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UNHCR
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ASQAEM Summary

Asylum Systems Quality Assurance and Evaluation Mechanism Project in the Central and Eastern Europe sub-region

UNHCR Project
Co-financed by the European Union

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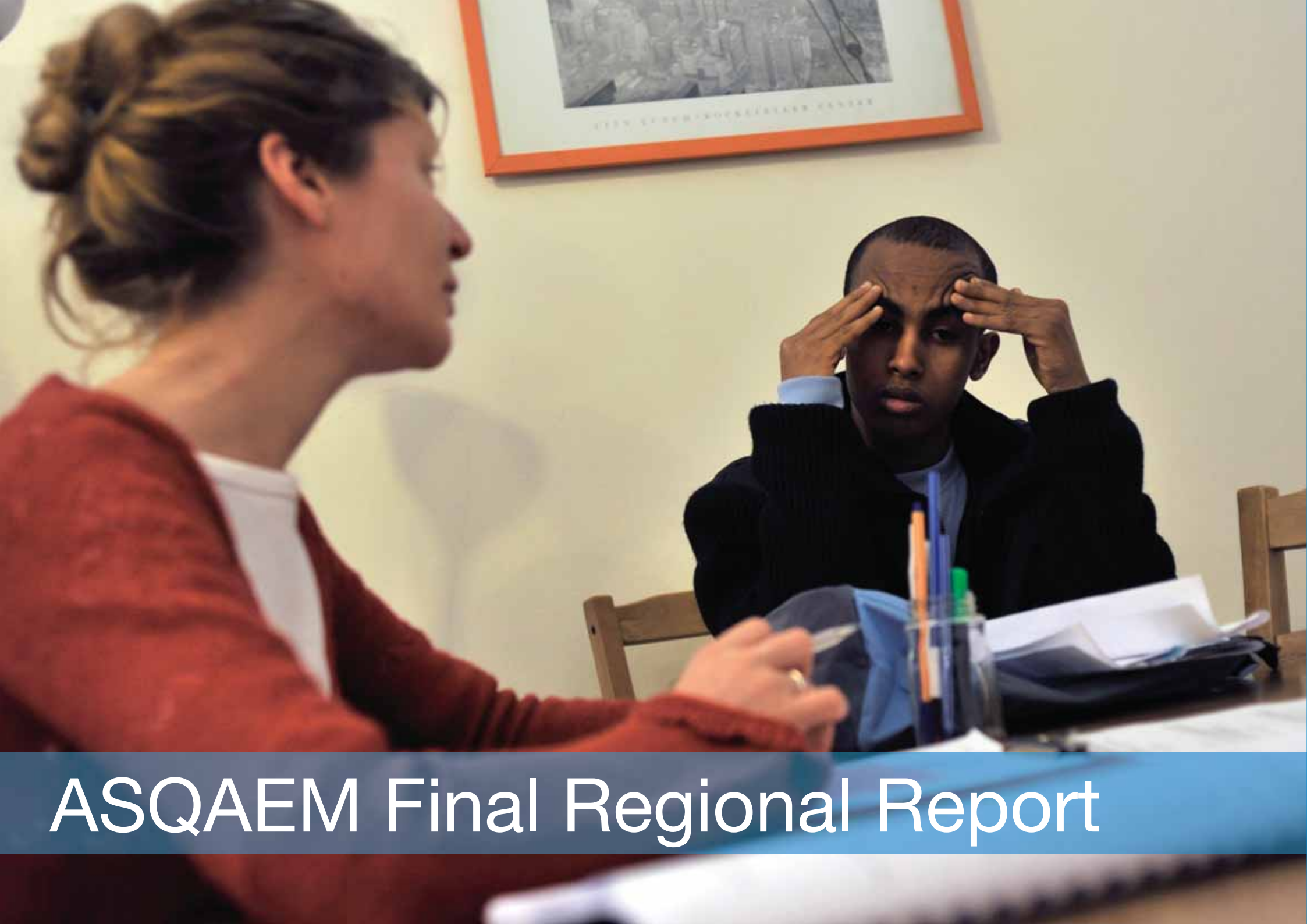
The UN Refugee Agency



ASQAEM Final Regional Report

UNHCR
The UN Refugee Agency

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Asylum Systems Quality Assurance and Evaluation Mechanism Project in the Central and Eastern Europe sub-region

Report written by
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ASQAEM Regional Coordinator

Vancouver, British Columbia, Canada
February 2010

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Final Regional Report

Foreword

In the Archaeological Museum in Istanbul, Turkey is a Cuneiform tablet recording the "peace" terms agreed to in 1274 BC between Hatusilus III, King of the Hittites and Ramesses II, Pharaoh of Egypt. A vicious four-day war for control of the Levant had led to neither party having an advantage and so it was called off. Apart from the speedy decision to end hostilities, what engages our interest today is a remarkable section of that treaty. It records the agreement between the rulers that they will return persons who fled the war without harming them – the first written agreement against *réfoulement*. Thirty two centuries ago concern was being expressed for victims of possible persecution.

The Asylum Systems Quality Assurance and Evaluation Mechanism (ASQAEM) Project officially began 1 September 2008 and concluded 28 February 2010. However, for many of the National Evaluators, work began earlier in 2008 and, in the case of Poland, which conducted a Pilot Project, work began in the latter part of 2007.

It has been a long journey filled with wonder, surprise, challenge, and remarkable people. Without these people the Project could not, and would not, have been successful. For each of those mentioned here there are others behind them supporting them, but on behalf of the UNHCR we would like to accord particular thanks to the following individuals for their expertise, intellectual curiosity and rigour, and most of all for their sense of humour:

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until 31 December 2009

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Focal Point for ASQAEM and Head of the Asylum Affairs Division
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Laszlo Szebeni - General Vice-President of the Court
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Supreme Court of Slovakia

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Vice President

Darinka Dekleva Marguc
MSc. High Court Judge, Head of Department for Protection of Constitutional Rights, Administrative Court of the Republic of Slovenia

Alenka Belič, Boštjan Zalar, Damjan Gantar, and Liljana Polanec
High Court Judges of the Administrative Court

At this point we would like to say a special thanks to our colleagues in the United Kingdom. As the outset of the Project, we travelled to London to meet with our colleagues at United Nations High Commissioner for Refugees (UNHCR) and the United Kingdom Border Agency as they had been jointly involved in a precedent-setting quality improvement project since 2003. They were an inspiration for the Project and the co-operation between the UNHCR and the UK Border Agency, which is responsible for refugee adjudication, served as a model. So, a particular thanks to Alexandra Pamela McDowall, Head of Legal Unit, and Sarah-Jane Savage, Quality Initiative Officer, both of the UNHCR, London. A special thanks as well to Bill Brandon, Deputy Director, UK Border Agency New Asylum Model (NAM+) Quality & Learning at the UK Home Office and Lea Jones, Head of Quality Audit, NAM+.

Finally, a very warm thank you to Sebastiaan de Groot, President of the International Association of Refugee Law Judges (IARLJ) and Vice President of the Dutch Court at Haarlem who took the time to serve as our outside adviser despite his many responsibilities.

UNHCR The UN Refugee Agency

1. Executive Summary

The consulting landscape is littered with unread reports. The aim of this Project has not been the production of (yet) another such report. The aim was to help change the refugee status determination systems in the Region[2] for the better. This Report memorialises the Project and, while embodying the results, also acts as a reference manual. This is the gist of the ASQAEM Report: what has been learned, what has been done to improve refugee status determination within the Region, and what tools were produced along the way to ingrain, sustain and further develop the refugee status determination systems in the Region.

Some Numbers

The observations made in the study are based upon considerable research. 579 first-instance interviews were monitored, each frequently lasting several hours; 1,088 first-instance decisions were reviewed; and 442 second-instance court decisions were analysed. This has allowed us to make some broad findings about the state of refugee status determination in the Region as well as some very particular observations in each country. All together, 207 recommendations were made in the eight participating countries. 24 training seminars were conducted involving decision-makers and judges from more than 20 countries.[3]

A look through the Tables of Contents will allow the reader to zero in on topics of interest. The Report is a veritable *smörgåsbord* of refugee decision-making information.

Peter Drucker once said that "my greatest strength as a consultant is to be ignorant and ask a few questions." He was right. A good consultant asks the questions the answers to which have long been assumed. A good consultant takes nothing for granted and most importantly, spends a good amount of time listening. When the Project began each National Evaluator was asked to become an expert in the refugee status determination system in his or her country. Until one understands the whole system, one is not in a position to make judgments about what is good or bad or what works or does not.

The Project also relied greatly upon the keen sense of human rights all the National Evaluators have and their abilities to home in on the essence of a problem. They are all enormously bright and well-educated and so they were given considerable scope to carry out their work.

Part A

In this Part we examine the refugee determination system as a whole, but analyse it within its five phases. Phase 1 constitutes an analysis of the period of time from an applicant's arrival in the country until the first interview; Phase 2 involves the interview itself; Phase 3 deals with the interviewer's written reasons for reaching the decision he or she did; Phase 4 takes us to the Court appeal or review of the first-instance decision; and Phase 5 lays out some general observations on the characteristics of a good internal quality audit system.

Finally, we make some general observations about significant Region-wide problems in refugee status determination.

There is no need for every refugee determination system around the world to take the same form. This was envisaged in the drafting of the Convention; however, it is important that the interpretation given to the refugee definition contained in the Protocol and Convention be interpreted the same way across different countries. That it is not, is nothing new.

Part B

In Part B of the Report we examine the refugee status determination system country by country. The National Evaluator in each country wrote his/her Report.[4] It contains significant details of the system, recommendations made, and conclusions arrived at.

Part C

Finally, in Part C, there is a compendium of the checklists developed during the ASQAEM Project. In many ways this is the heart of the Project because the checklists correspond to the five phases of the Project and are intended as pedagogical tools. Whether directed at the first-instance decision-maker or the reviewing judge, these one-page checklists give a succinct overview of what should be done whether preparing an asylum file before an interview or writing the reasons after. The Judges' checklist not only provides a logical guide for examining a first-instance decision but it is also annotated. Under each category, the relevant statutory law, binding or persuasive cases, are cited as is the UNHCR Handbook, UNHCR Guidelines and Excom Conclusions. By making reference to these in his/her own reasons, the reviewing judge can help direct the first-instance decision-maker to the governing law so that he or she, in turn, can incorporate it into his or her future decisions.

2. Genesis of the Project

A while back three people got to talking.[5] They were all part of the new UNHCR Regional Representation for Central Europe (RRCE). The Regional Representation had been formed in 2005 as one of the first such "coalitions" of UNHCR offices in the world. When Lloyd Dakin (Representative), Michael Lindenbauer (Deputy Representative) and Leonard Zulu (Senior Regional Protection Officer) got together that day in 2006 it was to discuss something which was troubling them. As they were receiving statistics and information from the four countries part of the then Regional Representation (Hungary, Poland, Slovakia and Slovenia) they recognised a wide disparity amongst the four countries with respect to refugee recognition rates.

Aware of the Quality Initiative Project between the UNHCR and the UK government that had begun in 2003, as well as the imminent publication of the European Directives on Procedures and Qualifications and the European Union plans for a Common European Asylum System, they decided to apply for European Refugee Fund funding to conduct a study to find out what was causing these large discrepancies. They wanted to identify shortcomings, provide training and build up internal governmental mechanisms enabling national refugee status determination authorities to address their own quality shortcomings in the future. To complete the circle, they wanted, as well, to review the courts that carried out the initial appeals of decisions made by the government agencies for refugee adjudication.

The ASQAEM Project began officially on 1 September 2008. By this time the RRCE had added Bulgaria and Romania to the countries within its Region. In co-operation with the Regional Representation in Germany, both Austria and Germany agreed to join the Project.

3. Methodological Approach

The ASQAEM Project was designed to be practical in nature. While there is certainly considerable theory involved, we have tried to make our recommendations both practical and respectful of the right of each country to devise the refugee status determination system with which it feels most comfortable.

Fundamental Principles

While there may be different methods of implementing the refugee Convention and the law on Subsidiary Protection, the underlying principles are non-negotiable. These are:

- The right to an unbiased decision-maker;
- The right to know the case against one and to meet it;
- The right to have the decision made by the person who heard the evidence.

Working Together Towards a Common Goal

It is hardly news to state that a project will be more successful when the parties involved work together as a team towards a common end. The "end" was abundantly clear: establish a refugee determination system that would fairly, thoroughly, effectively and efficiently analyse cases that came before it. Within the European context this meant a system that – as best as possible – would provide an evaluation of each claim before it in order to determine whether an applicant was entitled to either refugee protection or subsidiary protection.

Humility

No person is perfect and not every position stands the test of time. What this means is that all of us involved in this Project must recognise that we may be wrong and then proceed with this in mind. The best method of proceeding is to discuss issues rationally as they arise. For this reason, we established Project Implementation Boards (PIB) in each country. Within this forum (usually involving a representative or two from each country's refugee authority and an equal number from the UNHCR) the members of the Project Implementation Board would review the recommendations produced by the National Evaluator and decide whether to implement changes and, if so, how and when.

