

RISK, LEGITIMACY AND ASYLUM ADJUDICATION

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1. Introduction

The concept of asylum is a simple one: a foreign national present in a host country who can demonstrate a risk of persecution, torture or ill-treatment on return to their country of origin must be granted international protection.¹ However, the task of deciding whether or not a claimant qualifies for asylum is perhaps the most problematic adjudicatory function in the modern state. It has been noted that the superficial simplicity of asylum adjudication conceals “a mass of detailed, difficult and very problematic factual and legal issues”.² The National Audit Office has stated that in many instances decision-makers “face a significant challenge in determining whether the rules governing asylum status are met” while the courts have observed that “[t]he difficulty of the fact-finding exercise is particularly acute in asylum cases”.³ Such difficulties arise in part because of the nature of the asylum decision problem: the decision-maker must prognosticate the prospective risk of persecution or ill-treatment often on the basis of incomplete and limited evidence. Furthermore, there is the diverse nature of the asylum claimant population which comprises 146 different nationalities and originates overwhelmingly from non-western countries.

The problematic nature of the asylum decision is matched by the grave consequences of erroneous decision-taking. The purpose of the decision-making process is to ensure that those who have demonstrated a risk of persecution or ill-treatment will be awarded protection while also ensuring that those who do not qualify can be removed from the UK. Asylum adjudication raises the constant problem of either refusing protection to the genuine claimant or affording protection to the non-genuine claimant. The importance of asylum decision-making does not though arise solely from its error costs but also in light of its current scale. While asylum decision-making may seem an arcane area of administrative law adjudication, it has become increasingly familiar owing to the unprecedented number of asylum claims. In 2005, the Home Office made 27,395 initial decisions and 600 Immigration Judges of the Asylum and Immigration Tribunal (AIT)

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¹ Refugee Convention 1951, Article 1(A); European Convention on Human Rights, Article 3; Refugee Qualifications Directive 2004/83/EC (OJ L304 30.9.04 p.12).

² C.G. Blake, “Judicial Review, Second Tier Tribunals and Legality” in M. Partington (ed.), *The Leggatt Review of Tribunals: Academic Seminar Papers* (2001), p.68.

³ National Audit Office, *Improving the Speed and Quality of Asylum Decisions* (2003-04 HC 535), p.37; *HK v Secretary of State for the Home Department* [2006] EWCA Civ 1037, para.27 (Neuberger LJ).

determined 33,940 appeals.⁴ Asylum also continues to provide a substantial amount of work for the higher courts.⁵

In this context, this article considers the nature of asylum decision-making and proposals for reform. In so doing, three major and interrelated themes are examined. The first concerns the risk assessment task which is at the centre of the determination of each asylum claim. The language of risk assessment has become familiar in many areas of government, such as risk-based regulation and internal risk management.⁶ However, asylum adjudication illustrates a distinct form of risk assessment – case-management risk – which requires a qualitative evaluation of the risk posed either by or to an individual.⁷ Such decisions typically have substantial implications for an individual’s personal liberty and are taken against the backdrop of broader public security concerns. While the technique of case-management risk can be identified in a variety of different contexts – parole, mental health, immigration and terrorism – asylum decision-making poses a particularly acute tension between the risk to an individual’s basic human rights and the public interest in maintaining legitimate immigration control.⁸ To appreciate the nature of this risk assessment task, the legal tests need to be situated within their policy and administrative context. There is also the question of the appropriate standard of proof that a successful claimant must discharge.

The second theme concerns the crucial task of fact-finding. After all, the vast majority of administrative and tribunal determinations turn on their own individual facts; asylum claims, in particular, are highly fact-sensitive. Consideration of the range of information available to decision-makers on which to assess the risk of persecution is central as to how decision-makers approach the fact-finding task. As will be seen, asylum adjudication illustrates both the inherent difficulties in fact-finding and how governments may seek to influence this task. Furthermore, the peculiar nature of asylum adjudication, requiring decision-makers to assess the political and social situation in countries generating claims, creates scope for controversy over who possesses the appropriate expertise to make such assessments.

⁴ Home Office, *Asylum Statistics United Kingdom 2005* (2006).

⁵ See Department for Constitutional Affairs, *Judicial Statistics 2005 (Revised)* (Cm 6903, 2006).

⁶ See National Audit Office, *Managing Risks to Improve Public Services* (2003-04 HC 1078); P. Hampton, *Reducing administrative burdens: effective inspection and enforcement* (2005). For discussion, see J. Black, “The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom” [2005] *PL* 512 at 514-518. On risk and law generally, see R. Baldwin (ed.), *Law and Uncertainty: Risks and Legal Processes* (1997); B. Hudson, *Justice in the Risk Society* (2000).

⁷ M. Dean, “Risks, calculable and incalculable” in D. Lupton (ed.), *Risk and Sociocultural Theory: New Directions and Perspectives* (1999), p.131, 143-144.

⁸ R. Hood and S. Shute, *The Parole System at Work: a Study of Risk-based decision-making* (2000); J. Peay, *Decisions and Dilemmas: Working with Mental Health Law* (2003); R. Thomas, “Immigration Appeals for Family Visitors Refused Entry Clearance” [2004] *PL* 612 at 614-620; Lord Carlile of Berriew QC, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2006).

