of personal information during disclosure of personal information during Home Office interviews.

Method: Twenty-seven refugees and asylum seekers were interviewed using semi-structured interviews and self-report measures.

Results: The majority of participants reported difficulties in disclosing. Those with a history of sexual violence reported more difficulties in disclosing personal information during Home Office interviews, were more likely to dissociate during these interviews and scored

during significantly higher on measures of post-traumatic stress symptoms and shame than those with a history of non-sexual violence.

Conclusions: The results indicate the importance of shame, dissociation and psychopathology in disclosure and support the need for immigration procedures sensitive to these issues. Judgments that late disclosure is indicative of a fabricated asylum must take into account the possibility of factors related to sexual violence and the circumstances of the interview process itself.

2. Refugees' Experiences of Home Office Interviews: A Qualitative Study on the Disclosure of Sensitive Personal Information. *Journal of Ethnic and Migration Studies* 36(3) 519-535 Bögner, D., Brewin, C. & Herlihy, J. (2010).

Decisions on refugee status rely heavily on judgments about how individuals present themselves and their histories. Late or non-disclosure of sensitive personal information, for example, may be assumed to be a result of fabrication by the asylum claimant. However, if incorrect, such assumptions can lead to genuine refugees in need of protection being refused asylum. A study employing semi-structured interviews with 27 refugees and asylum-seekers with traumatic histories was conducted to explore the factors involved in the disclosure of sensitive personal information during Home Office interviews in the UK. Many reported difficulties with disclosing personal details, and interviewer qualities emerged as the strongest factor in either facilitating or impeding disclosure. The interview data showed that disclosure was not just based on personal decisions and internal processes, but was also related to interpersonal, situational and contextual factors, such as the gender of the interviewer and the interpreter, whether or not they had told anyone in their family, cultural practices in their country etc.

Repeated Memories: When an event is repeated a number of times we form Schematic

Memories. Rather than remember every detail of each instance, we form a generic memory which covers them all. It is sometimes known as a script – for example we have a 'script' for what usually happens when we go for a meal in a restaurant. Only events which stand out, or deviate from the script, are likely to be well remembered.

### **CASE B**

You are asked to review a case. You accept that the applicant is politically active in a political party that is legal but badly tolerated by the current regime. His two uncles and three brothers are active in the same party and one brother has a senior position. Furthermore, at the initial interview the claimant described being arrested on May 1st, after a demonstration and then detained for five days. He claims he was beaten and tortured, then was released after being seen by a guard who knew his family. He was then rearrested on June 13th and again detained for 5 days. However, in a subsequent statement he said that the first arrest lasted 7 days and the second arrest was on June 17th and his detention only last 3 days. You see that in first instance his claim was refused on credibility grounds on the basis of inconsistencies. What do you think?

### **Psychological Information**

Memory is a reconstruction of events at each time of telling, not an exact reproduction. Thus errors of detail are possible, unless there are particular reasons for certain details to be retained in memory. (For example if an arrest was at someone's birthday party). When events are 'traumatic' (life-threatening) the details which are most important to the person experiencing them may be retained, but less important details will not.

Below is a summary of an example of a study showing peripheral details of traumatic events in people seeking asylum.

Objective: To investigate the consistency of autobiographical memory of people seeking asylum, in light of the assumption that

discrepancies in asylum seekers' accounts of persecution mean that they are fabricating their stories.

Design: Repeated interviews.

Setting: England, 1999 and 2000.

Participants: Community sample of 27 Kosovan and 12 Bosnian refugees.

Main outcome measures: Discrepancies in repeated descriptions of one traumatic and one non-traumatic event, including specific details, rated as central or peripheral to the event. Self-report measures of post-traumatic stress disorder and depression.

Results: Discrepancies between an individual's accounts were common. For participants with high levels of post-traumatic stress, the number of discrepancies increased with length of time between interviews. More discrepancies occurred in details peripheral to the account than in details that were central to the account.

Conclusion: The assumption that inconsistency of recall means that accounts have poor credibility is questionable. Discrepancies are likely to occur in repeated interviews. For refugees showing symptoms of high levels of post-traumatic stress, the length of the application process may also affect the number of discrepancies. Recall of details rated by the interviewee as peripheral to the account is more likely to be inconsistent than recall of details that are central to the account. Thus, such inconsistencies should not be relied on as indicating a lack of credibility.