Gathering the Data

Early on in the Project a High Court judge asked how their performance in reviewing first-instance decisions would be done. There is no simple answer for that for before one can analyse a system for its effectiveness it is important to gather data. Equally, one cannot judge a "system" if one does not understand the "whole" system. As Alexander Pope pointed out many years ago in his Essay on Man an alteration in a part affects the whole. As already noted, the National Evaluators were asked to thoroughly study the refugee determination system in their countries from the moment an applicant entered the national territory until all possible appeals had been utilised. They were asked to become "experts" in how their national refugee status determination system functioned. Only when this was accomplished could we be sure that if we made suggestions for improvement, they would make sense and be based upon an accurate assessment of the whole system.

Analysing the Refugee Status Determination System in a Country

Once we had gained a suitable understanding of the system as a whole it was then possible to examine this whole in its constituent parts. To this end we recognised early on that the central and critical part of any refugee status determination "system" was the first interview (hearing), for it was at this moment that an applicant would have the best opportunity to tell his/her story fully. This is particularly important in those countries where there is no *de novo* second-instance hearing; in these cases a review would likely accept the stated facts and focus solely on the legality of the decision rather than its merits or believability.

With this in mind we divided the Project into five phases. The first concerned the period from an applicant's entry into the national territory until his/her first Interview. The second was the interview itself. The third was the written decision. The fourth concerned the appeal/review at the second instance (which in all countries except Poland occurred at the court level). Finally, we examined what would be necessary in order to build an internal quality control system.

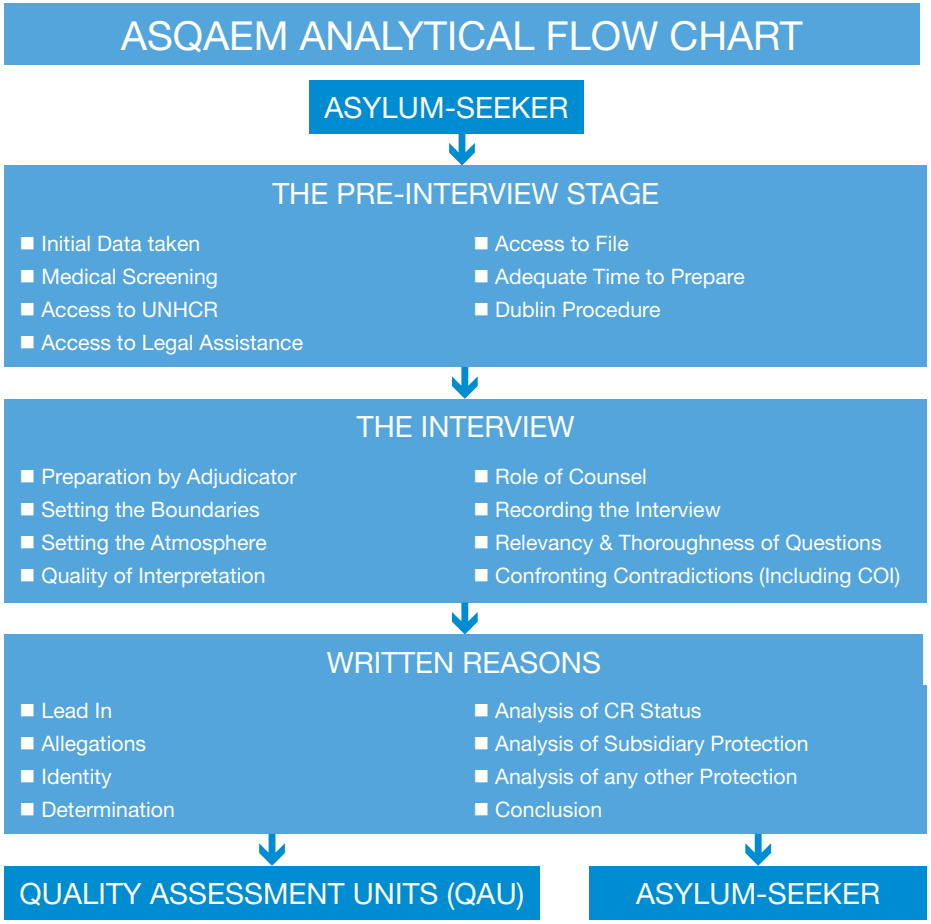
A Final Note

An all too common failing of many refugee status determination systems is that when they get busy, they put aside training. This is a serious mistake as, if the knowledge-base from which a decision maker operates is out of date, then the decisions based upon it may well be incorrect. If one does not keep up to date one runs the risk not only of making wrong decisions but also of being successfully appealed.

A simple analogy will suffice. If your doctor told you that he has not kept up to date with medical developments because he is just "too busy", what level of confidence would you have in his diagnostic abilities? Never be too busy to train or organise.

4. The Refugee Status Determination System

Put schematically, the analysis in the Project took on the following form:



The refugee status determination system differs in each country. In the individual Country Reports you can read a detailed examination of the refugee status determination system country by country. In this section, however, we will discuss the general issues that we examined across the Region at the first instance. Countries are in various stages of development, as might be expected given their histories, and so these issues may or may not be significant in a given country. In a successful refugee status determination system each phase must play its part.

4.1. Phase 1: The Pre-Interview Stage

The phase before the interview can be critical. If the essence of a good interview is to provide an applicant with the ability to get his/her whole story in front of the interviewer, then this phase should allow the applicant time to get information and prepare his/her case (with or without assistance). But it is also the most important time for the interviewer to prepare for the interview.

Initial Data Taken: What information is given by the asylum-seeker to the Asylum Authority? Is the representative of the authority trained in refugee matters? Will the information collected be used in the interview for credibility purposes? If so, has the asylum-seeker had an opportunity to review it and to comment on it?

Medical Screening: Is the information put in the file for a decision-maker to see or kept in a separate medical file. What problems are caused by either of these methods? Are families' medical records put in separate files or all in one? What are the effects on confidentiality in the case where they are all kept together?

Access to UNHCR: How do asylum-seekers learn of their right to contact the UNHCR?

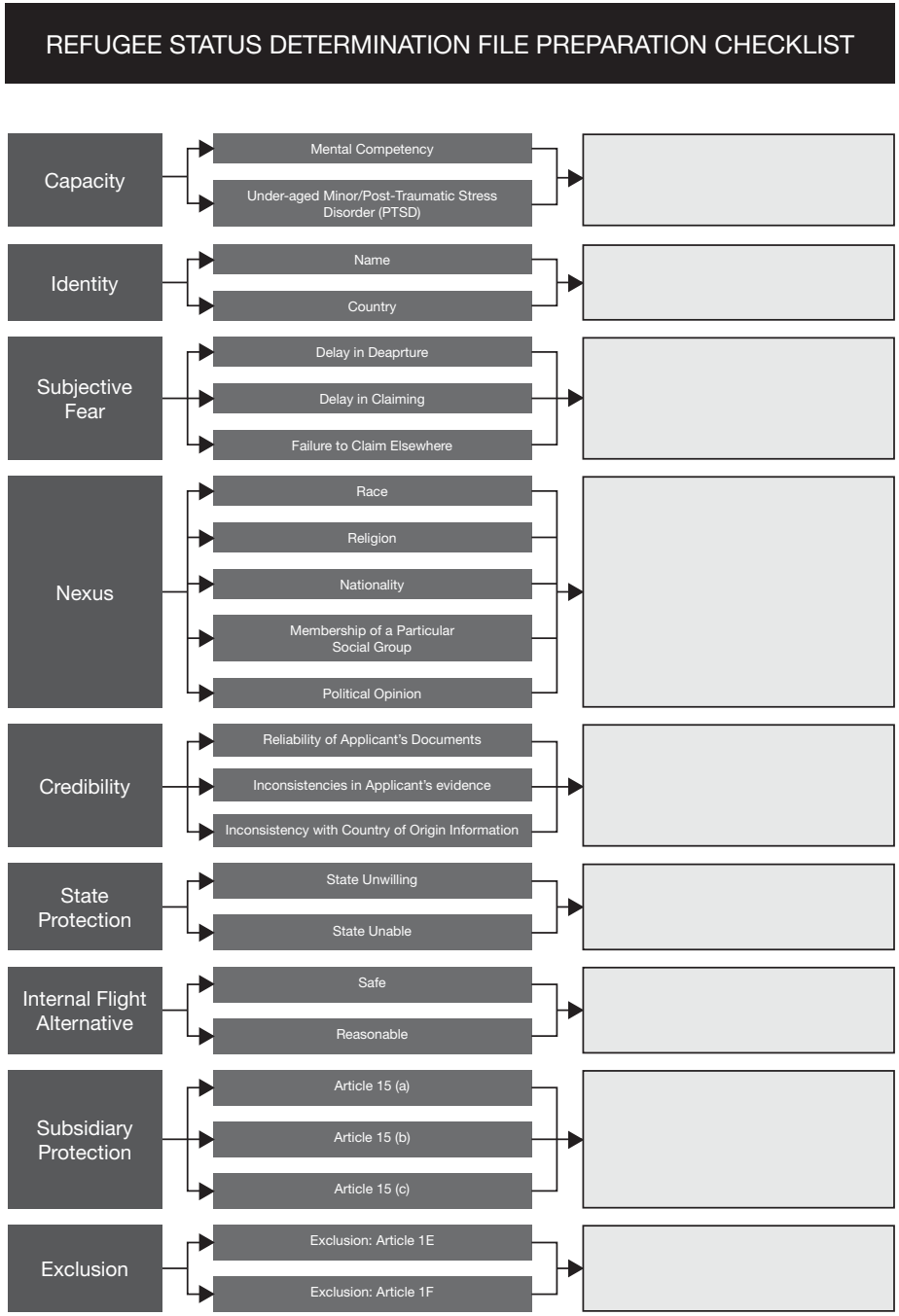
Access to Legal Assistance: Is there any legal assistance for the asylum-seeker; if so, at what stage of the proceedings? Equally important to there being assistance, is the asylum-seeker made aware of it at the earliest opportunity and is the assistance of a sufficiently high standard?

Access to File: At what point can an asylum-seeker get access to the documents in his/her file so that he or she knows what documents will be used in deciding the initial claim and so can make preparations?

Adequate Time to Prepare: Is there sufficient time to prepare between the applicant's arrival on the territory and his/her interview?

Dublin Procedure: What information is collected in the Dublin procedure and is any of that information used in arriving at credibility determinations at the in-merit hearing?

We have noted the importance of an adjudicator being properly prepared before the interview. In line with ASQAEM's practical bent we produced the following checklist which can assist the adjudicator in preparing his/her case file prior to the interview. The boxes draw the adjudicator's attention to possible issues which may lead him/her to do specific research or ask for specific documents.



For full-sized document please see Part C ASQAEM Checklists.

4.2. Phase 2 – The Interview

The interview is the heart of any claim for protection. It is here that the opportunity is provided for the decision-maker to hear the elements of the claim and to then decide whether the facts as presented allow for a successful claim either under the Convention, subsidiary protection, or some other form.

Preparation by Adjudicator: A well prepared interviewer knows the facts of the story, has read up on the available country conditions and consequently can ask relevant questions that will help resolve the claim. As noted above, the better the preparation, the better the decision. It is costly and very time consuming to hold second interviews or to hold appeals and so it makes sense to give the initial decision-maker the best evidence so he or she can make the best decision.

Setting the Boundaries: Has the asylum-seeker been made aware of the nature of the interview procedure, the role of the interpreter, when a decision may be expected, the possibility of an appeal, etc.?

Setting the Atmosphere: Many asylum-seekers are frightened by authority figures, often because of the experiences they had in their own countries. Apart from that they know that their future, perhaps their own or their family's safety, depends upon their interview. It is important for the decision-maker to create a positive and safe environment. Many people who are afraid will not open up and tell their stories. There are many cultural taboos which the interviewer must be aware of. Offer an applicant water, remind them that if they need a break to ask for it and start the interview with a few "ice breaker" questions. Decision-makers should also be conscious that they represent their country and act appropriately.