Adjudicative legitimacy provides the third theme. While legitimacy is central to administrative law, it assumes critical importance when analysing risk assessment regimes. What justificatory arguments do decision-makers draw upon? To what extent does the actual performance of decision-makers fulfil such values? Examination of this issue is complex because of the involvement of three actors in the determination process. First, there is an administrative agency, the Immigration and Nationality Directorate (IND) of the Home Office, responsible for the initial assessment of claims; secondly, a legal decision-maker, the AIT, which provides a single merits appeal; and thirdly, there are professional experts, which in this context includes both medical and country experts, the latter being those with a specialist knowledge of the conditions in countries of origin. As an essay on administrative justice, this article will adopt the familiar assumption that each of these actors reflects a different model of adjudication – bureaucratic, legal, and professional judgment – which in turn espouse competing legitimising values.⁹ If so, then the quest for legitimacy is likely to involve a complex competition between different adjudicatory processes. Asylum adjudication then might illustrate how a case-management risk regime can become an area of intense contestation between not only different institutional actors but also competing models of adjudication.

Briefly, the structure is as follows. The first section considers the legal tests governing asylum determination and the asylum risk assessment problem. The next section examines the difficulties involved in assessing asylum claims, in particular, the assessment of credibility and country conditions. Subsequent sections examine the tensions concerning expert evidence, the contest for adjudicative legitimacy and reform proposals.

2. Risk and Asylum Adjudication

Risk assessment is central to asylum adjudication. The basic question posed by the Refugee Convention is whether a claimant will, on return to their country of origin, face a real risk of persecution for reasons of their race, religion, nationality, membership of a political social group or political opinion.¹⁰ This obligation is now complemented by Article 3 ECHR – the prohibition against torture or inhuman or degrading treatment – which, owing to its “extra-territorial” effect, prevents the UK from returning a foreign national to a place where there may be subjected to such ill-treatment.¹¹ The task of adjudicating an asylum claim requires the decision-

⁹ See J. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (1983), pp.23-34; M. Adler, “A socio-legal approach to administrative justice” (2003) 25 *Law & Policy* 323 at 329-336.

¹⁰ Refugee Convention 1951, Art.1A(2). See generally J. Hathaway, *The Law of Refugee Status* (1991); G. Goodwin-Gill, *The Refugee in International Law* (1996). On UK asylum law, see C. Harvey, *Seeking Asylum in the UK: Problems and Prospects* (2000); D. Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (2004).

¹¹ On the “extra-territorial” effect of Article 3, see *Soering v United Kingdom* (1989) 11 EHRR 439; *R. v Special Adjudicator Ex p.Ullah; Do v Secretary of State for the Home Department* [2004] Imm AR 419. Removal may also be contrary to Article 8 ECHR (the right to private and family life) if the claimant has developed a family life in the UK though only if the case is truly exceptional on its individual

maker to assess the future risk of persecution or ill-treatment that the claimant might receive on return to their country of origin. In most, if not all, Article 3 cases, the concept of risk has the same or closely similar meaning to that in the Refugee Convention of a “well-founded fear of persecution”, save that it is confined to a risk of Article 3 forms of ill-treatment and not restricted to conduct with any particular motivation or by reference to the conduct of the claimant. Article 3 may also in exceptional circumstances prevent removal where there is a risk of death arising from the non-availability of medical treatment for, for instance, HIV/AIDS infection and there are compelling humanitarian grounds or where there is a risk of suicide or other self-harm that a claimant may inflict on removal.¹² This brief summary of asylum law cannot though do justice to its complexities and uncertainties which have arisen in part because of the absence of a single judicial body to provide authoritative rulings.¹³

While asylum adjudication is governed by the legal obligations of the Refugee Convention and ECHR, it is also directly concerned with the maintenance of immigration control. Indeed, the risk assessment task frequently involves an unavoidable conflict between the legal obligation to protect those at risk of persecution or ill-treatment and the public interest in maintaining legitimate immigration control. There are important policy justifications for imposing such controls: the need to discourage illegal and economic migration, people trafficking, health and welfare tourism; the prevention of the admission of a potentially unlimited volume of asylum applicants; and the protection of social cohesion. The social and economic conditions in countries producing applicants may involve considerable hardship for individuals who consequently desire a better life; the imposition of ordinary immigration controls may leave only one possibility: seeking political asylum.

The asylum decision-maker will then continuously have before them the risk of either being unduly lenient – and therefore risk falling into error by granting status to the undeserving – or unjustifiably mistrustful – and therefore risk committing error by refusing the truly genuine claim. Both types of error clearly involve serious adverse consequences. Refusing protection to the genuinely entitled claimant represents a basic failure to fulfil the purpose of the Refugee Convention to provide surrogate protection to those in need because the claimant’s own state is either unable or unwilling to protect its own nationals.¹⁴ It also poses considerable risk to the

facts. See *Huang, Abu-Qulbain and Kashmiri v Secretary of State for the Home Department* [2005] Imm AR 240, 269 (Laws LJ).