## B. List of Case Law

### Council of Europe:

#### European Court of Human Rights (ECtHR)

*F.G. v Sweden*,  
43611/11, 23 March 2016

*M.A. v. Switzerland*,  
52589/13, 18 November 2014

*Sufi and Elmi v. the United Kingdom*,  
8319/07 and 11419/07, 28 November 2011

*M. and Others v. Bulgaria*,  
414116/08, 26 October 2011

*M.S.S. v. Belgium and Greece*,  
30696/09, 21 January 2011

*N. v. Sweden*,  
23505/09, 20 July 2010

*R.C. v. Sweden*,  
41827/07, 9 March 2010

*N. v. Finland*,  
38885/02, 26 July 2005

*Nachova and Others v. Bulgaria*,  
43477/98 and 43579/98, 26 February 2004

*Hilal v. the United Kingdom*,  
45276/99, 6 June 2001

*T.I. v. the United Kingdom*,  
43844/98, 7 March 2000

*Chahal v. the United Kingdom*,  
2241/93, 15 November 1996

### European Union:

#### Court of Justice of the European Union

*A, B and C v Staatssecretaris van Veiligheid en Justitie*  
(Cases C-148/13 to C-150/13), 2 December 2014

*X, Y & Z v. Minister voor Immigratie en Asiel v Hoog  
Commissariat van de Verenigde Naties voor de  
Vluchtelingen*, Joined cases C-199/12 to C-201/12,  
7 November 2013

*M.M. v. Minister for Justice, Equality and Law  
Reform, Ireland, Attorney General*, C-277/11,  
22 November 2012

*Y & Z v Bundesrepublik Deutschland*, Joined cases  
C-71/11 and C-99/11, 5 September 2012

*N. S. (C 411/10) v. Secretary of State for the Home  
Department and M. E. (C 493/10) and others v.  
Refugee Applications Commissioner, Minister for  
Justice, Equality and Law Reform*, C-411/10 and  
C-493/10, 21 December 2011

#### United Nations Committee Against Torture (UNCAT)

*V.L. v. Switzerland*,  
CAT/C/37/D/262/2005, UN Committee Against  
Torture (CAT), 22 January 2007

*Falcon Ríos v. Canada*,  
CAT/C/33/D/133/1999, UN Committee Against  
Torture (CAT), 17 December 2004

*K.K. v. Switzerland*,  
CAT/C/31/D/186/2001, UN Committee Against  
Torture (CAT), 28 November 2003

*Tala v. Sweden*,  
CAT/C/17/D/43/1996, UN Committee Against  
Torture (CAT), 15 November 1996

*Kisoki v. Sweden*,  
CAT/C/16/D/41/1996, UN Committee Against  
Torture (CAT), 8 May 1996

### NATIONAL CASES

#### Canada

*Canada v Ward* [1993] 2 SCR 689

#### France

##### Council of State

No. 374167, 11 February 2015

#### Hungary

##### Administrative and Labour Court of Budapest

*R.Y. (Afghanistan) v Office of Immigration and  
Nationality (OIN)*, 17.K.31893/2013/3-IV, 28  
June 2013

#### Ireland

##### Refugee Appeals Tribunal

*A.O. V Refugee Applications Commissioner*, Minister  
for Justice, Equality and Law Reform, Attorney  
General and Ireland (Respondent) and Human  
Rights Commission (Notice Party) No. 2009 1194 JR

#### New Zealand

*Re G.J.* [1998] 1 N.L.R. 387

#### Poland

##### Administrative Court

Voivodeship Administrative Court, Warsaw no IV  
SA/Wa 685/15, 1 October 2015

#### Refugee Board

RdU-326-1/S/2015, 14 August 2015

#### Sweden

##### Migration Court of Appeal

UM 6397-09, 11 May 2010

#### United Kingdom

##### Supreme Court

*HJ (Iran) v Secretary of State for the Home  
Department* [2010] UKSC 31, 7 July 2010

##### House of Lords

*Islam v. Secretary of State for the Home Department  
Immigration Appeal Tribunal and Another, Ex Parte  
Shah, R v.* [1999] UKHL 20 (Shah and Islam),  
25 March 1999

##### Court of Appeal

*Demirkaya v Secretary Of State For Home  
Department* [1999] EWCA Civ 1654, 23 June 1999

##### Upper Tribunal (Immigration and Asylum Chamber)

*SM (lone women - ostracism) CG* [2016] UKUT 67  
(IAC), 2 February 2016

*BM and Others (returnees - criminal and non-  
criminal) (CG)* [2015] UKUT 293 (IAC), 2 June 2015

*SW (lesbians - HJ and HT applied) Jamaica CG* [2011]  
UKUT 251 (IAC), 24 June 2011