Quality of Interpretation: Interpretation need not be perfect but it must be such that the asylum-seeker can effectively communicate the facts of his or her case. It is also not acceptable for the interpreter to do anything other than interpret the exact words of the asylum-seeker and other parties at the interview. In other words, the interpreter uses the first person singular and not: "The asylum-seeker says he went to the government office to…". Nor may the interpreter ask his or her own questions, answer telephones during an interview, comment to the decision-maker on the credibility of the asylum-seeker or give evidence – except in exceptional circumstances.[6]

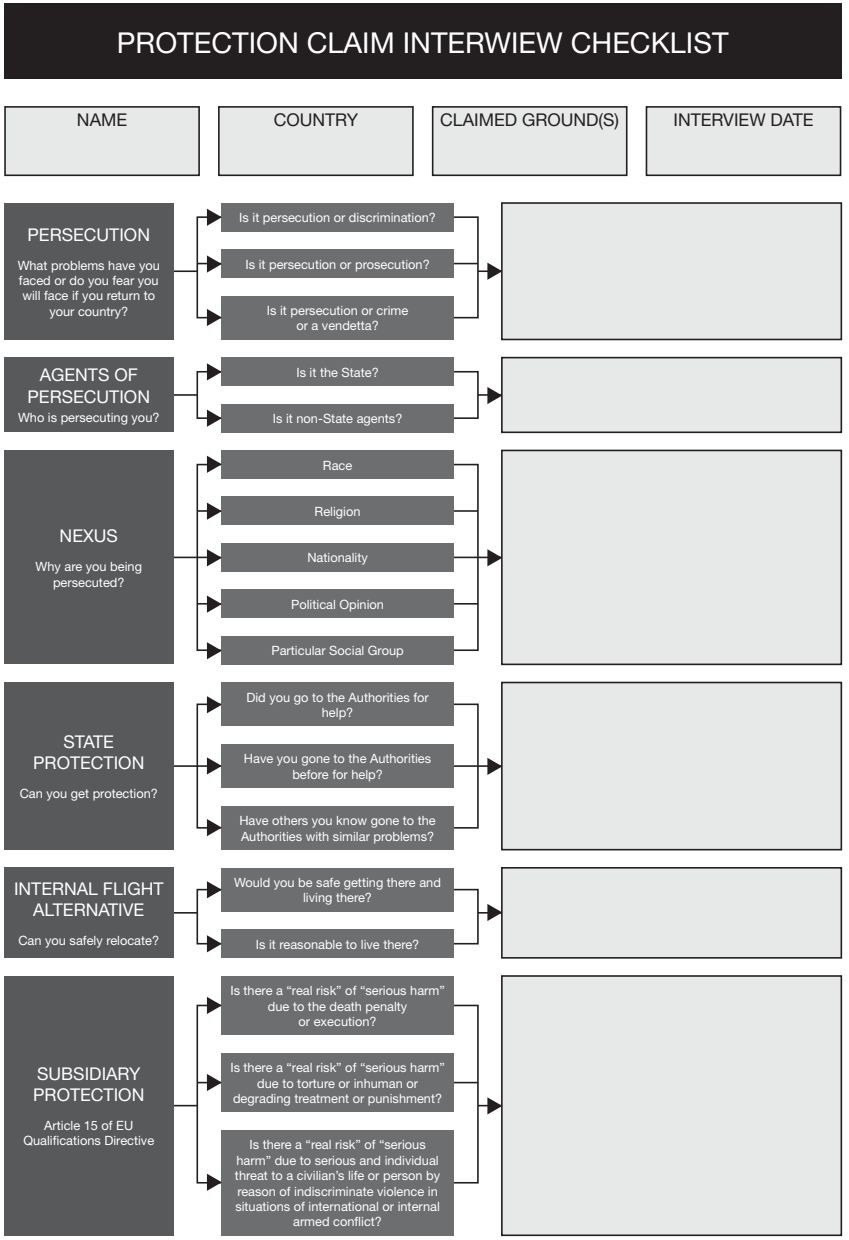
Relevancy and Thoroughness of Questions: Getting the Facts. This is a shared burden and a relaxed asylum-seeker is more likely to give the adjudicator the facts that he or she will need. An adjudicator should know the details of the story, be aware of country conditions and follow a checklist to ensure that he or she has not missed critical areas of examination.

Confronting Contradictions (including Country of Origin Information - COI): Between 50 and 80% of refugee judgments world-wide are decided on credibility assessments and yet no subject is more difficult. All contradictions, inconsistencies, omissions and the like – basically anything that a decision-maker might use to reject a claim – should be put to the applicant for his/her comment or explanation. This includes country of origin information (COI). A fundamental principle of fairness is that an asylum-seeker has access to the same information that the decision-maker has. The reason behind this is so that s/he can challenge it if s/he needs to and/or be prepared to deal with any information that might tend to negate the credibility of his/her claim. Country of origin information that might incline a decision-maker to disbelieve the claim should be put to the asylum-seeker for his/her response.

Role of Counsel: Preparation, Questioning, and Submissions. Earlier we talked about the importance of good preparation. But the role for good counsel does not stop there. Good counsel should be a part of the interview, whether asking questions important to the asylum-seeker's claim which have been missed, or objecting where there is a good reason to object. Finally, in submissions, good counsel has the opportunity to present his or her analysis of the claim for the decision-maker's consideration – to sum up the case for the adjudicator by combining the particular facts of the present case with the country conditions and the applicable law. It is a truism that the best judgments are often the product of the best arguments and so, to a large extent, decision-makers rely upon excellent legal representation to develop our laws.

Recording the Interview: Ensuring an Accurate Record. This varies from place to place but the most effective manner of making an accurate record is to audio-record the interview. The interviewer then has the ability to observe the asylum-seeker as he or she gives the story, rather than focussing on typing or handwriting a verbatim record of the interview. If there is a dispute over the record the tape can resolve it. As noted, many jurisdictions use a computer- or hand-created record. Clearly, those cannot equal a tape for accuracy. In these jurisdictions, in order to overcome this shortcoming, they read the record back to the claimant at the conclusion of the interview or later and note any comments where the asylum-seeker may object. There are a couple of significant problems with this approach. Firstly, it requires of the asylum-seeker or counsel great concentration, after what can be a long interview, in order to correct anything in the record with which there is disagreement. Secondly, there can be a tendency for an applicant to look for what is recorded incorrectly but miss what was never entered by the decision maker in the first place but should have been. And, of course, a claimant may not want to antagonise the adjudicator by objecting too often.

Once again preparation is key, as is the ability to cover the questions that need asking. As the Asylum Qualification Directive makes clear, the gathering of facts in an asylum claim is a shared responsibility. The following checklist enables the adjudicator to be sure that he or she has gathered all the necessary facts in order to come to a reasoned decision.



For full-sized document please see Part C ASQAEM Checklists.

4.3. Phase 3 – Written Reasons

One can think of a decision as a novel or, perhaps better, a short story. A well-written decision is a stand-alone affair. A reader knowing nothing of the claim should be able to read the decision, come to an understanding of the facts of the asylum claim, appreciate the relevance of the independent country information, and understand the law in the area. He or she should then be able to see clearly how the decision-maker took all of these factors into consideration when arriving at the decision. Finally, a well written decision is no longer than it needs to be to accomplish the above. This may sound easy enough but it is not. It demands good analytical as well as good synthetical skills.

There is a lamentable tendency in judgment writing towards wordiness. Many decisions suffer from being repetitive, or unnecessarily referring to aspects of the claim that are not important to the decision. Good decisions do not unnecessarily quote statutes — they can be footnoted — as they disrupt the flow. Long decisions are easier to write than short ones and that is because making one's reasons crisp requires careful consideration of the issues.

Obviously, reasons should be long enough to capture the salient points which mean that some reasons will, of necessity, be longer than others.

What of "templates" and "AutoText"? First, let us make it clear what we are referring to. A template is a sketch of a document that in its text covers certain essential elements; in a decision, it could refer to the basis of the claim, an analysis of the nexus to the Convention, protection and the Internal Flight Alternative test.

AutoText is a feature found on Microsoft Word that allows one to write a sentence or paragraph that one will use with frequency and to save it. In this way the next time one wants it, it is there with the click of a button. No more trying to remember that carefully drafted bit, no more trying to remember which decision the piece was in.

Are there dangers to using templates and AutoText? Yes, as with everything. However, they are used widely in the legal arena. The advantage lies in the fact that one does not have to rewrite the same thing again and again. Also, if the AutoText concerns a legal test, then it means that the decision-maker will accurately state that test every time – no more typing slips. Most importantly, it frees up a decision-maker's time so that s/he can focus on the job at hand: analysing the particular facts of the case in front of her or him, and applying the country condition information and law to those facts.

What follows is a written reason checklist designed, once again, to provide useful information and guidance for a decision-maker about to write his/her reasons.

REFUGEE STATUS DETERMINATION
WRITTEN DECISION CHECKLIST

Lead In	A paragraph which identifies the asylum-seeker and the basis of his or her claim.
Allegations	This is the asylum-seeker's story of why he or she is seeking asylum. This might contain written information he or she provided prior to the claim and/or it could also include his or her testimony. Enter enough information for a reader unfamiliar with the material to get an understanding of the grounds of the claim. Include only details germane to the basis of the claim and leave out those that are not. In other words do not be wordy.
Identity	A short statement of whether the asylum-seeker's identity (name and country of origin) is accepted and why.
Determination	A short statement of the decision which should address the possible protection grounds (Convention status, Subsidiary Protection status, and any national protection status).
Analysis	This is the heart of the decision – where you analyse the individual factual aspects of this claim, the pertinent country of origin information and the applicable law and then draw your conclusion. You proceed by firstly analysing whether the Convention applies; if it does not, you proceed to analyse subsidiary protection and then to any other possible protection bases. Use a "headline" to introduce each section of your analysis. With respect to the Convention analysis, deal with any of the Convention grounds that might apply, analyse credibility, protection and Internal Flight Alternative. Using credibility as an example, go through credibility issues in chronological or thematic order using a "headline" for each. This keeps you in focus and assists the reader or Court whom you are attempting to engage with effective reasoning.
Conclusion	A short re-statement of the conclusion for the ease of all those who want to view the conclusion without reading the reasons.

Although it might seem obvious, the purpose of reasons is to disclose how you arrived at your decision. They should be short and to the point. Your reasons should tell a story to the reader. He or she should be put in your place: Here is the story you were told, here is what you decided as to whether the asylum-seeker is in need of protection, and here are your reasons for arriving at that conclusion.

Many decisions suffer from being wordy, repetitive, and unnecessarily referring to aspects of the claim that are not important to the decision. Avoid unnecessarily quoting statues — they can be footnoted — as they disrupt the flow. Long decisions are easier to write than short ones and that is because making your reasons crisp requires careful consideration of the issues.

Obviously, reasons should be long enough to capture the salient points which means that some reasons will, of necessity, be longer than others.

For full-sized document please see Part C ASQAEM Checklists.

4.4. Referral to Court

We move now to an examination of second-instance decision-making. The courts play a critical role in the Refugee Status Determination (RSD) process. It is they who have the power and the duty to examine first level decisions to ensure that the applicant was treated in accordance with the law. For this to be so, it is of course necessary that the reviewing judge know the law with respect to refugees. For this purpose we have devised a "Judges' Checklist".

A "Judges' Checklist" is designed for judges who are called upon to review an administrative decision on refugee or subsidiary protection status. In the legal and judicial professions, checklists are common – they are designed to keep the busy professional "on track" and safe from the all too common human failing of "missing something".

What need is there for a Judges' Checklist?

There is an enormous variance in the acceptance rate around the Region[7], while at the same time, the EU is aiming at a Common European Asylum System. However, as already pointed out, different countries are interpreting the same refugee definition in very different ways.

Annual asylum applications in our Region run from Slovenia with 425 to Poland with 10,047.[8] Acceptance rates for refugee status at first instance in our region run from 0.6% in Slovenia to 26% in Romania. That is not only an enormous statistical difference but an enormous difference to the lives of the individual applicants to which, perhaps, the statistics numb us.

To give a graphic sense of this difference let us look at the case of Iraqi asylum-seekers in the countries covered under the ASQAEM Project:

- Austria received 472 applicants; 47% got Convention status and 32% got Subsidiary Protection [79% total];
- Bulgaria received 533 applicants; 1% got Convention status and 96% got Subsidiary Protection [97% total];
- Germany received 4,327 applicants; 63% got Convention status and 1% got Subsidiary Protection [64% total];
- Hungary received 136 applicants; 84% got Convention status and 7% got Subsidiary Protection [91% total];
- Poland received no Iraqi applicants;
- Romania received 243 applicants; 61% got Convention status and 4% got Subsidiary Protection [65% total];
- Slovakia received 131 applicants; 0% got Convention status and 69% got Subsidiary Protection [69% total];
- Slovenia received no Iraqi applicants.

It is because of these enormous variances that the role of the judiciary assumes such an importance. Yet simply passing on the problems to the judiciary to fix is not an easy task, for within the judicial field itself there are significant variations. In some countries judges rarely hear refugee cases. In others, their powers may be limited. In still others the training or support services (such as country of origin information), may be few. Refugee law is intricate and complicated. However, it is at the second-instance court hearing that the remedy lies for a poor administrative decision. If the courts do not fulfill their review function appropriately, then errors will remain uncorrected and these regional variances will continue. And, to underline this once more, these "statistics" capture individual lives.

Quite apart from offering ongoing training at Conferences as the UNHCR does, as the International Association of Refugee Law Judges does and as this ASQAEM Project has done, what is needed are some practical tools. We have developed a number of them for the first-instance administrative decision-makers.[9] One is also needed for administrative courts; a simple checklist that will allow a busy judge to get to the heart of the matter when reviewing an asylum decision from first instance.

The following checklist is designed to allow a judge who might not hear a great deal of refugee cases to analyse the major components of what should be included in an administrative decision.[10] The categories are ordered in a logical sequence for approaching a case review.

In what follows we go through the topics and comment upon the identified issues. These topics are annotated to reflect European legislation, the EU Directives, the Convention and Protocol as well as significant court decisions from domestic tribunals or courts, the European Court of Human Rights (ECtHCR), the European Court of Justice (ECJ) and leading international law cases.