¹² *D v United Kingdom* (1997) 24 EHRR 423; *Bensaid v United Kingdom* (2001) 33 EHRR 10; *N v Secretary of State for the Home Department* [2005] Imm AR 353; *J v Secretary of State for the Home Department* [2005] Imm AR 409.

¹³ As the AIT has noted, in *LK v Secretary of State for the Home Department (AA applied) Zimbabwe* [2006] Imm. AR 67, 74: “both the principles of procedure and interpretation of international Conventions have developed in a way which is unusually piecemeal because it has been based on a constantly changing background of the statutory jurisdiction of the Immigration Appellate Authorities and the occasional interaction of judicial review as well as appeals to the higher courts.”

¹⁴ *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489.

individual's life and limb; the price of indifference to genuine refugees seems almost incalculable.¹⁵ It is precisely because the costs of such decisions to individual appellants are so high that they must be scrutinised closely. Public confidence in the asylum process may be undermined if genuinely entitled claimants are wrongfully rejected. On the other hand, affording international protection to those who do not face persecution confers on them a status, such as refugee status with the rights and privileges it entails, which they do not deserve. This clearly poses a threat to the policy justifications for maintaining legitimate immigration control and public confidence in the asylum process. Furthermore, aspiring entrants who have applied under ordinary immigration procedures may feel aggrieved that others have been able to jump the queue.

While the risk of error is ever-present, some decision-making process is nevertheless required. The "all or nothing" nature of asylum adjudication compels a decision either way: either the individual is recognised to be in need of international protection and therefore not to be removed from the country or is not in need of protection and to be removed. As the error costs of incorrect decisions are so high, the decision-making process is continually subject to both enormous stress and political controversy. On one side of the debate are those who fear that decision-makers will adopt a sceptical approach and risk rejecting genuine claimants while others voice the concern that decision-makers will overlook the risks posed to society by unmeritorious claimants.¹⁶

Aligned to the centrality of assessing risk is the appropriate standard of proof. While the burden of proof is always on the claimant to demonstrate their case, the standard of proof adopted is lower than the civil standard of proof, the balance of probabilities test; the asylum claimant must demonstrate a reasonable degree of likelihood of persecution or a real risk of ill-treatment on return.¹⁷ The adoption of the lower standard of proof relates to the establishment of risk on return and reflects the difficulties claimants may experience in proving the nature of future risk by allowing "a more positive role for uncertainty."¹⁸ It is precisely because the imposition of the burden of proof on the applicant may pose some difficulties that the evidence is viewed in a more benevolent manner than in other legal proceedings; by requiring something less than proof positive, asylum law deliberately errs on the side of caution. The civil standard of proof, typically applied to ascertain the probability that past events happened, is inapplicable in this context as

¹⁵ See A.C. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (2002), chap.1.

¹⁶ For treatments of asylum policy debate in the UK, see N. Steiner, *Arguing About Asylum: The Complexity of Refugee Debates in Europe* (2000), pp.97-132; L. Schuster, *The Use and Abuse of Political Asylum in Britain and Germany* (2003), pp.131-179; M.J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (2004), pp.107-131.

¹⁷ *Sivakumaran v Secretary of State for the Home Department* [1988] A.C. 958; *Kacaj v Secretary of State for the Home Department (Article 3 – Standard of Proof – Non-State Actors) Albania* (Starred determination) [2002] Imm AR 213; Refugee Qualifications Directive, n.1 above, articles 5 and 8.

¹⁸ *Kaja v Secretary of State for the Home Department* [1995] Imm AR 1, 8.

asylum adjudication primarily focuses upon an assessment of the future risk of persecution or ill-treatment that a claimant may suffer on their return.

The leading judicial discussion of risk assessment in asylum claims is to be found in *Karanakaran*.¹⁹ Here the Court of Appeal recognised that as asylum adjudication concerns future risk, it is an administrative-legal decision-making process differing in important ways from civil litigation. Decision-makers are not constrained by the rules of evidence adopted in civil litigation but must instead take into account all relevant considerations when assessing future risk.²⁰ Nothing should be excluded from the assessment, such as a claim by the applicant that a certain event happened (*e.g.* they were tortured), unless there can be no real doubt that that the claimed event did not in fact occur. As the court explained, the question whether an applicant qualifies for international protection is not a head-to-head litigation issue; testing a claim does not ordinarily involve a choice between two conflicting versions of the truth but an evaluation of the intrinsic and extrinsic credibility, and ultimately the significance, of the applicant's case.²¹ The sources of information available to the decision-maker will frequently comprise: the claimant's oral testimony; country reports produced by government and non-governmental organisations; expert evidence; and, more recently, the AIT's country guideline determinations. Everything relevant must be taken into account when assessing risk. Further, the issues for a decision-maker are questions not of hard fact but of evaluation: "the facts, so far as they can be established, are signposts on the road to a conclusion on the issues; they are not themselves conclusions."²² Finally, as the assessment of risk must be undertaken on the basis of an often quickly changing factual situation, the decision-making process must take into account any changes that have occurred after the initial decision (*e.g.* a change of regime in the claimant's country of origin).²³

On the one hand, asylum adjudication bears the hallmarks of routine individualised decision-making by governmental administration. Individuals apply to a public authority to determine their eligibility: forms are completed and interviews conducted so that findings of fact can be made; decision-makers establish whether or not the relevant criteria have been fulfilled; unsuccessful claimants may appeal.