## C. Agendas of Pilot Project 7 Seminars

### Prague Process Targeted Initiative

#### 1<sup>st</sup> Seminar of Pilot Project 7

#### *Quality in Decision-making in the Asylum Process Continuous Training Using Content of Jurisprudence*

*Tbilisi, 23-25 September 2015*

#### AGENDA

##### DAY 1 – September, 23<sup>rd</sup> 2015

09.30-10.00 Registration

##### **Welcome Session** chaired by Sweden and Germany

10.00–10.15	Opening remarks by: Ms. Anna Bengtsson, Project leader, Swedish Migration Agency, Sweden Mr. Thorsten Schroeder, Federal Office for Migration and Refugees, Germany Mr. George Jashi, Executive Secretary, Secretariat of the State Commission on Migration Issues, Georgia
10.15–10.25	Partners remarks by Mr. Peter Stockholder, Head of Regional Protection Support Unit, UNHCR Georgia
10.25–10.40	Presentation on “Current developments in asylum procedures in Georgia”, Mr. Irakli Lomidze, Head of Unit for Refugee Issues, Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia
10.40–10.50	Introduction by Ms. Anna Bengtsson, Swedish Migration Agency
10.50–11.00	Summary of answers provided to the PP7 Questionnaire, Ms. Angela Daggstrom, Swedish Migration Agency
11.00-11.20	Tour de table

##### **Session 1: Refugee and International Protection Law** chaired by Sweden

11.20-11.50	Core issues in Refugee and International Protection Law, Judge Judith Gleeson, Upper Tribunal (Immigration and Asylum Chambers), United Kingdom and Judge Judith Putzer, Administrative Court of Vienna, Austria
11.50–12.10	Coffee break
12.10-13.30	Core issues in Refugee and International Protection Law – continued, followed by Q&A session
13.30–14.30	Lunch

**Session 2: The Functioning of the Memory and its Relevance regarding Credibility Issues** chaired by Germany

14.30–15.15	Psychology and Credibility Assessment - The multi-disciplinary approach, including Q&A session, Ms. Jane Herlihy, Clinical and Research Psychologist, Director at the Centre for the Study of Emotion and Law, London, United Kingdom
15.15-15.30	Introduction to case study session on asylum cases
15.30-16.30	Case studies in break-out sessions (including coffee break), Facilitators: Judith Gleeson, Judith Putzer and Jane Herlihy
16.30–17.15	Discussion in plenary of case studies
18.00	Guided tour of the city
20.00	Dinner

**DAY 2 – September 24<sup>th</sup> 2015**

**Session 3: Persecution and Convention Grounds of the 1951 Convention** chaired by Georgia

09.30–09.50	Reflections from day 1 and outlook into day 2
09.50-11.00	Persecution and Convention grounds and evolvement in jurisprudence, Judith Gleeson and Judith Putzer
11.00-11.30	Credibility assessment, memory for traumatic experiences and decision making
11.30-11.50	Coffee break
11.50 – 12.30	Inter-active session
12.30 – 12.45	Presentation of the results and findings of the Asylum Systems Quality Initiative Eastern Europe and the Southern Caucasus, Mr. Peter Stockholder, UNHCR Georgia
12.45 – 13.45	Lunch

**Session 4: Training Manuals, Quality Assurance Mechanisms** chaired by Sweden

13.45 – 14.00	Introduction to the afternoon session
14.00 – 15.30	Rotating presentations on two topics (45 min each): <ol style="list-style-type: none"> <li>1. CREDO Manual: <i>Credibility Assessment in Asylum Procedures – a Multidisciplinary Approach, vol 1.</i>, Ms. Jane Herlihy and Ms. Judith Putzer</li> <li>2. Database searches on case law, newsletters &amp; blogs (incl. UNHCR Manual on the Case Law of the Regional European Courts), Ms. Judith Gleeson and Ms. Anna Bengtsson</li> </ol>
15.30–15.45	Coffee break
15.45–17.00	Inter-active session

17.40	Excursion to Mtskheta ( <i>old Georgian capital</i> )
20.00	Dinner

**DAY 3 – September 25<sup>th</sup> 2015**

**Session 5: Convention Ground - Membership of Particular Social Group** chaired by Germany

09.30 – 09.45	Reflections from day 2
09.45 – 11.20	Convention ground - Membership to particular social group (presentation and inter-active session), Ms. Judith Gleeson and Ms. Judith Putzer
11.20 – 11.40	Coffee break Reflections and Summing up
11.40 – 12.00	Feedback session, Q&A
12.15 – 12.30	Summing up and future seminars, Ms. Anna Bengtsson
12.30	Lunch
Afternoon	Departure of participants

**Prague Process Targeted Initiative**

**2<sup>nd</sup> Seminar of Pilot Project 7**

**Quality in Decision-making in the Asylum Process  
Continuous Training Using Content of Jurisprudence**

**Brussels, 17-19 February 2016**

**AGENDA**

**DAY 1 – September, 23<sup>rd</sup> 2015**

08.45-09.15	Registration
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**Welcome Session** chaired by Sweden and Germany