REVIEW OF AN ADMINISTRATIVE DECISION
A Judges' Checklist

CAPACITY	Is the applicant competent or in need of a changed procedure? UNHCR Handbook: P 207 – 219; Asylum Procedures Directive: Articles 6 (2) - (4), 10 (3), 12 (1) - (3), 17 (1).
IDENTITY	Has the decision-maker identified the applicant? UNHCR Handbook: P 197; UNCHR Note on Burden and Standard of Proof in Refugee Claims (Note): P 10; Asylum Procedures Directive: Articles 11, 23 (4); Qualification Directive: Article 4 (2).
FACTS	1. Has the burden of ascertaining the facts been shared between applicant and the decision-maker? UNHCR Handbook: P 196, 203; Note: P 6; Qualification Directive: Articles 4 (1), 14 (3) (b); Asylum Procedures Directive: Articles 12 (1) - (4), 17 (1) (b), 34 (2) (a); 2. Have all the facts in the claim been canvassed, and where necessary, further explored?
PERSECUTION	Based upon the facts presented in the claim, has the decision-maker identified all possible instances of past persecution or serious harm? Convention: Article 33; UNHCR Handbook: P 45. 51; Note: P 19; Qualification Directive: Articles 4 (4), 9 and 17. Persuasive International Case Law: Applicant A v Minister (1997) 190 CLR 225, Judge McHugh J, par. 258; Refugee Appeal No.71427/99, New Zealand Refugee Status Appeals Authority, 16 August 2000; Ward v. Canada, Ward v Canada [1993] 2 S.C.R. 689; SB v Secretary of State for the Home Department Moldova CG [2008] UKIAT 00002.
AGENTS OF PERSECUTION	Has the decision-maker identified the Agent(s) of Persecution? UNHCR Handbook: P 65; UNHCR Position Paper on Agents of Persecution (Persecution), 14 March 1995: P 3; UNHCR, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees (1 April 2001) (Interpreting): P 19; Qualification Directive: Article 6; European Court of Human Rights: H.L.R. v. France, Judgment of 29 April 1997, Application no. 11/1996/630/813, P 44; Committee Against Torture: Sadiq Shek Elmi v. Australia, Comm. No. 120/1998 (14 May 1999), P 65.
NEXUS	Has the decision-maker sufficiently analysed all possible nexii that might arise out of the facts in the claim? UNHCR Handbook: P 66 – 67; Qualification Directive: Articles 9 (3), 10 (2); Persuasive: Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal ex parte Shah [1999] 2 A.C. 629; Fornah v. Secretary of State for the Home Department (2006).
CREDIBILITY ANALYSIS	1. Has the decision-maker identified and applied the correct standard of proof [balance of probability / preponderance of the evidence / more likely than not] including benefit of the doubt for establishing the facts of the applicant's story? UNHCR Note: P 3, 11 & 12; F. H. v. Sweden, App 32621/06, P 95; Matsiukhina and A. Matsiukhin v. Sweden, Judgment of 21 June 2005, Application no. 31260/04, P 95; N. v. Finland, Judgment of 26 July, 2005, Application no. 38885/02, P 155. 2. Were contradictions, inconsistencies and omissions put to the applicant for response? UNHCR Handbook: P 66, 67 & 199. 3. Were the contradictions inconsistencies and omissions central to the claim? UNHCR Note: P 9; Qualification Directive: Article 4 (5); Asylum Procedures Directive: Article 28 (2). Persuasive: Rajaratnam v. Canada (Minister of Employment and Immigration) (1991), 135 N.R. 300 (F.C.A.) 4. Were there any important, but "unasked", questions about the applicant's story?
COUTNRY OF ORIGIN INFORMATION ANALYSIS	1. Is the country of origin information clear, pertinent, authoritative and recent? Qualification Directive: Article 4 (3) (a); Asylum Procedures Directive: Article 8; ECtHR: Salah Sheekh v. Netherlands, 13 January 2007 App 1948/04, P 136. 2. Was country of origin information inconsistent with applicant's story put to him for comment? UNHCR Handbook: P 37, 42, 195, 204, 205; UNHCR COI Paper: February, 2004, P 23. 3. If the country of origin information is unclear does the decision-maker state why s/he prefers that country of origin information which supports / does not support the applicant's story?
STATE PROTECTION	Did the decision-maker consider the applicant's personal circumstances when evaluating whether there would be effective protection for him or her if he or she should return? UNHCR Handbook: P 98, 100; UNHCR, Interpreting: P 15; UNHCR, Note on International Protection, 7 July 1999: P 20; 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 (UNHCR IFA Guidelines), July 2003: P 15; Qualification Directive: Article 7; European Court of Human Rights: H.L.R. v. France, Judgment of 29 April 1997, Application no. 11/1996/630/813. Persuasive: Ward v. Canada, Ward v Canada [1993] 2 S.C.R. 689; Horvath v Secretary of State for the Home Department [9][2001] 1 AC 489, Lord Hope of Craighead at 497-498; Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal ex parte Shah [1999] 2 A.C. 629.
INTERNAL FLIGHT ALTERNATIVE	1. Did the decision-maker identify an area in the home country where the applicant might be safe? UNHCR Handbook: P 91; Qualification Directive: Article 8 (1). 2. Did the decision-maker consider the applicant's personal circumstances when evaluating whether he or she would be safe in the internal flight alternative? Qualification Directive: Articles 4 (3), 8 (2); Asylum Procedures Directive: Article 8 (2) (a); AG v. Ward, Supreme Court of Canada, 30 June 1993 2 S,C.R. 689. 3. Did the decision-maker consider the applicant's personal circumstances when evaluating whether it would be reasonable for him or her to relocate to the internal flight alternative? Qualification Directive: Articles 4 (3), 8 (2), Asylum Procedures Directive: Article 8 (2) (a). See also: UNHCR IFA Guidelines: P 2, 4, 6, 9 – 30, 34, 35; ExCom conclusion no. No. 87 (L) – 1999; Executive Committee of the High Commissioner's Programme, Note on International Protection, A/AC.96/914, 7 July 1999: P 17; Interpreting: P 37; European Court of Human Rights: Salah Sheekh v. The Netherlands, Judgment of 13 January 2007, Application no. 1948/04, Par. 141. Persuasive: Thirunavukkarasu v. Canada (Minister of Employment and Immigration), Canada: Federal Court, 10 November 1993; Appellant S395/2002 v MIMA (2003) 78 ALJR 180 78 ALD 8.
REFUGEE TEST	Did the decision-maker correctly apply the refugee test – a "reasonable chance" of persecution upon return? UNHCR Handbook: P 42; Interpreting: P 10; Note: P 16, 17. Persuasive: United States Supreme Court: I.N.S. v. Cardoza-Fonseca, (1987) 467 U.S. 407 (USSC): "reasonable possibility"; United Kingdom House of Lords: R. v. S.S.H.D., ex parte Sivakumaran, (1988) 1 All E.R. 193 (U.K. HL): "reasonable degree of likelihood"; Canadian Federal Court of Appeal: Adjei v. M.E.I., (1989) 57 D.L.R. 4th 153 (Can. FCA): "serious possibility", "good grounds", "reasonable chance" and "reasonable possibility"; High Court of Australia: (1989) 63 ALR 561 (Australia HC): "real chance".
SUBSIDIARY PROTECTION	Did the decision-maker correctly analyse any "real risks" that an applicant might face "serious harm" upon return as those factors are set out in Articles 2 and 15 of the Asylum Qualifications Directive? See: International Covenant on Civil and Political Rights: P 7; CAT: P 3; European Convention on Human Rights: P 3; Charter of Fundamental Rights of the European Union: P 4; European Court of Justice: Judgment of the Court of Justice in Case C-465/07, Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie, 17 February 2009; Persuasive: QD & AH v. SS for Home Department, June UK Ct of Appeal, 24 June, 2009 EWCA Civ 620; UKAIT: GS, July 23, 2009.
APPLICATION OF THE LAW	Did the decision-maker correctly apply the laws as set out in national legislation, EU Directives, Geneva Convention & Protocol and national and international court case law, particularly European Court of Justice & European Court of Human Rights?

For full-sized document please see Part C ASQAEM Checklists.

Capacity

Is the applicant able to play a normal role in the hearing process? In some cases an applicant is from a vulnerable category (children, abused women, etc.) or mentally incapable of appreciating the nature of the process.

The UNHCR Handbook provides some guidance on the issue with respect to mental unbalance:

> 207. *It frequently happens that an examiner is confronted with an applicant having mental or emotional disturbances that impede a normal examination of his case. A mentally disturbed person may, however, be a refugee, and while his claim cannot therefore be disregarded, it will call for different techniques of examination.*
>
> *208. The examiner should, in such cases, whenever possible, obtain expert medical advice. The medical report should provide information on the nature and degree of mental illness and should assess the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his case.... The conclusions of the medical report will determine the examiner's further approach.*[11]

The EU Asylum Procedures Directive (APD) makes reference to this issue under sections 10 (3) and 12 (3).

Equally, the Handbook provides guidance on interviewing children:

> *213. There is no special provision in the 1951 Convention regarding the refugee status of persons under age. The same definition of a refugee applies to all individuals, regardless of their age. When it is necessary to determine the refugee status of a minor, problems may arise due to the difficulty of applying the criteria of "well-founded fear" in his case. If a minor is accompanied by one (or both) of his parents, or another family member on whom he is dependent, who requests refugee status, the minor's own refugee status will be determined according to the principle of family unity.*
>
> *214. The question of whether an unaccompanied minor may qualify for refugee status must be determined in the first instance according to the degree of his mental development and maturity. In the case of children, it will generally be necessary to enroll the services of experts conversant with child mentality. A child – and for that matter, an adolescent – not being legally independent should, if appropriate, have a guardian appointed whose task it would be to promote a decision that will be in the minor's best interests. In the absence of parents or of a legally appointed guardian, it is for the authorities to ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded.*[12]

The EU Asylum Procedures Directive makes reference to this issue under Articles 6 (2) - (4), 12 (1) and 17 (1).

The crux of the issue is that an applicant must be able to effectively state his/her case.

Identity

Without identifying the applicant (name and country) there can be no case at all. The EU Asylum Qualification Directive (AQD) states under Article 4 (2) that it is necessary to establish identity:

> *The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants' disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.*[13]

As noted in Canadian case law, "the Federal Court of Canada held that once the decision-making authority had concluded that identity had not been established, it was not necessary to analyze the evidence any further."[14]

Facts

Paragraph 196 of the UNHCR Handbook states:

> *…while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.*

Paragraph 6 of the UNHCR Note on *Burden and Standard of Proof in Refugee Claims* states:

> *In view of the particularities of a refugee's situation, the adjudicator shares the duty to ascertain and evaluate all the relevant facts. This is achieved, to a large extent, by the adjudicator being familiar with the objective situation in the country of origin concerned, being aware of relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged which can be substantiated.*

It goes without saying that the facts of the claim are what generally make or break the application for status. That is why the Asylum Qualification Directive goes into such detail when discussing it. Many basic issues are covered: Shared burden of accumulating facts, duty to assess country of origin information, including aspects related to the laws of the country and their enforcement, assessing the individual position, the personal circumstances of the applicant, the applicant's duty to attempt to provide supporting evidence, etc. The centrality of the role of "facts" in an asylum claim warrants this Article being quoted in full:

Article 4

Assessment of facts and circumstances

1. *Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.*
2. *The elements referred to in paragraph 1 consist of the applicant's statements and all documentation at the applicants' disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.*
3. *The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:*

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

   (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

   (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

   (d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

   (e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.
4. *The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.*
5. *Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:*

   (a) the applicant has made a genuine effort to substantiate his application;

   (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;

(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;

(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and

(e) the general credibility of the applicant has been established.

It is particularly important to recognise the importance of subsections 4 and 5. Subsection 4 hearkens back to Paragraph 45 of the Handbook:

> *Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word "fear" refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.*

Subsection 4 is important because a presumption is built in favour of a claim where a decision-maker decides (standard of proof is obviously extremely important here) that persecution "has" taken place. It is equally important for underlining the fact that "persecution" is, notwithstanding what has just been said, geared towards the future.

Subsection 5 is important because it qualifies the requirement of the applicant to provide information in support of his/her claim.

The Project has found that more than a few decision-makers do not take either subsections 4 or 5 into account when deciding claims.

□ Persecution

The Convention does not legally define the concept of "persecution", however, from Article 33 of the Convention it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution.

> *No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

The UNHCR Handbook in paragraph 51 states:

> *There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.*

If there is no risk of future persecution, then there is no basis for a successful claim for refugee status. Accordingly, a full review of all the incidents related by the applicant is necessary. This is to be followed by an analysis of whether these singly or together meet the requirements of past persecution and, if so, whether they provide a foundation for assessing the future risk of persecution. If there are no individual instances of past persecution related by the applicant the situation must still be analysed on the basis of the evidence in order to evaluate the likehood of future persecution. As the definition of persecution has been widely interpreted, the Asylum Qualification Directive lists some non-exclusive examples for guidance.

Article 9

Acts of persecution

1. *Acts of persecution within the meaning of Article 1 A of the Geneva Convention must:*

   (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

   (b) be an accumulation of various measures, including violations of human rights which are sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. *Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:*

   (a) acts of physical or mental violence, including acts of sexual violence;

   (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

   (c) prosecution or punishment, which is disproportionate or discriminatory;

   (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

   (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12 (2);

   (f) acts of a gender-specific or child-specific nature.