At the same time, this particular adjudicative process possesses its own distinctive features. Its purpose is to determine the eligibility of people who claim that they will be persecuted or tortured in their own country and who as foreign nationals would not otherwise qualify to remain in the country. An asylum decision possesses distinct and considerable social and moral

¹⁹ *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449.

²⁰ See the Asylum and Immigration Tribunal (Procedure) Rules SI 2005/230, r.51(1).

²¹ *Karanakaran*, n.19 above, 479 (Sedley LJ).

²² *ibid.*

²³ The asylum appeal system is therefore an "extension of the decision-making process" rather than simply a means of reviewing decisions already taken: *Sandralingham and Ravichandran v Secretary of State for the Home Department*; *Rajendrakumar v Immigration Appeal Tribunal and Secretary of State for the Home Department* [1996] Imm. AR 97, 112 (Simon Brown LJ). See also Nationality, Immigration and Asylum Act 2002, s.85(4).

importance. A positive decision on an asylum claim is an implicit recognition that the moral worth in protecting an individual outweighs the public security in enforcing immigration control. It is also an indication that a foreign country, in some cases a country with which the UK has close relations, is either incapable or unwilling to provide basic protections to its own citizens.

When compared with other case-management risk assessment contexts, the risks involved in asylum claims are far more pronounced.²⁴ Most fundamentally, asylum adjudication involves an evaluation of the prospective risk of persecution or ill-treatment that a claimant may face on return on the basis of facts at the date of decision. Asylum adjudication, Sedley LJ has explained, “is not a conventional lawyer’s exercise of applying a litmus test to ascertained facts; it is a global appraisal of an individual’s past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.”²⁵

3. Assessing Claims

As in other case-management risk contexts, the assessment of risk in each asylum claim depends on its own individual facts. It is unsurprising then that as fact-finding in asylum cases is a highly problematic enterprise, it consumes the majority of initial and appellate decision-maker’s time. There is often considerable difficulty in obtaining reliable evidence of the facts that gave rise to the fear of persecution. The fact-finding exercise is often complex and difficult to manage as it usually involves an assessment of both the particular circumstances of the individual’s case and the general social and political situation in the country from which refuge is sought. The decision-maker must first assess whether or not the claimant’s account is credible and then whether this fear is objectively well-founded by reference to conditions in the relevant country. In light of the dual nature of the asylum test, in which the claimant alone possesses almost all the relevant personal knowledge and the decision-maker is best placed to deal with general country conditions, there is a mutually owed, two-way obligation between the claimant and the decision-maker to co-operate in ascertaining and evaluating the facts.²⁶ Furthermore, evaluating the significance of facts can

²⁴ For instance, a prisoner refused release by the Parole Board and an individual sectioned under the Mental Health Act will be eligible for a subsequent assessment while a refused visa applicant may re-apply or appeal. By contrast, the appeal determination is usually the end of the asylum decision-making process. The Home Office does not monitor the treatment of failed applicants on return and does not undertake any further risk assessment prior to removal. Under the Immigration Rules (HC 395 1997), r.353 an unsuccessful asylum applicant may lodge a fresh asylum claim before removal but only if the new submissions are significantly different and have a realistic prospect of success. See *R. (Rahimi) v Secretary of State for the Home Department* [2005] EWHC Admin 2838.

²⁵ *R. v Immigration Appeal Tribunal and Secretary of State for the Home Department Ex p. Shah* [1997] Imm. AR 145, 153.

²⁶ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (1992), para.196; *Secretary of State for the Home Department v RK (Obligation to investigate) Democratic Republic of Congo* [2004] UKIAT00129, para.46.

be stressful because of the underlying and constant tension between being either unduly mistrustful or unduly lenient.²⁷

Assessing Credibility

Assessing the credibility of an asylum claimant is one of the primary functions of the decision-maker since it will “lead to the establishment of much of the factual matrix for the determination of the case. In some cases, but by no means all, the issue of credibility may be the fulcrum of the decision as to whether the claim succeeds or fails.”²⁸ Credibility is “at the core of the asylum process” because, in contrast with civil litigation, evaluation of the evidence is often only concerned with the applicant’s version of events.²⁹ Most claimants are compelled by circumstances to rely on their own statements to prove their cases as it can be very difficult for them to acquire other evidence. Many, if not most, claims will not then be corroborated by either a witness or documentary evidence and will stand or fall on the decision-maker’s acceptance or rejection of the credibility of the claimant’s story.³⁰ Under the Refugee Qualifications Directive, the decision-maker must take into account all relevant facts when considering an asylum claim.³¹ While past persecution may be a serious indicator of future risk, it is by no means conclusive; equally, a claimant who has entirely escaped past persecution may be able to establish a future risk.