09.15-09.30	Opening remarks by: Ms. Anna Bengtsson, Project Leader, Swedish Migration Agency, Sweden Mr. Thorsten Schroeder, Federal Office for Migration and Refugees, Germany
09.30-09.45	Short summary of the 1 <sup>st</sup> PP7 Seminar and introduction to the objectives of the 2 <sup>nd</sup> PP7 Seminar, Anna Bengtsson, Swedish Migration Agency
09.45-10.50	Tour de table on main challenges faced and expectations on this seminar (3 minutes per state)

**Session 1: Assessment Stages in Refugee Status Determination**  
chaired by Sweden

10.50-11.20	Core issues in International Protection, Judge Judith Gleeson, Upper Tribunal (Immigration and Asylum Chamber), United Kingdom
11.20-11.40	Coffee break
11.40-12.20	Structured Decisions and Subsidiary Protection, Judith Gleeson
12.20-13.00	Structured Credibility Assessment – the CREDO Manual ( <i>Credibility assessment in asylum procedures – a multidisciplinary training manual</i> ), Gábor Gyulai, Hungarian Helsinki Committee
13.00-14.00	Lunch
14.00-14.45	The role of Psychology in Refugee Status Determination, including Q&A session, Dr. Jane Herlihy, Clinical and Research Psychologist, Director at the Centre for the Study of Emotion and Law, London, United Kingdom
14.45-14.50	Introduction to case study session on asylum cases
14.50-16.50	Case studies in break-out sessions (including coffee break), Facilitators: Judith Gleeson, Jane Herlihy, Gábor Gyulai and EU MS trainers
16.50-17.45	Discussion in plenary of case studies and role of trainers
19.30	Dinner

**DAY 2 – 18<sup>th</sup> February 2016**

**Session 2: Evidence Assessment in the Asylum Process**  
chaired by Germany

09.00-09.20	Reflections from day 1 and outlook into day 2
09.20-10.40	Memory for traumatic experiences and impact on credibility assessment in decision making, Jane Herlihy
10.40-11.00	Coffee break
11.00-12.00	Multidisciplinary approach to credibility assessment – other aspects (language, culture, etc.), Gábor Gyulai
12.00-13.00	Lunch

**Session 3: Credibility assessment and Training of Trainers (ToT)**  
chaired by Sweden

13.00-14.00	UNHCR Manual on the Case Law of the European Regional Courts, Samuel Boutruche, Judicial Engagement Coordinator, UNHCR Strasbourg.
14.00-15.00	Credibility assessment, standards and indicators, Judith Gleeson and Gábor Gyulai
15.00-15.20	Coffee break

15.20-16.30	Parallel working groups
	A. CREDO Manual: <i>Credibility Assessment in Asylum Procedures – a Multidisciplinary Approach, vol 1.</i> , Jane Herlihy and Gábor Gyulai
	B. Training-of-trainers (ToT): facilitating case studies session to achieve good learning outcomes, drafting of fictive cases, Helga Dreismann and Yvonne Bengtsson
	C. Open session for discussing own cases, Judith Gleeson and Anna Bengtsson
16.30-17.10	Database searches on case law, newsletters & blogs, Judith Gleeson
17.10-17.30	Presentation of Draft Guidelines on how to organise continuous training and discussion, Anna Bengtsson
19.00	Dinner

**DAY 3 – 19<sup>th</sup> February 2016**

**Session 3 (continued): Credibility assessment and Training of Trainers (ToT)**  
chaired by Sweden

09.00-09.20	Reflections from day 2 including on Training of Trainers
09.20-10.10	Introduction of the EASO Practical Guide on Evidence Assessment, Mr. Stein Wouters, Office of the Commissioner General for Refugees and Stateless Persons, Belgium
10.10-11.20	Training methodology (focusing on asylum issues), Gábor Gyulai
11.20-11.40	Closing session and outlook into the 3rd PP7 Seminar
11.40	Lunch
Afternoon	Departure of participants

**Prague Process Targeted Initiative**

**3<sup>rd</sup> Seminar of Pilot Project 7**

**Quality in Decision-making in the Asylum Process  
Continuous Training Using Content of Jurisprudence**

*Berlin, 20-22 April 2016*

**AGENDA**

**DAY 1 – 20 April 2016**

08.45-09.00	Registration
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**Welcome Session**  
chaired by Sweden and Germany