3. *In accordance with Article 2 (c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.*

Of particular importance within the ambit of this Project is the recognition that persecution does not need to be "repetitive".

Agents of Persecution

The notion of persecution is normally associated with the authorities of the country from which the applicant fled. If the agent of persecution is the state or other groups or entities acting at the instigation or with the consent of the state (e.g., death squads, militias or paramilitary forces), it can be assumed that there is no internal protection available for the applicant in his/her country of origin, and, accordingly, the internal protection/flight alternative cannot be applied.

There is nothing in the text of the 1951 Covention that suggests the source of the feared harm is in any way determinative in the evaluation of the application.

In the UNHCR paper, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, (1 April 2001)*,[15] paragraph 19 states:

> *In UNHCR's view, the source of the feared harm is of little, if any, relevance to the finding of whether persecution has occurred, or is likely to occur. It is axiomatic that the purpose and objective of the 1951 Convention is to ensure the protection of refugees. There is certainly nothing in the text of the Article that suggests the source of the feared harm is in any way determinative of that issue. UNHCR has consistently argued, therefore, that the concerns of well-foundedness of fear, of an actual or potential harm which is serious enough to amount to persecution, for a reason enumerated in the Convention are the most relevant considerations.*

In the UNHCR paper, *UNHCR Position Paper on Agents of Persecution, 14 March 1995,*[16] in paragraph 3:

> *Clearly, the spirit and purposes of the Convention would be contravened and the system for the international protection of refugees would be rendered ineffective if it were to be held that an asylum-seeker should be denied needed protection unless a State could be held accountable for the violation of his/her fundamental human rights by a non-governmental actor.*

And, finally, in paragraph 65, the UNHCR Handbook states:

> *Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. Serious discriminatory or other offensive acts committed by the local populace can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.*

Who the agent of persecution was or may be is important. In the recent past not all EU member states acknowledged that persecution may be by non-state actors where the state does not offer effective protection. Consequently, Article 6 of the Asylum Qualification Directive states:

> *Actors of persecution or serious harm include: the state, parties or organisations controlling the state or a substantial part of its territory, and non-state actors, if it can be demonstrated that the state and other actors including international organisations are unable or unwilling to provide protection.*[17]

Nexus[18]

Article 1/A of the 1951 Geneva Convention specifies that a person will qualify for refugee status under the Convention only if he or she fears persecution 'for reason' of one or more of the five grounds listed in Article 1A (2), which is often referred to as the 'nexus' requirement.

Paragraphs 66 – 67 of the UNHCR Handbook states:

> *It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. However, it is not the applicant's duty to analyze his/her case to such an extent as to identify the reasons in detail. It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect.*

Articles 9 (3) and 10 (2) of the Asylum Qualification Directive state:

> *9 (3) in accordance with Article 2 (c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1*
>
> *10 (2) when assessing if an applicant has a well-founded fear of being persecuted, it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.*

Accordingly these provisions reinforce that the effect of the measures taken against the individual concerned is decisive. If the measures taken amount to persecution and there is a link to a Convention ground, the nexus is established.

Credibility

Credibility has many aspects but perhaps none as important as the standard to be applied when evaluating facts in a claim. Whereas the test for "risk of persecution" is aimed at future events, the test for the facts supporting the claim is aimed at past events. Any attempt to construct a Common European Asylum System will founder if the member states require different "degrees" or "standards" of proof of past facts. On this most central point, the Asylum Qualification Directive[19] is silent as is the jurisprudence of the European Court of Justice and the European Court of Human Rights.[20] Consequently, guidance can be sought both from international case law and the UNHCR.

The standard of proof most commonly used is that of the "Balance of Probability." This is the standard used by Common Law courts in civil law matters to establish facts. It is also the standard of probability used by some Common Law courts to establish the "facts" in refugee claims and it is used by the UNHCR and other civil law courts in refugee claims.

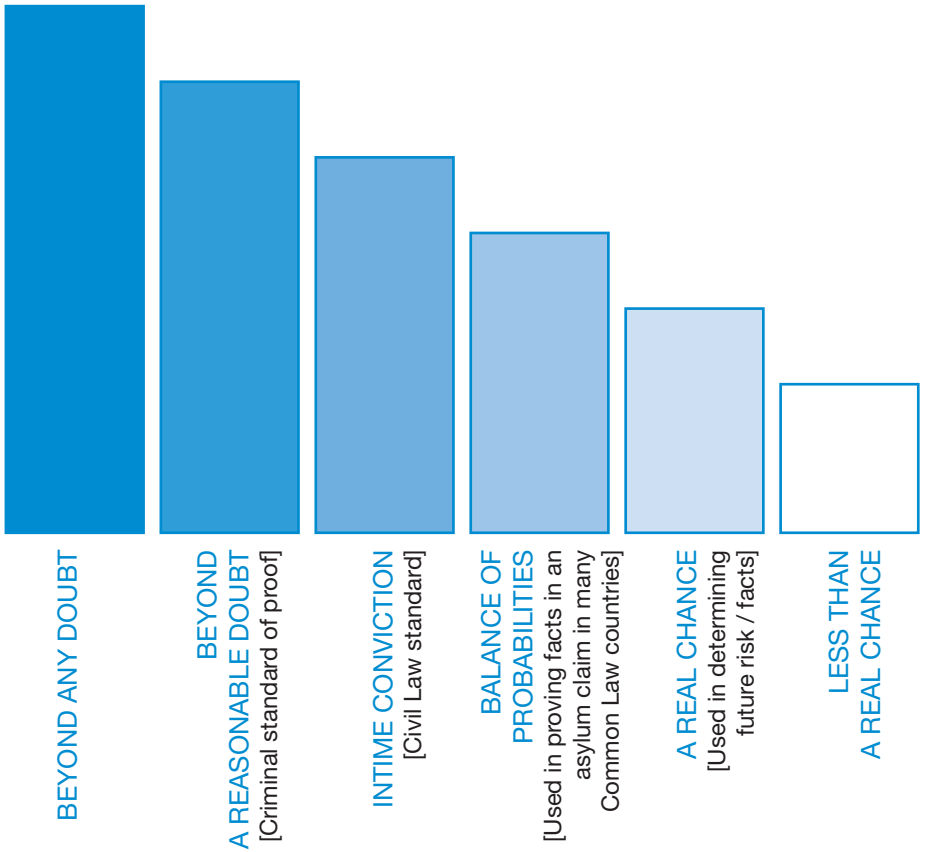
In paragraph 196 of the UNHCR Handbook (1992),[21] the UNHCR appears to adopt the "Balance of Probability" standard, perhaps even assisted with the "benefit of the doubt" in close calls:

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

However, it is in the *UNHCR Note on Burden and Standard of Proof in Refugee Claims (1998)*[22] that the UNHCR clearly adopts the Common Law position:

> *3. The terms "burden of proof" and "standard of proof" are legal terms used in the context of the law of evidence in common law countries. In those common law countries which have sophisticated systems for adjudicating asylum claims, legal arguments may revolve around whether the applicant has met the requisite "standard" for showing that he or she is a refugee. While the question of the burden of proof is also a relevant consideration in countries with legal systems based on Roman law, the question of standard of proof is not discussed and does not arise in those countries in the same manner as in common law countries. The principle applicable in civil law systems is that of "liberté de la preuve" (freedom of proof), according to which the evidence produced to prove the facts alleged by the claimant, must create in the judge the "intime conviction" (deep conviction) that the allegations are truthful. Having said this, and while the common law terms are technical and with a particular relevance for certain countries, these evidentiary standards have been used more broadly in the substantiation of refugee claims anywhere, including by UNHCR. Therefore the guidelines provided here should be treated as applicable generally to all refugee claims.*
>
> *8. In common law countries, the law of evidence relating to criminal prosecutions requires cases to be proved "beyond reasonable doubt". In civil claims, the law does not require this high standard; rather the adjudicator has to decide the case on a "balance of probabilities". Similarly in refugee claims, there is no necessity for the adjudicator to have to be fully convinced of the truth of each and every factual assertion made by the applicant. The adjudicator needs to decide if, based on the evidence provided as well as the veracity of the applicant's statements, it is likely that the claim of that applicant is credible.*
>
> *11. In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin. 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. [Emphasis added]*

The following chart shows some of the various standards of proof in use across the Region.



As noted at the outset, the resolution of which standard to apply is of fundamental concern. What the Project has encountered is the use of every standard noted in the chart above, except "less than a real chance". Serious though this is, we have even encountered different standards being used by different decision-makers within a country and even different standards employed within a single decision.

Country of Origin Information (COI)[23]

If one refers to the importance of country of origin information (COI) in determining the case in refugee status determination one can trace a substantial growth. The UNHCR Handbook (published in 1992) referr to the role of country of origin information as follows:

> *40. As regards the objective clement, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin-- while not a primary objective--is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there. [Emphasis added]*

In its paper *UNHCR Country of Origin Information: Towards Enhanced International Cooperation, (February 2004)*,[24] the UNHCR states:

> *In individual claims, the particular circumstances and the credibility of the claimant will often be the most decisive elements. Internal or external evidentiary contradictions do not necessarily mean that the claimant is not generally credible, and excessive reliance should not be placed upon information systems at the expense of the claimant's own testimony.*

However, by today, with the exponential growth of available country of origin information through the internet, country of origin information has assumed an importance which, alone, can make or break a case.[25] Consequently, judges must very carefully assess the country of origin information used by the decision-maker in arriving at the conclusion – and this should include ensuring that where the country of origin information is determinative in deciding the case the applicant has had an opportunity to comment upon it. Equally important, where country of origin information does not take a definitive position with respect to the issue relied upon by the decision-maker, has the decision-maker provided reasons for why s/he chose one interpretation rather than another?

Article 4 of the EU Asylum Qualification Directive states:

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

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

Article 8 of the EU Asylum Procedures Directive states:

Article 8 (2) (a)

> *Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that: applications are examined and decisions are taken individually, objectively and impartially.*

Article 8 (2) (b) - requirement to use precise and up-to-date country of origin information obtained from various sources

> *Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that: precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions.*

The International Association of Refugee Law Judges Working Party produced the Judges' Country of Origin Information Checklist for the bi-ennial Conference in Mexico City in 2006 which is reprinted here with kind permission of the author.

Country of Origin Information Judicial Checklist[26]

When assessing Country of Origin Information in the context of deciding asylum or asylum-related cases judges may find the following nine questions useful:

Relevance and adequacy of the Information

- How relevant is the country of origin information to the case in hand?
- Does the country of origin information source adequately cover the relevant issue(s)?
- How current or temporarily relevant is the country of origin information?

Source of the Information

- Is the country of origin information material satisfactorily sourced?
- Is the country of origin information based on publicly available and accessible sources?
- Has the country of origin information been prepared on an empirical basis, using sound methodology?

Nature / Type of the Information

- Does the country of origin information exhibit impartiality and independence?
- Is the country of origin information balanced and not overly selective?

Prior Judicial Scrutiny

- Has there been judicial scrutiny by other national courts of the country of origin information in question?

The ECtHR in Salah Sheekh[27] pointed out in paragraph 136:

> *…it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations.*
>
> *This judgment is important for its emphasis that the country of origin information may not simply emanate from the country doing the refugee assessment but must also involve outside reputable sources.*

State Protection

The refugee definition under the Geneva Convention does not require the lack of state protection to be demonstrated separately. It requires only that the asylum-seeker must – 'owing to his/her well-founded fear of being persecuted' – be unable or unwilling to avail him/herself of the protection of the country of origin'. Accordingly, a failure of internal/state protection occurs where a government is unwilling to defend citizens against private harm, as well as in situations of objective inability to provide meaningful protection.

The UNHCR Handbook in paragraph 98 states:

> *Being unable to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant. Such denial of protection may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.*

And in paragraph 100:

> *The term unwilling refers to refugees who refuse to accept the protection of the Government of the country of their nationality. It is qualified by the phrase "owing to such fear". Where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country "owing to well-founded fear of persecution". Whenever the protection of the country of nationality is available, and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.*

In paragraph 15 of the UNHCR paper, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, it is stated:

> *The question is whether the risk giving rise to the fear is sufficiently mitigated by available and effective national protection from that feared harm. Where such an assessment is necessary, it requires a judicious balancing of a number of factors both general and specific, including the general state of law, order and justice in the country, and its effectiveness, including the resources available and the ability and willingness to use them properly and effectively to protect residents.*

In paragraph 20 the *UNHCR Note on International Protection, 7 July 1999*,[28] it is stated:

> *An individual analysis must be done to establish whether the asylum-seeker can be sent to a third country. The question of whether a country is "safe" is not a generic one, which can be answered for any asylum-seeker in any circumstances (i.e. on the basis of a "safe third country list"). A country may be "safe" for asylum-seekers of a certain origin and "unsafe" for others of a different origin, also depending on the individual's background and profile.*

In paragraph 15 of the *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 (UNHCR IFA Guidelines), July 2003,*[29] it is stated:

> *…State protection … involves an evaluation of the ability and willingness of the State to protect the claimant from the harm feared. A State may, for instance, have lost effective control over its territory and thus not be able to protect. Laws and mechanisms for the claimant to obtain protection from the State may reflect the State's willingness, but, unless they are given effect in practice, they are not of themselves indicative of the availability of protection. … It can be presumed that if the State is unable or unwilling to protect the individual in one part of the country, it may also not be able or willing to extend protection in other areas. This may apply in particular to cases of gender-related persecution.*

As outlined above, state protection, when addressed to issues of enforcement of the law, must be "effective" – that is, there must be a law addressing the particular act, and an effective method of arrest, prosecution and punishment which is available to the applicant. Where "protection" is directed at societal persecution the questions involve assessing the effectiveness of state-sponsored remedies. It also involves other agencies of government or perhaps even non-governmental organisations (NGOs) or international organisations.