Assessing credibility is a familiar problem in many areas of administrative and legal decision-making.³² In essence, the issue is whether the decision-maker is able correctly to determine whether or not the applicant is telling the truth. Even in ordinary conditions, this task is extremely difficult. Studies in the field of experimental psychology, for example, indicate that people habitually overrate their ability to delineate truth and falsity and are only able to do so successfully some 50 per cent of the time.³³ Asylum adjudication, however, poses some further difficulties. The evaluation of claims must be undertaken bearing in mind the stress generated by making the claim, the

²⁷ Added to this are the time pressures decision-makers are under to produce decisions. Immigration judges must produce a determination 10 days after an appeal hearing: Asylum and Immigration Tribunal (Procedure) Rules SI 2005/230, r.22 and r.23.

²⁸ *SW v Secretary of State for the Home Department (Adjudicator’s questions) Somalia* [2005] UKIAT00037, para.20.

²⁹ C.G. Blake, “Judging Asylum and Immigration Claims: the Human Rights Act and the Refugee Convention” (2001) 21 *Public Money & Management* 25 at 27.

³⁰ *Kasolo v Secretary of State for the Home Department* (13190), date notified 1.4.1996. See also the Immigration Rules (HC 395 1997), r.339L.

³¹ Refugee Qualifications Directive, n.1 above, article 4(3) as transposed into UK law by the Immigration Rules (HC 395 1997), r.339I-J. See further R. Thomas, “Assessing the credibility of asylum claims: EU and UK approaches examined” (2006) 8 *Journal of Migration and Law* 79 at 86-92; G. Noll, “Evidentiary assessment in refugee status determination and the EU Qualification Directive” (2006) 12 *EPL* 295.

³² E.g. social security adjudication; prison disciplinary adjudication.

³³ A. Vrij, *Detecting Lies and Deceit: the Psychology of Lying and the Implications for Professional Practice* (2000); P. Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (2001); A. Memon, A. Vrij and R. Bull, *Psychology and Law: Truthfulness, Accuracy and Credibility* (2003).

possible consequences if refused and the process of giving of evidence in the highly formalistic atmosphere of an interview or appeal hearing. Claimants may be frightened, bewildered, perhaps even desperate, and will often not understand the process. Most applicants will not be able to speak English; their evidence will have to be translated raising potential communicative, cross-cultural and linguistic difficulties.³⁴ Furthermore, the evidence presented will often be fragmented, incomplete and confused. Even the most basic facts of an individual's claim, such as their nationality, may be in doubt. The IND has, for instance, argued that some individuals who claim to be from well-known refugee producing countries, such as Somalia and Afghanistan, are in reality economic migrants from neighbouring countries in search of a better life. In such "disputed nationality" cases, the decision-maker who concludes that the claimant is claiming a false nationality is entitled simply to say so.³⁵

Given such evidential uncertainty, decision-makers require some methodology for assessing credibility. However, each of the three methods commonly employed can be problematic in some respect.³⁶ First, the decision-maker may doubt an individual's credibility if there are internal inconsistencies in their account. Such inconsistencies may, however, be explicable on the basis of the fallibility of human memory, the claimant's inability to recall their story fully or a reluctance to do so in light of traumatic experiences suffered.³⁷ At the same time there is a risk that the non-genuine claimant may be able to present a consistent and coherent story albeit false. The Tribunal has been reluctant to give guidance other than exhorting decision-makers to use their "common sense and experience" to decide whether an account which frays at the edges is nevertheless truthful or alternatively whether the applicant has got themselves into difficulties through unplanned departures from a pre-rehearsed and unreliable script.³⁸

A related issue concerns the appropriate procedure through which the claimant provides evidence: interviews; adversarial hearings; or solely the production of documentary material. IND's initial interview process has

³⁴ See W. Kälin, "Troubled communication: cross-cultural misunderstandings in the asylum-hearing" (1986) 20 *International Migration Review* 230; S. Pöllabauer, "Interpreting in asylum hearings: issues of role, responsibility and power" (2004) 6 *Interpreting* 143; R. Rycroft, "Communicative barriers in the asylum account" in P. Shah (ed.), *The Challenge of Asylum to Legal Systems* (2005), p.223.

³⁵ *Khan v Secretary of State for the Home Department (Disputed Nationality – Removal Directions) Afghanistan* (Starred determination) [2002] UKIAT04412; *MY v Secretary of State for the Home Department (Disputed Somali Nationality) Somalia* (Starred determination) [2004] Imm AR 359.

³⁶ A. Weston, "'A witness of truth' – credibility findings in asylum appeals" (1998) 12 *Immigration & Nationality Law & Practice* 87 at 88-89; G. Coffey, "The Credibility of Credibility Evidence at the Refugee Review Tribunal" (2003) 15 *IJRL* 378 at 385-395.

³⁷ J. Cohen, "Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers" (2002) 13 *IJRL* 293; J. Herlihy, P. Scragg and S. Turner, "Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study" (2002) 324 *British Medical Journal* 324.