09.00-09.15	Opening remarks by: Ms. Anna Bengtsson, Project Leader, Swedish Migration Agency, Sweden Ms. Imke Wilms, Federal Ministry of the Interior, Germany Mr. Thorsten Schröder, Federal Office for Migration and Refugees, Germany
09.15-09.30	Short summary of the 2nd PP7 Seminar and introduction to the objectives of the 3rd PP7 Seminar, Ms. Anna Bengtsson
09.30-10.30	<i>Tour de table</i> on main challenges faced and expectations on this seminar (3 minutes per state)
10.30-10.50	Coffee break

**Session 1: Exclusion Clauses**  
chaired by Sweden

10.50-11.30	Core issues in International Protection and Exclusion Clauses, Judge Judith Gleeson, Upper Tribunal (Immigration and Asylum Chamber), United Kingdom
11.30-12.30	Exclusion Clauses and Training on addressing them, Mr. Peter Stockholder, Head of Regional Protection Support Unit, Tbilisi, UNHCR
12.30-13.30	Lunch
13.30-14.15	Presentation on Exclusion clauses, Ms. Mi Hanne Christiansen, Head of Unit, Directorate of Immigration, Norway
14.15-16.15	Parallel working groups (including coffee break)
	A. Memory and Traumatic Experiences, Dr. Jane Herlihy, Clinical and Research Psychologist, Director at the Centre for the Study of Emotion and Law, London, United Kingdom
	B. Training-of-trainers (ToT): Focus on skills, giving feedback EU MS Expert trainers Ms. Yvonne Bengtsson (SE) and Ms. Silvana Günther (DE)
	C. i) Introduction into EDAL Database on Case law, Ms. Amanda Taylor, Junior Legal Officer, European Council on Refugees and Exiles (ECRE)
	ii) Internal Protection Alternative – Study on 11 European states and application of Actors of protection, Ms. Amanda Taylor (ECRE)
17.15-19.30	Guided bus tour
19.30	Dinner

**DAY 2 – 21 April 2016**

**Session 2: Vulnerable persons, interview techniques, Internal Protection Alternative**  
chaired by Germany

08.00-09.00	Optional session for discussing own national cases in small group
09.00-09.20	Reflections from day 1 and outlook into day 2

09.20-10.30	Vulnerable persons and concerns in the asylum process, Ms. Jane Herlihy and Ms. Yvonne Bengtsson
10.30-10.50	Coffee break
10.50-11.10	Interviewing vulnerable persons, Ms. Jane Herlihy and Ms. Yvonne Bengtsson
11.10-11.35	Internal Protection Alternative, Judge Judith Putzer, Federal Administrative Court, Vienna
11.35-12.00	Internal Protection Alternative – Study on 11 European states and application of Actors of protection, Ms. Amanda Taylor (ECRE)
12.00-13.00	Lunch

**Session 3: Case study session (focus on Exclusion, Internal Protection Alternative)**  
chaired by Sweden

13.00-13.30	Jurisprudence on Exclusion, Judith Gleeson
13.30-16.00	Case studies in break-out session (including coffee break). Facilitators: Judith Gleeson, Judith Putzer, Mi Hanne Christiansen, Peter Stockholder, Silvana Günther, Yvonne Bengtsson
16.00-17.00	Reporting back in plenary
17.00-18.00	2-3 optional sessions for national cases; or for COI and internet sources; or burnout issues
20:00	Dinner

**DAY 3 – 22 April 2016**

**Session 4: Training Materials and Draft PP7 Guidelines**  
chaired by Sweden

08.00-09.00	Optional session for discussing own national cases
09.00-09.30	Reflections from day 2
09.30-10.20	Presentation of European Asylum Support Office (EASO) work on Quality issues with a focus on "Practical tool for identification of persons with special needs (IPSN-tool)", Ms. Maria Kovalakova, Centre for Training, Quality and Expertise, EASO
10.20-10.50	Presentation of the Draft PP7 Guidelines, Ms. Anna Bengtsson
10.50-11.10	Coffee break
11.10-12.00	Discussion and feedback session on the Draft PP7 Guidelines
12.00-12.30	Closing session
12.30	Lunch
Afternoon	Departure of participants

## D. Sample Presentations

Some sample Powerpoint presentations used in this project are enclosed:

### 1. Using Jurisprudence

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### Using Jurisprudence

Upper Tribunal Judge Judith Gleeson

Prague Process Targeted Initiative  
Pilot Project 7, Seminar 2  
Brussels, February 2016



The project is funded by the European Union

UN Resolution 8(I), adopted by the General Assembly during its First Session, 10 January 1946

- *The General Assembly,*
- (c) *Recommends* to the Economic and Social Council that it take into consideration in this matter the following principles:
  - (i) This problem is international in scope and nature;...