Article 7 of the Asylum Qualification Directive outlines the obligations of states to provide protection:

> *(2) Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.*
>
> *(3) When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Council acts.*

Internal Flight Alternative (IFA)

The UNHCR Handbook, in paragraph 91 states:

> *The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality…persecution may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.*

In the UNHCR Guidelines on IFA several important points are established:

Paragraph 2

> *The concept of an internal flight or relocation alternative is not a stand-alone principle of refugee law, nor is it an independent test in the determination of refugee status.*

Paragraph 4

> *…since the concept can arise only in the context of an assessment of the refugee claim on its merits, it cannot be used to deny access to refugee status determination procedures. A consideration of internal flight or relocation necessitates regard for the personal circumstances of the individual claimant and the conditions in the country for which the internal flight or relocation alternative is proposed.*

Paragraph 6

> *If internal flight or relocation alternative is to be considered in the context of refugee status determination, a particular area must be identified and the claimant provided with an adequate opportunity to respond.*

Paragraph 34

> *…the decision-maker bears the burden of proof of establishing that an analysis of relocation is relevant to the particular case. If considered relevant, it is up to the party asserting this to identify the proposed area of relocation and provide evidence establishing that it is a reasonable alternative for the individual concerned.*

Paragraph 35

> *Basic rules of procedural fairness require that the asylum-seeker be given clear and adequate notice that such a possibility is under consideration. They also require that the person be given an opportunity to provide arguments why (a) the consideration of an alternative location is not relevant in the case, and (b) if deemed relevant, that the proposed area would be unreasonable.*

Most of these points are confirmed in Article 8 of the Asylum Qualification Directive.

Article 8 (1)

> *As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.*

Article 8 (2)

> *In examining whether a part of the country of origin is in accordance with paragraph 1, Member States, at the time of taking the decision on the application, shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.*

Article 8 (3)

> *Paragraph 1 may apply, notwithstanding technical obstacles to return to the country of origin.*

In the case of *Salah Sheekh v. The Netherlands,*[30] the European Court of Human Rights in paragraph 141 stated:

> *…The Court considers that 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 importance of *Salah Sheekh* is that it requires a decision-maker to ensure that (i) an applicant can access the area, (ii) he or she can gain admittance and, (iii) remain there. It goes without saying that the area must be safe.

Refugee Test

The 1951 Refugee Convention sets as the test for refugee status that a person has a "well-founded fear of being persecuted" for one of the 5 refugee grounds. This, of course, leaves open the question of what standard of proof will be applied by a decision-maker when evaluating whether an applicant has established such a "well-founded fear". In the UNHCR Handbook, in paragraph 42 it is stated that:

In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.

Later in the *UNHCR Note on Burden and Standard of Proof in Refugee Claims,* paragraph 16 and 17 amplify the meaning of these words:

The Handbook states that an applicant's fear of persecution should be considered well-founded if he "can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable...".

A substantial body of jurisprudence has developed in common law countries on what standard of proof is to be applied in asylum claims to establish well foundedness. This jurisprudence largely supports the view that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not. To establish "well-foundedness", persecution must be proved to be reasonably possible.

In a paper entitled *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*[31] the UNHCR in paragraph 10 stated:

…the standard of proof for establishing a well-founded fear of persecution has been developed in the jurisprudence of common law jurisdictions. While various formulations have been used, it is clear that the standard required is less than the balance of probabilities required for civil litigation matters. It is generally agreed that persecution must be proved to be "reasonably possible" in order to be well-founded.

It is, of course, critical to note that what is being referred to as the "refugee test" refers to an assessment of "future" risk should an applicant return. As noted above, the actual formulation has been stated in many ways, all of which amount to essentially the same thing; for example:

- **United States Supreme Court:** I.N.S. v. Cardoza-Fonseca, (1987) 467 U.S. 407 (USSC): "reasonable possibility";
- **United Kingdom House of Lords:** R. v. S.S.H.D., ex parte Sivakumaran, (1988) 1 All E.R. 193 (U.K. HL): "reasonable degree of likelihood";
- **Canadian Federal Court of Appeal:** Adjei v. M.E.I., (1989) 57 D.L.R. 4th 153 (Can. FCA): "serious possibility", "good grounds", "reasonable chance", and "reasonable possibility";
- **High Court of Australia:** Chan Yee Kin v. Minister for Immigration and Ethnic Affairs (1989) 63 ALR 561 (Australia HC): "real chance."

Subsidiary Protection

Subsidiary protection must be considered where, as a result of the analysis, the decision-maker has determined that the applicant is not a Convention refugee. This is an area of emerging law and is governed by Articles 2 and 15 of the Asylum Qualification Directive. As we shall see, article 15 (3) poses significant problems.

Article 2

(e) "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) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

Article 15

Serious harm

Serious harm consists of:

(a) death penalty or execution; or
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;[32] *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.

The first two subsections of Article 15 derive from European conventions and treaties, as well as other international conventions and case law from the European Court of Human Rights and the Committee Against Torture (CAT). However, the ambit of subsection 3 was in question until the *Elgafaji*[33] case was sent to the European Court of Justice. It is worth reprinting a substantial portion of the judgment for the analysis it provides to the various elements of the subsection.

27 *At the outset, it should be noted that the referring court seeks guidance on the protection guaranteed under Article 15 (c) of the Directive, in comparison with that under Article 3 of the European Convention on Human Rights (ECHR) as interpreted in the case-law of the European Court of Human Rights (see, inter alia, European Court H.R. NA. v. TheUnited Kingdom, judgment of 17 July 2008, not yet published in the Reports of Judgments and Decisions, § 115 to 117, and the case-law cited).*

28 *In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15 (b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15 (c) of the Directive is a*

provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.

29 *The questions referred, which it is appropriate to examine together, thus concern the interpretation of Article 15 (c) of the Directive, in conjunction with Article 2 (e) thereof.*

30 *Having regard to those preliminary observations, and in the light of the circumstances of the case in the main proceedings, the referring court asks, in essence, whether Article 15 (c) of the Directive, in conjunction with Article 2 (e) thereof, must be interpreted as meaning that the existence of a serious and individual threat to the life or person of the applicant for subsidiary protection is subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his circumstances. If not, the referring court wishes to know the criterion on the basis of which the existence of such a threat can be considered to be established.*

31 *In order to reply to those questions, it is appropriate to compare the three types of 'serious harm' defined in Article 15 of the Directive, which constitute the qualification for subsidiary protection, where, in accordance with Article 2 (e) of the Directive, substantial grounds have been shown for believing that the applicant faces 'a real risk of [such] harm' if returned to the relevant country.*

32 *In that regard, it must be noted that the terms 'death penalty', 'execution', and 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin', used in Article 15 (a) and (b) of the Directive, cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm.*

33 *By contrast, the harm defined in Article 15 (c) of the Directive as consisting of a 'serious and individual threat to [the applicant's] life or person' covers a more general risk of harm.*

34 *Reference is made, more generally, to a 'threat … to a civilian's life or person' rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of 'international or internal armed conflict'. Lastly, the violence in question which gives rise to that threat is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances.*

35 *In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15 (c) of the Directive.*

36 *That interpretation, which is likely to ensure that Article 15 (c) of the Directive has its own field of application, is not invalidated by the wording of recital 26 in the preamble to the Directive, according to which '[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.*

37 *While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15 (c) of the Directive have been met in respect of a specific person, its wording nevertheless allows – by the use of the word 'normally' – for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.*

38 *The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15 (c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.*

39 *In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.*

40 *Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4 (3) of the Directive, the following may be taken into account:*

– the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8 (1) of the Directive, and

– the existence, if any, of a serious indication of real risk, such as that referred to in Article 4 (4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower.

41 *Lastly, in the case in the main proceedings, it should be borne in mind that, although Article 15 (c) of the Directive was expressly transposed into the Netherlands law only after the facts giving rise to the dispute before the referring court, it is for that court to seek to carry out an interpretation of national law, in particular of Article 29 (1) (b) and (d) of the Vw 2000, which is consistent with the Directive.*

42 *According to settled case-law, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC (see, inter alia, Case C 106/89 Marleasing [1990] ECR I 4135, paragraph 8, and Case C 188/07 Commune de Mesquer [2008] ECR I-0000, paragraph 84).*

43 *Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 15 (c) of the Directive, in conjunction with Article 2 (e) of the*

Directive, must be interpreted as meaning that:

– the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;

– the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

44 *It should also, lastly, be added that the interpretation of Article 15 (c) of the Directive, in conjunction with Article 2 (e) thereof, arising from the foregoing paragraphs is fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR (see, inter alia, NA. v. The United Kingdom, § 115 to 117 and the case-law cited).*

What is significant is that the Court relied upon European Court of Human Rights case law that leaves open the possibility with respect to Article 3 of the European Court of Human Rights that it may be invoked where there is no "individual" aspect of the person in question, simply the fact that he or she may be at risk "simply" by being on the territory. The European Court of Justice, while adopting this interpretation, also at the same time restricts it to situations where the armed conflict has reached "such a high level" that "substantial grounds" are demonstrated that an applicant would face a "real risk" if returned.

In the case law of the European Court of Human Rights the required standard of protection or risk of persecution under the European Court of Human Rights is basically identical to that of the Asylum Qualification Directive under Article 2 (e). The standard is: substantial grounds for believing that the person would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.[34] Thus, Article 3 implies a positive obligation on State Parties to the Convention not to deport the person in question to that country.[35] The risk of ill-treatment is assessed in the light of the general situation prevailing in the country where the applicant is to be sent back as well as the personal circumstances of the applicant.

Regarding the assessment of the "real risk" the European Court of Human Rights has also underlined the importance of taking due account of the so-called "risk factors", i.e., all relevant factors which may increase the risk of ill-treatment:

In *N.A. v. The United Kingdom,*[36] the court states:

…due regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively and when considered in a situation of general violence and heightened security, the same factors may give rise to a real risk. Both the need to consider all relevant factors cumulatively and the need to give appropriate weight to the general situation in the country of destination derive from the obligation to consider all the relevant circumstances of the case.

Interpretation of the 'risk' – personal nature of the 'risk'

In its early case law the European Court of Human Rights, in emphasising the absolute character of Article 3 of the European Convention on Human Rights, adopted a rather strong test for evaluating the real risk of ill-treatment.[37] The European Court of Human Rights set out that 'special distinguishing features' need to be shown that singles out the applicant from the 'generality'.[38] The European Court of Human Rights emphasised that 'a mere possibility of ill-treatment… is not in itself sufficient to give rise to a breach of Article 3.'[39]

There has, however, been a substantial shift in the jurisprudence of the European Court of Human Rights with the judgment in Salah Sheek in 2007, where the European Court of Human Rights revisited its previous approach.[40]

In *Salah Sheekh v. The Netherlands,*[41] the court found that Article 3 can be engaged if the applicant establishes that he or she is a member of a group systematically exposed to a practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question.[42]

In those circumstances the Court will not insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in light of the applicant's account and the information on the situation in the country of destination in respect of the group in question.[43]

Thus, the European Court of Human Rights lowered the standard of protection in the above circumstances.[44] Nonetheless, if the applicant cannot meet the above mentioned criteria (existence of a group systematically exposed to a practice of ill-treatment and the membership of that group) he or she will still be required to adduce evidence that he or she is 'singled out' from the 'generality'.

The European Court of Human Rights has acknowledged the special situation in which asylum-seekers find themselves and emphasised that owing to that

…it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum-seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies.'[45]

Thus the European Court of Human Rights appears to adopt a similar approach to that contained in the UNHCR Handbook.[46]

Beyond the decision in *Elgafaji* there have been several other national court decisions, involving the issue whether international humanitarian law should be used when interpreting the meaning under Article 15 (3) of "armed conflict", how to determine when the degree of indiscriminate violence has reached such a high level, or what constitutes indiscriminate violence.[47]

□ Application of the Law

Are all the findings/conclusions clearly supported by the reasoning of the decision? The Asylum Procedures Directive, while not directly addressing this evolving issue, does allude to it in a couple of Articles.