³⁸ *K v Secretary of State for the Home Department (Democratic Republic of Congo)* [2003] UKIAT00014, para.10.

been criticised for aggressive questioning and publicly funded representation is no longer generally available though claimants may request that interviews be tape-recorded.³⁹ Oral hearings are the norm at the appeal level; credibility assessments based on oral evidence will only very rarely be capable of being overturned on appeal.⁴⁰ However, it may equally be doubted whether oral evidence is superior to examining documentary evidence in demonstrating that an unconvincing claimant is truthful or that a convincing one has been either deluded or lying.⁴¹

A second method of assessing credibility is to test the external credibility of a claim, *i.e.* whether the claimant's story is consistent with objective country evidence. However, such evidence typically comprises general rather than specific information on country conditions and may in any event be ambiguous as to whether or not certain events did actually occur. Thirdly, decision-makers may simply test the plausibility of a claimant's story. This too though can be problematic. Making visceral judgments as to the plausibility that certain claimed events happened risks a greater role for the decision-maker's own values and preconceptions; events that appear implausible may nevertheless have actually occurred.⁴² Furthermore, as the courts have stressed, rejecting a claimant's story because of its inherent implausibility "can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases" as much of the evidence will refer to societies with customs and circumstances which are very different from those within the experience of the decision-maker.⁴³

All of the methods to assess credibility are, however, complicated further by the cultural distances separating applicants and decision-makers. Asylum claimant populations are often highly diverse. There is a substantial risk that decision-makers will make decisions from their own western assumptions unaware of the importance of cultural differences between themselves and claimants.⁴⁴ What may seem plausible for a person in a western environment may be completely implausible for someone in a non-western environment; decision-makers must take great care in not allowing their own perceptions and values to influence that judgment.⁴⁵ As Sir Thomas Bingham, in a

³⁹ *R. (Dirshe) v Secretary of State for the Home Department* [2005] 1 WLR 2685.

⁴⁰ *Subesh, Suthan, Nagulanathan and Vanniyasingam v Secretary of State for the Home Department* [2004] Imm AR 112, 131 (Laws LJ).

⁴¹ *R. v Secretary of State for the Home Department Ex p. Yousaf and Jamil* [2000] 3 All ER 649, 657 (Sedley LJ).

⁴² As the Tribunal noted in *MM v Secretary of State for the Home Department (DRC – plausibility) Democratic Republic of Congo* [2005] Imm AR 198, 202: "A story may be implausible and yet may properly be taken as credible; it may be plausible and yet properly not believed."

⁴³ *HK v Secretary of State for the Home Department*, n.3 above, para.29 (Neuberger LJ).

⁴⁴ See M. Coussey, *Annual Report of the Independent Race Monitor 2004-05* (London: Home Office, 2005), para.3.21; P.A. Granhag, L.A. Strömwall and M. Hartwig, "Granting asylum or not? Migration Board personnel's beliefs about deception" (2005) 21 *Journal of Ethnic and Migration Studies* 29.

⁴⁵ *Ibrahim Ali v Secretary of State for the Home Department* [2002] UKIAT07001, para.3. As the Tribunal once put it, in *Ivanov v Secretary of State for the Home Department* (12583), date notified 10.10.1996, a claim might well be credible although it seemed bizarre when viewed "from the safety of the Strand".

passage cited frequently in this context, has explained, “[n]o judge worth his salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even – which may be quite different – in accordance with his concept of what a reasonable man would have done.”⁴⁶ However, while the Tribunal has stressed the dangers inherent in assessing credibility by reference to a claimant’s demeanour in light of the cultural differences, empirical evidence suggests that it may play an important role in decision-making.⁴⁷

Given the difficulties created by this cultural gap, decision-makers may again look to country information for assistance. Indeed, the Tribunal has recognised that country evidence may perform a crucial role in showing that adverse inferences based on the claimant’s evidence can be apparently reasonable when based on an understanding of life in a western country but are less reasonable when the circumstances of life in the country of origin are exposed. However, to pre-empt subsequent discussion, the question of what comprises reliable country evidence – whether provided by the Home Office or country experts – is a particularly contested issue. The Tribunal has rejected the Court of Appeal’s suggestion that, owing to the difficulty of assessing credibility in a cross-cultural situation, immigration judges need all the help provided by a country expert: there could be no ready acceptance of country experts’ views as that would substitute trial by expert for trial by immigration judge.⁴⁸

Claimants may also rely upon corroborative medical or psychiatric evidence which deal with the risks they might face on return in light of their medical or psychiatric history. Again, the role of such expert evidence is contested. Initially, the Tribunal’s view was that such reports deserved careful and specific consideration as evidence of possible ill-treatment or trauma.⁴⁹ However, more recently the Tribunal has doubted whether such reports assist in assessing credibility.⁵⁰ For instance, a medical report corroborating an individual’s claim that their scars resulted from ill-treatment does not necessarily have to be accepted as the scars could have been caused by other means. Similarly, psychiatric reports diagnosing post-traumatic stress disorder may be of limited value as a non-genuine claimant has an obvious interest in exaggerating or feigning such symptoms. The AIT is unlikely to accept without more diagnostic conclusions, which are dependant upon assertions by the claimant whose truthfulness is at issue before the immigration judge but not before the doctor. Furthermore, post-traumatic

⁴⁶ T. Bingham, “The Judge as Juror: the Judicial Determination of Factual Issues” (1985) 38 *CLP* 1 at 14 as cited by the Tribunal in *Kasolo*, n.30 above.