Resolution of the UN General Assembly, 1<sup>st</sup> session, 12 February 1946

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### Task of the decision maker

- Establish what international protection applicant seeks
- Identify material facts and possible exclusion triggers
- Make findings of credibility and material fact, using all available evidence (including country and medical evidence)

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### Task of the decision maker- continued

- Identify relevant legal provisions
  - international and national
- Use relevant legal guidance in decided cases (jurisprudence) to assist in applying them
  - this is also the law
- Need to decide the case so your country's international obligations are upheld
  - including exclusion provisions, where triggered

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### What is jurisprudence?

- Jurisprudence is the theory and **practice** of the law
- As expressed in the reported, and in particular, the leading or guidance cases, of senior Courts and Tribunals **around the world**
- A repository of legal analysis and knowledge on the **interpretation of difficult points**
  - See 'Internet Sources and Materials' for places to find the best decisions worldwide

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### Working with the judgment: *ratio decidendi* and judicial guidance

- **Discussion:** may help clarify the correct approach
- *Ratio decidendi:* Paragraphs in judgment where legal conclusions drawn and/or interpretative guidance given.
- Binding or persuasive?

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### Using jurisprudence: the research stage

- What is the **legal issue** in this case? What are the relevant legal provisions?
- Research relevant decided cases on the **point of law** (online search)
- Print copies of the most important to use at hearing (if a Judge) and in writing your decision
- Check for recent higher court commentary on those judgments (simple text string search)

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### Using jurisprudence: Oral and written submissions

- Ensure that you are given a full printed copy of all judgments relied on in argument by the parties.
- Ask them which paragraphs they rely on. Check that those are relevant paragraphs – if not, put the relevant paragraphs to the representatives and ask for comments.
- Also ask for comments on the judgments you identified as relevant. Mark the paragraphs mentioned.

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### Article 1A (continued) Stateless persons and other nationalities

- ...or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
- In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

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### Who is a CEAS refugee under the Qualification Directive?

**ARTICLE 2 (d)**

- "refugee" means a third-country national who, owing to a well-founded fear of being persecuted
  - for reasons of race, religion, nationality, political opinion or membership of a particular social group,
  - is outside the country of nationality
  - and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country;
- or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it,
- and to whom Article 12 does not apply;

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### Jurisprudence in decision writing: Unpacking the judgment

- Not all of the paragraphs in the judgment are jurisprudence.
- Judgments will set the scene, explaining law, procedural process, facts asserted and believed, and parties' submissions.
- Discussion section
- Guidance given
- Individual decision

Thank you. Any questions?

Judith Gleeson  
[Uppertribunaljudge.Gleeson@ejudiciary.net](mailto:Uppertribunaljudge.Gleeson@ejudiciary.net)  
Brussels, February 2016

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### The Qualification Directive – subsidiary protection

**ARTICLE 2 (F)**

- "person eligible for subsidiary protection" means a third-country national or a stateless person who does not qualify as a refugee
- but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence,
  - would face a real risk of suffering serious harm as defined in Article 15,
  - and to whom Article 17(1) and (2) does not apply,
  - and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

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### Article 15 – Serious harm

Serious harm consists of:

- (a) the death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

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### Other considerations

**PRINCIPLE OF NON-REFOULEMENT**

- Refugee Convention Articles 32 and 33
- Qualification Directive Article 21
- Articles 2 and 3 ECHR (European Convention on Human Rights)
- Article 3 CAT (UN Convention Against Torture or other Inhuman, Cruel, Degrading Treatment or Punishment)

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### Other considerations

**Cessation -**

- Refugee Convention Article 1D
- Qualification Directive Article 14 and 16

**Exclusion –**

- Refugee Convention Article 1F
- Qualification Directive Articles 12 and 17

## 2. International Protection Basics

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### International Protection Basics

Upper Tribunal Judge Judith Gleeson

Prague Process Targeted Initiative  
Pilot Project 7, Seminar 2  
Brussels, February 2016

The project is funded by the European Union

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### Refugee Convention definition Article 1A

For the purposes of the present Convention, the term "refugee" shall apply to any person who:

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

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### Domestic Protection Standards in CEAS countries

**Article 3**

- **More favourable standards**
- Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.

Thank you!