Article 9 (2) - Requirements for a decision by the determining authority

> *Member States need not state the reasons for not granting refugee status in a decision where the applicant is granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of Directive 2004/83/EC. In these cases, Member States shall ensure that the reasons for not granting refugee status are stated in the applicant's file and that the applicant has, upon request, access to his/her file.*[48]

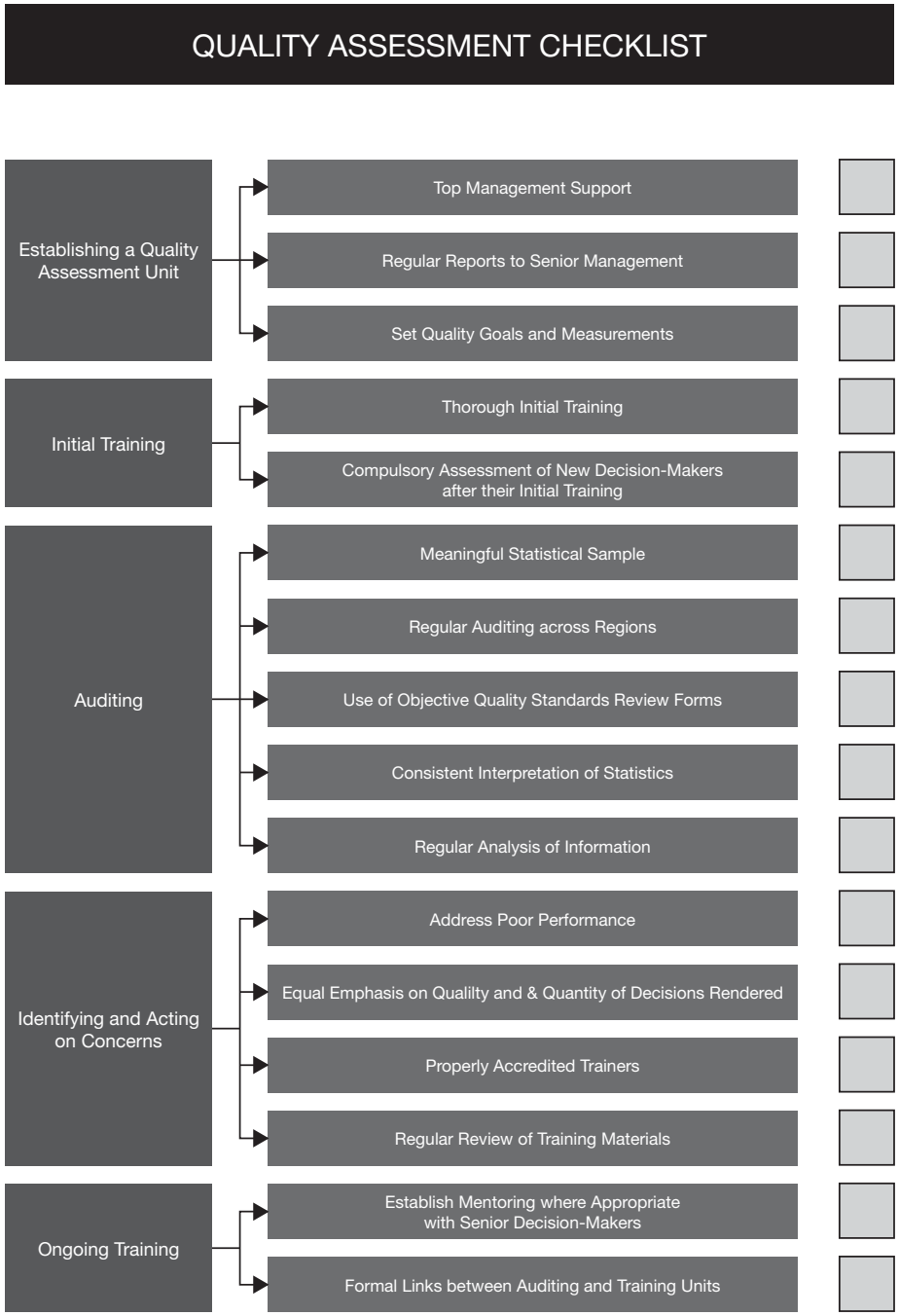
Article 35 (3) (f) – border procedures

> *… in case permission to enter is refused by a competent authority, this competent authority shall state the reasons in fact and in law why the application for asylum is considered as unfounded or as inadmissible.*[49]

However, in its supervisory role the courts should carefully review the decision at the first instance to see if the relevant laws, as set out in national legislation, EU Directives, Geneva Convention & Protocol, were followed and whether the interpretation of those laws was in line with national and international jurisprudence, particularly that of the European Court of Justice and the European Court of Human Rights.

4.5. Phase 5 – Quality Assessment Units

While the courts have the supervisory responsibility to review decisions where called upon, the first-instance refugee status determination authority should also be engaged in reviewing the quality of its own decisions. ASQAEM has assisted the countries in the Project, where they do not have such a "system" to set one up. In the follow-up project, Further Developing Asylum Quality, these countries will be assisted in setting up, and developing their own internal quality assessment units. The checklist which follows is based upon the materials provided by the UK government and the UNHCR in the UK when they jointly developed such a system.



For full-sized document please see Part C ASQAEM Checklists.

5. Overall Findings of the Project

What have we learned along the way? Well, a great deal. In what follows we deal briefly with seven major areas of concern. To a greater or lesser extent each of these issues is a problem throughout the Region, although the degree to which it affects particular countries varies.

▫ Proper Interpretation.

Interpretation is involved in almost all asylum interviews. As the applicant's story will serve as the basis for the analysis an interpreter must, to the greatest extent possible, convey word for word what the applicant is relating to the decision-maker and vice versa. The role is critical and an interpreter has no other function to perform. Unfortunately, the quality of interpretation throughout the Region varies widely and, overall, has been of a very low quality.

▫ Gathering the Facts.

Article 4 of the Asylum Qualification Directive makes it clear that the decision-maker has an obligation to thoroughly gather the facts in the claim before him/her. Without this a claim for asylum can not be thoroughly or legally analysed. Within the Region several examples can be found where the first-instance decision-maker does not adequately discharge his/her duty and, in some national court case law, this has not been adequately addressed.

▫ Confronting Applicants with Contradictions.

Not uncommonly an applicant may appear to contradict himself/herself or provide evidence that seems inconsistent. An unresolved contradiction or major inconsistency can seriously weaken an applicant's credibility. However, what appears at first sight as a contradiction or inconsistency might, upon examination, turn out not to be one. For this reason the law and the courts have held that a decision-maker must put these contradictions or inconsistencies to the applicant for his/her explanation. The decision-maker may then evaluate this explanation to see whether it removes the supposed contradiction or inconsistency or not. This "secondary" evaluation will permit the decision-maker to either conclude that the contradiction/inconsistency no longer remains as a threat to the applicant's credibility or that it does so remain. The suggested amendment to Article 10 of the Asylum Procedures Directive refers to this requirement to allow an applicant to address an apparent contradiction particularly with country of origin information:

The proposal also clarifies that country of origin information must be made accessible to the applicant or his/her legal advisor to the extent it has been used by the determining authority for the purpose of taking a decision on the application. This amendment is considered necessary in the light of evolving jurisprudence of the European Court of Justice with regard to the right of defence (to be heard) and the principle of equality of arms.

The proposed amendment to Article 15 of the Asylum Procedures Directive states:

In this respect, it makes clear that (i) the content of the interview must enable the determining authority to collect information needed to apply substantive grounds of international protection in accordance with the Qualification Directive, and (ii) that the applicant must be given the opportunity to provide necessary clarifications with regard to the elements of his/her application or any inconsistencies which occur in his/her statements.

▫ Standard of Proof.

We have discussed this before. However, this area of the law is in a state of international flux. As noted, a Common European Asylum System cannot evolve where different countries, let alone different decision-makers, do not apply a common standard of proof when reviewing the aspects of the claimant's history put forward during an interview. It is a major unfairness to have some decision-makers requiring an applicant to "prove" his allegations of past persecution "beyond any doubt" while another decision-maker in another country (sadly, sometimes even in the same country) asks only that the story be more believable than not. One decision-maker when evaluating a claim wants to be "deeply convinced" while another will be satisfied if there is a "real chance" that the events stated by the applicant are true.

▫ Reasoning for Conclusions.

Once again, the proposed amendment Article 10 of the Asylum Procedures Directive states:

Several additional requirements for a decision by the determining authorities are introduced in order to lay down necessary conditions for ensuring access to effective remedy in the context of a single examination procedure, and to ensure the confidentiality of a decision in cases involving gender and/or age-based persecution. To this effect, the amendment firstly specifies that the determining authority must state reasons in fact and in law in a decision rejecting the application with respect to (i) refugee status or (ii) international protection status (i.e. both refugee status and subsidiary protection status). The amendment is necessary with a view to aligning the single procedure, as set out in this proposal, with the principle of effective judicial protection of rights guaranteed by Community Law. [Emphasis added]

While it might seem to be suprising, the practise in the Region discloses that many decisions, both at first and second instance, suffer from a lack of reasoning connecting the applicant's story to both the country of origin information and the law. The courts in particular must be highly sensitive to this as it is a matter of fairness and due process and as such is a "procedural" failure and not simply one of content.

▫ Country of Origin Information.

As noted in the proposed amendment to 10 of the Amended Asylum Procedures Directive it is important that the applicant be given access to country of origin information where it appears to be at odds with elements of his/her story and therefore to go to credibility. In some cases, national refugee status determination authorities (and even, sometimes, the court) do not cite the source of the country of origin information. Citing the source allows for an assessment of the objectivity, relevance, etc., of the country of origin information – without knowing where it has come from no analysis can be performed on an item which might, by itself, lead to the rejection of a claim is unfair.

▫ Poorly Written Reasons.

Poorly written reasons *per se* are not necessarily wrong. However, they are often an indication of a lack of clear thinking on the part of a decision-maker and therefore should be reviewed with care. Where facts, law, country of origin information and opinion are all thrown together into a rambling text it is often the case that the "reasoning' is either absent or of a very poor quality. Writing a clear set of reasons requires skill and attention to the various elements necessary when analysing a claim for protection.

6. Conclusions

As noted at the outset, the ASQAEM Project has been an innovative one which sought to tap the various pockets of knowledge and excellence throughout the Region. It has been successful in doing so. But its true value has been a "regional" awareness that refugee status determination needs improvement and that all the parties necessarily need to be involved. It has also demonstrated the need to balance the "theory" of refugee law with the "practicalities" of decision-making. Recognition of this has been critical for the success of the Project. Underlying all of this has been a willingness to deal with the issues and an openness to learn on all of our parts. It is also worth mentioning that the very important issue of trust has been established – as it should be – and that further development of the issues dealt with in this Project in Europe will rely upon it.

On the more substantive aspect it is clear from the previous section that there will need to be a strong focus in the future on the seven problem areas.

Endnotes

1 From April 2008 – 31 December 2008 Detelin Ivanov was the National Evaluator.

2 By "Region" we mean Austria, Bulgaria, Germany, Hungary, Poland, Romania, Slovakia and Slovenia.

3 Although only eight countries participated in the Project, there were several judges' seminars where judges from many other countries were in attendance.

4 In Slovenia, the Assistant National Evaluator drafted the Report.

5 There were others, of course, significantly Boonshan Sangfai, Senior Regional Program Officer, and Pierre Kalibutwa, Senior Regional Administrative Officer.

6 Such circumstances sometimes arise when the interpreter knows that there is not an equivalent word in the home language or that the applicant's answer is based upon a misunderstanding of the interviewer's/interpreter's words.

7 When referring to "Region" the reference is to the Region falling within the UNHCR Regional Representation for Central Europe which comprises Bulgaria, the Czech Republic, Hungary, Poland, Romania, the Slovak Republic and Slovenia, as well as Auatria and Germany who were part of the Project.

8 2007 statistics.

9 See Part C of the Report.

10 As will be obvious, there are many more aspects to an asylum claim that are not captured here, but the Checklist is limited to one page on purpose and so choices had to be made.

11 See also sections 209 – 212.

12 See also sections 215 – 219.

13 See also the Asylum Procedures Directive, articles 11, and 23 (4).

14 - Husein, Anab Ali v. M.C.I. (F.C.T.D., no. IMM-2044-97), Joyal, May 27, 1998

15 Available at: http://www.unhcr.org/refworld/docid/3b20a3914.html.

16 UN High Commissioner for Refugees, Agents of Persecution - UNHCR Position, 14 March 1995, available at: http://www.unhcr.org/refworld/docid/3ae6b31da3.html

17 Literally transposed by the Hungarian Asylum Act under Section 62; the only difference is that, instead of 'non-state' actors, Section 62 (c) transposed 'person or organisation who or which is independent of the state from which the applicant was forced to flee or the party or organisation controlling the state or a substantial part thereof'.

18 The inability to properly analyse "Nexus" is a fault throughout the Region and particular training sessions on this have been offered.

19 See Article 4 (5) where the "standard" is "substantiate".

20 See N. v. Finland, Judgment of 26 July, 2005, Application no. 38885/02 which states in paragraph 195: "In light of the overall evidence now before it the Court finds however that the applicant's account of his background in the Democratic Republic of Congo must, on the whole, be considered sufficiently consistent and credible."

21 This can be found at: http://www.unhcr.org/cgi bin/texis/vtx/refworld/wmain?page=search&docid=3ae6b3314&skip=0&query=handbook on procedures and criteria

22 This can be found at: http://www.unhcr.org/cgi bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6b3338&skip=0&query=note on burden and standard of proof.