⁴⁷ *Loy Hope Luwuzi v Secretary of State for the Home Department* [2002] UKIAT07186, para.6; *B v Secretary of State for the Home Department (Democratic Republic of Congo)* [2003] UKIAT00012, para.7; C. Jarvis, “The Judge as Juror Re-visited” (2005) 9 *Immigration Law Digest* 16.

⁴⁸ *R. (Es Eldin) v Immigration Appeal Tribunal* (Court of Appeal, 29.11.2000, unreported), para.18 (Brooke LJ); *Zarour v Secretary of State for the Home Department* (01TH00078), date notified 2.8.2001, paras 20-21.

⁴⁹ *Ibrahim v Secretary of State for the Home Department* [1998] INLR 511.

⁵⁰ *HE v Secretary of State for the Home Department (DRC – credibility and psychiatric report) Democratic Republic of Congo* [2005] Imm AR 119.

stress disorder may arise not just from previous ill-treatment but from other causes such as the prospect of being removed to their country of origin which may not be a pleasant place to which to return. While the Tribunal has expressly doubted the quality of some medical reports, medical experts themselves have argued that the Tribunal has been too willing to dismiss their reports without good reason.⁵¹

While the difficulties in assessing credibility seem substantial, there is a further problematic dimension: the introduction of evidentiary rules prompted by executive mistrust of initial and appellate decision-making. IND has long entertained concerns arising from abuse of the asylum process and has introduced various measures to combat it. One difficulty has been that as the substantive rules governing eligibility are contained in international human rights conventions and therefore subject to judicial interpretation, IND is relatively powerless to alter them. An obvious alternative has then been to introduce evidential rules to reduce the scope for such perceived abuse. Section 8 of the 2004 Act therefore requires a decision-maker to take into account, as damaging a claimant's credibility, any behaviour which is either designed or likely to conceal information or to mislead, obstruct or delay the handling or resolution of a claim.⁵² For instance, a failure without reasonable explanation to produce a passport to an immigration officer, the production of a false passport, the destruction of a passport or travel tickets and the failure to answer a question must be taken into account as damaging credibility.⁵³ The concern with section 8 is that it establishes an evidential presumption that just because the claimant has behaved in a specified manner, their credibility to be in need of international protection is damaged. It has long been accepted that claimants may feel apprehensive and unable to speak freely and give a full and accurate account of their case and that untrue statements by themselves are not a reason for refusing refugee status.⁵⁴ Delays in either claiming asylum or revealing the full details of a claim may result from the claimant's shame or trauma resulting from the torture, sexual violence or other persecutory treatment they have suffered. Section 8, however, goes further by stating that a claimant who has not taken advantage of a reasonable opportunity to claim asylum in a safe third country has damaged their credibility, thereby reversing case-law that such a failure cannot "conceivably by itself throw doubt on whether . . . [the claimant] . . . is indeed a genuine asylum seeker."⁵⁵

⁵¹ In *HE, ibid.*, at 125 the Tribunal remarked that "the quality of reports is so variable and sadly often so poor and unhelpful, that there is no necessary obligation to give weight to them merely because they are medical or psychiatric reports." See also D. Rhys Jones and S. Verity Smith, "Medical evidence in asylum and human rights appeals" (2004) 16 *IJRL* 381.

⁵² Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, ss 8(1) and (2).

⁵³ Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.8(3).

⁵⁴ See, e.g. UNHCR, n.26 above, paras.198 and 199.

⁵⁵ Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.8(4); *R. (Degirmenci) v Immigration Appeal Tribunal* [2003] EWHC Admin 324, para.11 (Collins J). See also *R. v Uxbridge Magistrates' Court Ex p. Adimi* [2001] QB 667.

While structuring discretion is a key theme in administrative law,⁵⁶ section 8 gives a deliberate steer toward reaching negative credibility assessments.⁵⁷ It has for this reason been viewed as an interference with the independence and fairness of the decision-making process.⁵⁸ For its part, the AIT has recognised that section 8 will inevitably distort the fact-finding process by interfering with the well-established rule that the fact-finder should look at the evidence as a whole, giving each item of it appropriate weight.⁵⁹

Given the conditions under which the truthfulness of an asylum claimant's story has to be evaluated, it is clear that the assessment of credibility is a formidable task. As one immigration judge has noted, asylum adjudication requires critical judgments to be made but without any set of clearly defined parameters.⁶⁰ This in turn has prompted criticism that there are substantial inconsistencies in decision outcomes. Of course, there is always the risk that the outcome of a claim will largely depend on the identity of the individual decision-maker. However, the alternative course of involving a greater number of decision-makers to make collective decisions in individual cases would both lengthen the process and increase costs. In the majority of cases therefore the credibility findings of an immigration judge will, in the absence of any error of law, be final.⁶¹

Country of Origin Information

While credibility is often decisive, it is just one aspect of the risk assessment task. The decision-maker must also assess whether or not the fear of persecution is objectively well-founded by reference to country conditions. Further, credibility does not displace the need to assess the risk on return that might arise irrespective of an individual's circumstances. An asylum claim can be generated not just on the basis of the personal risk of harm to an individual but also on the basis of a serious risk to all people generally.⁶² This underlines the need to assess conditions in countries of origin. This task though raises its own problematic issues. Is it possible to obtain relevant and accurate information concerning conditions in refugee producing countries? When, if at all, can such information properly be considered to be objective? Who is best placed to collect and assess country of origin information?