Judith Gleeson  
[Uppertribunaljudge.Gleeson@ejudiciary.net](mailto:Uppertribunaljudge.Gleeson@ejudiciary.net)  
Brussels, February 2016

### 3. Particular Social Group

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## Particular Social Group

Upper Tribunal Judge Judith Gleeson  
Judge Judith Putzer

Prague Process Targeted Initiative  
Pilot Project 7, Seminar 1  
Tbilisi, September 2015

The project is funded by the European Union

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## Article 1A

'Owing to a well-founded fear of being persecuted for reasons of... **membership** of a particular social group ... is outside his country of nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country; etc'

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## More characteristics

- Orphans or street children
- Members of a family (inc vendetta/blood feud)
- Homosexuals (male or female)
- Former trafficked persons (usually women and/or children)

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## More characteristics

- Very young adults (just over 18)
- Former members of a particular regime (KHAD in Afghanistan, Ba'ath party members) – but exclusion possible
- Land owners or former land owners
- Wealthy individuals

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## Reason for persecution

- Reason in the mind of the persecutor
- Persecutor's motives irrelevant
- Persecution must flow at least in part from the Refugee Convention reason (PSG)
- But PSG reason cannot be defined by the persecution (circular)

*Sepe v Secretary of State for the Home Department [2003] UKHL 15*  
*K and Fornah v SSHD [2006] UKHL 46*

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## Recast Qualification Directive, Article 10(1)(d)

- a group shall be considered to form a particular social group **where in particular**:
- members of that group share an innate characteristic, or
- a common background that cannot be changed, or share
- a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, **and**
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

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## Thank you! Safe journey home.

Judith Gleeson  
[Uppertribunaljudge.Gleeson@ejudiciary.net](mailto:Uppertribunaljudge.Gleeson@ejudiciary.net)  
Tbilisi, September 2015

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ПРАЖСКИЙ ПРОЦЕСС

## Recast QD 10(1)(d) continued

- Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation.
- Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States.
- Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;

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## Shared Characteristics

- Women
- Children
- (Intact) women who have not suffered FGM
- Perceived or actual adulterers (mainly women)
- Young women of a particular ethnic group (Kikuyu under 65 in Kenya)
- Women who refuse arranged marriages

### 4. Internal flight/relocation

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## Internal relocation / Internal flight

Upper Tribunal Judge Judith Gleeson  
Judge Judith Putzer

Prague Process Targeted Initiative  
Pilot Project 7, Seminar 3  
Berlin, April 2016

The project is funded by the European Union

PRAGUE PROCESS  
ПРАЖСКИЙ ПРОЦЕСС

## The Applicant's claim

Refer to Protection Basics - why is the appellant seeking international rather than domestic protection?

- Actors of persecution
- Actors of protection
- Can the appellant find safety elsewhere in the country of origin?
- Is it reasonable to expect them to do so?

PRAGUE PROCESS  
ПРАЖСКИЙ ПРОЦЕСС

### The protection need

- Is there a real risk of persecution or serious harm for a Refugee Convention or CEAS Qualification Directive reason for this appellant in their home area?
- If there is no such risk, no protection is needed and internal relocation is not in issue.
- If there is a risk, is it local or does it extend beyond the home area? How great is the risk?

PRAGUE PROCESS  
ПРАЖСКИЙ ПРОЦЕСС

### Actors of persecution

- Who does the appellant fear?
- State actors - risk throughout country of origin
- Rogue state actors
- Non-state actors

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ПРАЖСКИЙ ПРОЦЕСС

### Actors of protection

- Has there been any attempt to access domestic protection? How did that go?
- Is there a willingness and ability for the state in the country of origin to protect persons in this appellant's situation?
- Are there family members or a refuge or shelter outside the home area where the risk to the appellant would fall below the international protection level?

PRAGUE PROCESS  
ПРАЖСКИЙ ПРОЦЕСС

### Reasonableness of internal relocation

- Internal relocation is always considered as if from the home area to the protection site
- Is it reasonable to expect the appellant to go to the safer area (bear in mind the appellant has been prepared to travel to your country)
- Can the appellant get there? (war zones etc)
- Will the appellant be able to survive there?
- Individual factors - female head of household, child, effect of previous traumatising etc.

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### Assistance available to you

- Country reports
- Country experts
- International country-specific jurisprudence
- Medical evidence

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### The Case Studies

- Group exercises and how to approach them
- List of cases for each case study
- What we want you to do

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### Thank you. Any questions?