23 Reference Hungarian Helsinki Committee's 2007 publication on country of origin information in Europe. This publication can be found at http://helsinki.webdialog.hu/dokumentum/COI_in_Asylum_Procedures_US.pdf. A follow-up to this study will begin shortly.

24 Available at: http://www.unhcr.org/refworld/docid/403b2522a.html

25 See the Note referred to above.

26 This excerpt has been kindly been provided by the IARLJ and its author, Dr. Hugo Storey. The full paper, Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist was presented at the Seventh Biennial IARLJ World Conference, Mexico City, 6-9 November 2006 by members of the COI-CG Working Party. Dr. Storey's assistant Rapporteur on this Working party is a member of the Higher Administrative Court of Slovenia – Mr. Bostjan Zalar.The full article with supporting text may be found at: http://www.iarlj.org/conferences/mexico/images/stories/forms/WPPapers/Hugo%2StoreyCountryofOriginInformationAndCountryGuidanceWP.pdf

27 Salah Sheekh v. The Netherlands, Judgment of 13 January 2007, Application no. 1948/04.

28 Available at: http://www.unhcr.org/refworld/docid/3ae68d98b.html

29 HCR/GIP/03/04, available at: http://www.unhcr.org/refworld/docid/3f2791a44.html

30 Judgment of 13 January 2007, Application no. 1948/04.

31 1 April 2001.

32 See International Covenant on Civil and Political Rights (ICCPR) Article 7.; Convention Against Torture (CAT) Article 3; European Convention on Human Rights (ECHR) Article 3.

33 Judgment of the Court of Justice in Case C-465/07, Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie, 17 February 2009.

34 See, *inter alia*, Ahmed v. Austria, Judgment of 17 December 1996, Application no. 25964/94, paragraph 39.

35 See Soering v. the United Kingdom, paragraph 90-91.

36 Judgment of 17 July 2008, Application no. 25904/07, paragraph 130.

37 Vilvarajah and Others v. the United Kingdom, Judgment of 30 October 1991, Application no. 13163/87, 13167/8 and 13165/87, paragraph 108: 'the Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe'.

38 Ibid, paragraph 111: 'their personal situation was [not] any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country.'

[39] Ibid., see also Cruz Varas and Others v. Sweden, Judgment of 20 March 1991, Application no. 15576/89.

[40] Salah Sheekh v. The Netherlands, Judgment of 13 January 2007, Application no. 1948/04, paragraph 148.

[41] Judgment of 13 January 2007, Application no. 1948/04, par. 148.

[42] Ibid, paragraphs 138-149.

[43] Ibid, paragraph 148.

[44] See also the UNHCR Statement on Subsidiary Protection Under the EU Asylum Qualification Directive for People Threatened by Indiscriminate Violence; January 2008; available at: http://www.unhcr.org/refworld/docid/479df7472.html [accessed 1 October 2009]; see also the ECtHR judgments in Saadi v. Italy, Judgment of 28 February 2008, Application no. 37201/06, paragraph 132 and NA. v. the United Kingdom, paragraphs 113, 115, 116-117.

[45] F.H. v. Sweden, Judgment of 5 June 2009, Application no. 32621/06, paragraph 95.

[46] Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, paragraph 196.

[47] See Asylum Qualification Directive and AH; Case No: IATRF 99/0759/C [UK Court of Appeal] and GS (Article 15 (c): indiscriminate violence) Afghanistan CG [2009] UKAIT 00044.

[48] Under the Recast Asylum Procedures Directive this provision is proposed to be deleted.

[49] Under the Recast Asylum Procedures Directive this provision is proposed to be deleted.

Appendix A

Refugee Status Determination Regional Statistics (Provisional)

Total for Project Countries

	2007	2008	2009
Asylum applications	60,581	55,574	67,044
Refugee recognition	12,945	11,554	11,794
Complementary protection	5,730	5,282	6,100

Austria

	2007	2008	2009
Asylum applications	11,921	12,841	15,821
Refugee recognition	5,197	3,753	3,247
Complementary protection	1,638	1,628	1,536
Number of asylum applications by unaccompanied minors / separated children	516	770	1,062
Female applicants		4,321	4,866
Main countries of origin in 2009	Russian Federation (Chechnya), Afghanistan, Kosovo		

Bulgaria

	2007	2008	2009
Asylum applications	975	746	853
Refugee recognition	13	27	39
Complementary protection	322	267	228
Number of asylum applications by unaccompanied minors / separated children	23	13	8
Female applicants	98	130	115
Main countries of origin in 2009	Iraq, Stateless, Afghanistan, Iran, Armenia and Algeria		

Germany

	2007	2008	2009
Asylum applications	30,303	28,018	33,033
Refugee recognition	7,197	7,291	8,115
Complementary protection	673	562	1,611
Number of asylum applications by unaccompanied minors / separated children	180 (only thouse under age 16)	727	1,306
Female applicants		8,918	10,997
Main countries of origin in 2009	Iraq, Afghanistan, Turkey, Kosovo, Iran, Vietnam, Russian Federation, Syria, Nigeria, India		

Hungary

	2007	2008	2009
Asylum applications	3,425	3,120	4,672
Refugee recognition	169	160	166
Complementary protection	69	130	217
Number of asylum applications by unaccompanied minors / separated children	73	176	271
Female applicants	650	604	1.106
Main countries of origin in 2009	Serbia including Kosovo, Somalia, Afghanistan, Turkey, Georgia		

Poland

	2007	2008	2009
Asylum applications	10,147	8,517	10,587
Refugee recognition	212	193	133
Complementary protection	2,919	2,595	2,377
Number of asylum applications by unaccompanied minors / separated children	246	70	14
Female applicants		4,068	4,671
Main countries of origin in 2009	Russian Federation, Georgia, Armenia, Vietnam and Belarus		

Romania

	2007	2008	2009
Asylum applications	742	1182	995
Refugee recognition	141	105	64
Complementary protection	20	33	30
Number of asylum applications by unaccompanied minors / separated children	30	71	37
Female applicants		105	108
Main countries of origin in 2009	Republic of Moldova, Pakistan, Afghanistan, Turkey and Iraq		

Slovakia

	2007	2008	2009
Asylum applications	2,643	910	882
Refugee recognition	14	22	14
Complementary protection	82	65	97
Number of asylum applications by unaccompanied minors / separated children	154	71	28
Female applicants		91	99
Main countries of origin in 2009	Pakistan, Moldova, India, Vietnam, Afghanistan and China		

Slovenia

	2007	2008	2009
Asylum applications	425	240	201
Refugee recognition	2	3	16
Complementary protection	7	2	4
Number of asylum applications by unaccompanied minors / separated children	27	16	23
Female applicants	82	43	48
Main countries of origin in 2009	Bosnia and Herzegovina, Serbia including Kosovo, Turkey, Croatia and Afghanistan		

Appendix B

Grant Application Checklist

The Grant Application is clear in what it states;
there are fifteen goals – so how did we do?

1

Goal: Strengthen the quality of decision-making in asylum procedures and thereby support the development and enhancement of quality oriented, fair and efficient asylum procedures.

Outcome:
- This has, of course been the general focus of the Project from the initial analysis through to the development of a focal point in each Ministry for quality assessment.
- To this end a Refugee Status Determination File Preparation Checklist has been devised to help decision-makers at first-instance prepare appropriately for their upcoming interviews.

2

Goal: Support the development of procedures and practices designed to achieve a single procedure for the assessment of applications for international protection.

Outcome:
- This has been accomplished throughout the Region.

3

Goal: Develop and align interview techniques that are sensitive to the situation and circumstance of persons of concern who apply for international protection.

Outcome:
- Training has been provided on this.
- Additionally, a Protection Claim Interview Checklist has been developed and circulated amongst first-instance decision-makers to help ensure that they cover the necessary points in an interview.

4

Goal: Develop recording processes and techniques for the gathering of facts and events forming the basis of the claim for international protection that are sensitive to the situation and circumstance of persons of concern who apply for international protection.

Outcome:
- The issue of how to record has been mixed, although a general concensus has developed that whichever way this is done it has to be improved.

5

Goal: Ensure that the quality and utilisation of interpretation services facilitates the accurate communication of the asylum claim to the adjudicator.

Outcome:
- This has been a major issue throughout the region. A lack of interpreters professionally trained and a scarcity of languages available is common throughout the region.
- Training has been provided to first-instance decision-makers on how to ensure accurate interpretation and on how to control the hearing room.
- Efforts have been made to improve this with the circulation of an Evaluation Report Checklist developed by the UNHCR, a copy of which is included with your materials.
- Reference has also been provided to the Canadian Immigration and Refugee Board (IRB) Interpreters' Manual which can be located at: http://www.irb-cisr.gc.ca/Eng/brdcom/publications/inter/Pages/index.aspx which contains, as well, an interpreters Code of Conduct.

6

Goal: Ensure that the process of credibility assessment of the application for international protection is fair.

Outcome:
- This is the bane of refugee adjudication not only in the Region but world-wide. Training on credibility assessment has been provided throughout the Region on several occasions.
- To facilitate this a Standards of Probability & Assessment of Risk chart has been circulated to both first- and second-instance decision-makers.

7

Goal: Ensure that the quality and process of assessing and applying country of origin information is fair and efficient.

Outcome:
- Fifteen years ago it was difficult to access Country of Origin Information (COI) and often it was available only in hard copy. Now, there is an abundance of country of origin information - although it must be noted that a great deal of it is only in English and German - and the problem is no longer how to get it but how to limit it to what is relevant.
- Country of origin information continues to grow in its importance to the outcome of refugee decisions – as a result, training has been given with a special emphasis on allowing applicants to respond to any country of origin information that contradicts their account of what is happening in the place they have come from.
- As noted, the IARLJ has produced a 9-point Checklist for Assessing Country of Origin Information. By kind permission of the IARLJ and the paper's author Dr. Hugo Storey we reproduce it here.

8

Goal: Ensure the proper application of the relevant laws and procedural safeguards in the decision-making process on applications for international protection.

Outcome:
- This is ongoing and forms part of the greater whole.

9

Goal: Ensure that the approach of the asylum authorities in the interpretation of the refugee definition and inclusion criteria under the 1951 Convention is in conformity with established guidelines and recommendations developed by the Executive Committee of the UNHCR.

Outcome:
- This has largely been done and, once again, forms part of the greater whole of the training provided.

10

Goal: Ensure that the approach of the asylum authorities in the granting of complementary/subsidiary forms of protection takes into account the need for international protection of the concerned individuals in accordance with established international human rights law and protection standards.

Outcome:
- Subsidiary Protection, particularly under Article 15 (c) of the Qualification Directive has assumed an importance lately through the decision of the European Court of Justice (ECJ) in Elgafagi and the cases which have followed it, particularly in Germany and the UK. Problems of access to these judgments arise when country judgments have not been translated into English.

11

Goal: Ensure a consistent approach in line with UNHCR guidelines by asylum authorities in applying exclusion and cessation clauses; the concept of an internal flight alternative when assessing claims for international protection; when dealing with gender related persecution claims; with regard to agents of persecution; when dealing with *sur place* claims.

Outcome:
- The application of exclusion and cessation clauses has only slightly been touched upon in direct training as other more fundamental issues needed to be addressed first. Internal Flight Alternative (IFA) has been addressed, but will require greater focus. Gender related persecution and vulnerable categories is an issue that is currently being focussed upon. *Sur Place*, where it has arisen through court reviews or first-instance decisions has been addressed.

12

Goal: Ensure that the use of accelerated procedures when assessing claims for asylum does not unduly lead to the non-consideration of the protection merits of claims.

Outcome:
- This has been a significant issue in a couple of countries, particularly where the transposition of the EU Directives has either been inaccurate or non existent. The issues in these countries is being addressed either through discussion, policy, or changes to the national asylum law.

13

Goal: Ensure that the authorities deal with the protection merits of all cases that are returned to their jurisdictions under the operations of the Dublin II regulations.

Outcome:
- Training has been provided at both first- and second-instance on the proper application of the Dublin II Regulations.

14

Goal: Ensure that the practice at appeal/review levels (second-instance) offer effective remedies.

Outcome:

- Through one-on-one meetings, group discussions, seminars, and national and international conferences judges at second instance have received training on what to look for and how to analyse first-instance decisions.
- To this end a Review of an Administrative Refugee Status Determination Decision: A Judges' Checklist, which you have in your package, has been circulated. Initial reaction from the judges has been very positive and it has been taken up by judges in many other countries not within the Region.

15

Goal: Ensure that the procedural standards and safeguards and application of criteria for the grant of refugee status and subsidiary protection in the participating member states widely support the harmonisation of asylum systems and construction of a common European asylum system.

Outcome:

- This is not easily accomplished but has been an overall goal and, through inter-regional sharing amongst authorities, there is a significant awareness of the need to assume this responsibility and work towards it.

16

Goal: Written Reasons

Outcome:

- A sixteenth goal, though not explicitly cited in the Grant Application, is the thorough and effective writing of reasons.
- To this end an Refugee Status Determination Written Decision Checklist was developed and circulated.

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