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## 5. UNHCR: Update on the CJEU and ECtHR case law regarding credibility assessment: a UNHCR's perspective

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UNHCR  
United Nations High Commissioner for Refugees  
Haute Commissaire des Nations Unies pour les Réfugiés

### Update on the CJEU and ECtHR case law regarding credibility assessment: a UNHCR's perspective

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### I. Introduction

- **Credibility: a very complex and challenging** area of refugee law and status determination
- **A significant proportion of decisions to deny status are based wholly or partially on adverse credibility findings**
- **Absence of a common approach** to credibility assessment among European States
- **Limited guidance in the EU asylum acquis** (Art. 4 and a few provisions in the Asylum Procedures Directive)
- **Useful standards in the ECtHR case law**
- **UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, the UNHCR Note on Burden and Standard of Proof and the CREDO projects** provide some additional guidance
- **UNHCR Manual on the Case Law of the European Regional Courts** (<http://www.refworld.org/docid/558803c44.html>)

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### II. General observations on the importance of the risk assessment

- **CJEU:** "That assessment (...) **must, in all cases, be carried out with vigilance and care**, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union" (*Abdulla and others*, C-175/08, C-176/08, C-178/08 and C-179/08, para. 90)
- **ECtHR:** "The States must have particular regard to Article 3 of the Convention, which enshrines **one of the most fundamental values of democratic societies**" and "the **importance** which the Court attaches to **Article 3** of the Convention and the **irreversible nature of the damage** which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 **imperatively requires close scrutiny by a national authority (...)**" (*M.S.S. v. Belgium and Greece*, paras. 218 and 293)

### III. Shared burden of proof

- **UNHCR: Duty to ascertain and evaluate all the relevant facts shared** between the applicant and the examiner

- **EU asylum law:**

Art. 4(1) QD: "Member States **may** consider it **the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application** for international protection"

- **ECtHR case law:**

=> "in principle, the applicant has to adduce evidence capable of proving that there are substantial grounds for believing that (...) he would be exposed to a real risk of being subjected to treatment contrary to Article 3" (*R.C. v. Sweden*, para. 50)

### The Duty of the Determining Authority (2/2)

- **ECtHR case law:**

=> "in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, (...), he would be exposed to a real risk of (...) treatment contrary to Article 3 (...). **Where such evidence is adduced, it is for the Government to dispel any doubts about it.**" (*Saadi v. UK*, para. 129)

=> Close and rigorous scrutiny requirement

=> Obligation to verify the authenticity of documentary evidence submitted by the applicant (*Singh and Others v. Belgium*, para. 104)

=> "The assessment is **adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources**" (*Salah Sheikh v. NL*, para. 136)

### Duty of the applicant

- **UNHCR:**

=> the applicant's duty to substantiate the application does **not entail a duty to provide documentary or other evidence in support of every material fact** asserted by the applicant

=> **Applicants' statements about themselves constitute evidence** capable of substantiating the application

- **EU asylum law:**

=> Art. 4 (1) QD: Member States may consider it the duty of the applicant to submit **'all the documentation at the applicant's disposal.'**

=> Art. 11 (2) (b) APD: Member States "may provide that applicants for asylum have to hand over **documents in their possession** relevant to the examination of the application (...)"

- **ECtHR case law:**

=> "(...) the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake." (*Nachova and Others v. Bulgaria*, para. 147)

=> But **only "to the greatest extent practically possible"** given the difficulties to adduce evidence (*Said v. The Netherlands*, para. 49)

=> **Excessive burden of proof** on the applicant hinders a thorough examination of the merits of the claim (*M.S.S. v. Belgium and Greece*, para. 389; *M. and Others v. Bulgaria*, para. 127)

### Benefit of the doubt and credibility issues (1/2)

- **UNHCR**

After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. It is hardly possible for a refugee to 'prove' every part of his case it is therefore frequently necessary to give the applicant the benefit of the doubt

- **EU Asylum Law**

=> Article 4 (5) QD: where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when, inter alia:

- (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

=> CJEU: (*A, B and C*, C-148/13, C-149/13 & C-150/13) the limits on the method of assessing the credibility of the declared sexual orientation of an asylum applicant imposed by Art. 4

### The Duty of the Determining Authority (1/2)

- **UNHCR:**

=> Necessary to lighten the burden of proof normally incumbent upon the applicant, and information that cannot easily be obtained from the applicant may have to be sought elsewhere

=> It may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application

- **EU asylum law:**

=> Art 4 (1) QD: Duty to cooperate

=> CJEU: "it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application." (*M.M.*, C-277/11, para. 65)

=> "A Member State may also be better placed than an applicant to gain access to certain types of documents" *M.M.*, C-277/11, para. 66)

=> Art. 4(3) QD: Duty to take into account COI

=> Duty of the appeal body to **review both the law and the facts** (*Samba Diouf*, para. 57)

### Benefit of the doubt and credibility issues (2/2)

- **ECtHR**

*N. v. Sweden* - "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" (para 53)

*R.C. v. Sweden*: "the applicant's basic story was consistent throughout the proceedings and that notwithstanding some uncertain aspects, such as his account as to how he escaped from prison, such uncertainties do not undermine the overall credibility of his story." (para. 52)

"when information is presented [by the respondent State] 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" (para. 50)

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(including some suggested further reading)

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