⁵⁶ K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (1971).

⁵⁷ J. Ensor, A. Shah and M. Grillo, "Simple myths and complex realities – seeking the truth in the face of section 8" (2006) 20 *Immigration, Asylum and Nationality Law* 95.

⁵⁸ See, e.g. Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants, etc.) Bill* (2003-04 HL 35 HC 304), para.26.

⁵⁹ *SM v Secretary of State for the Home Department (Section 8: Judge's process) Iran* [2005] Imm AR 673, 675-676.

⁶⁰ T. Talbot, "Credibility and risk: one adjudicator's view" (2004) 10 *Immigration Law Digest* 29 at 30.

⁶¹ See Nationality, Immigration and Asylum Act 2002, s.101; Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.26; *CA v Secretary of State for the Home Department* [2004] Imm AR 640.

⁶² See *Hariri v Secretary of State for the Home Department* [2003] EWCA Civ 807, para.8 (Laws LJ); *Batayav v Secretary of State for the Home Department* [2003] EWCA Civ 1489, paras 38-39 (Sedley LJ).

One answer to this last question is that the collection of country information is simply an administrative task. From the administrative perspective, IND caseworkers require country information in order to determine claims. Since 1996, IND has then published country reports prepared by its Country of Information Policy Unit (CIPU). This unit initially provided IND caseworkers with country of origin information and also developed policy on country specific issues. However, in 2004 the government agreed to split these functions; country information is now provided by the Home Office's Country of Origin Information Service (COI Service).⁶³ The sole purpose of the COI Service is to provide accurate, objective, sourced and up-to-date information on asylum seekers' countries of origin, for use by IND officials involved in the asylum determination process.

Country information reports are regularly published on the top 20 asylum producing countries.⁶⁴ A country report is a collation of material already in the public domain which concentrates on the issues most commonly raised in asylum claims. These reports are the means through which IND co-operates with claimants; it does not and should not simply require a claimant to produce the general background material relevant to the case. The reports are integral to the determination process as they are commonly relied upon as evidence in support or otherwise of an asylum claim throughout both the initial and appellate stages of the process. It is therefore essential that the information they provide is accurate, fairly represented and comprehensive. However, the reports have received criticism on two fronts.

First, the location of the unit responsible for producing objective country evidence within the government department responsible for asylum policy raises obvious concerns with regard to the objectivity and independence of the reports. As the House of Lords EU Committee has noted, an improved asylum process should "ensure that authoritative and credible country of origin information is available" but the Home Office's country reports are not generally accepted to be "authoritative, credible and free from political or policy bias".⁶⁵ Recent experience suggests that it is too much to assume that government produced reports or dossiers can be entirely free from political interference. Secondly, it has been argued that the reports have contained basic inaccuracies, lacked objectivity, used out of date material, omitted

⁶³ Hansard HC Debs., vol.424, col.119WS, September 8, 2004 (Minister for Citizenship and Immigration). This Unit is now located within the Home Office's Research Development and Statistics Service rather than IND.

⁶⁴ The reports are available from the Home Office website.

⁶⁵ House of Lords European Union Committee, *Handling EU asylum claims: new approaches examined* (2003-04 HL 74), paras 104 and 115. Similar concerns have been expressed with regard to US State Department reports, occasionally relied upon in asylum appeals. See, e.g. *Gramatikov v Immigration and Nationality Service*, 128 F.3d 619, 620 (7th Circuit 1997): "[t]here is a perennial concern that the [State] Department softpedals human rights violations by countries which the United States wants to have good relations with."; *Said v Netherlands* (application no.2345/02, 5 July 2005), European Court of Human Rights (Judge Loucaides): US State Department reports "cannot by definition be relied on as a neutral and impartial exposition of the facts mentioned therein."

potentially relevant material and given a falsely positive outlook on country conditions.⁶⁶

A frequent suggestion for the improvement of the asylum determination process has been the establishment of an independent documentation centre in order to collect, analyse and disseminate credible and trustworthy country of origin information and which is patently free from any political interference. While IND has steadfastly refused to act upon this suggestion, it has, in response to continued concerns over country information, established the Advisory Panel on Country Information (APCI) to consider and make recommendations about the content of country information.⁶⁷ As a quality control mechanism, APCI has sought to provide rigorous external scrutiny of the reports following their publication and highlighted a number of shortcomings in the published reports. Independent expert reviews of the reports on major refugee-producing countries – Sri Lanka and Somalia, for instance – have identified a number of weaknesses such as selective and misrepresentative quoting of source material, use of outdated material, lack of independent analysis, exclusion of relevant material and even reliance on material produced by government sources.⁶⁸ Such reviews have not been wholly negative and the Home Office has responded constructively by updating or changing its reports. The panel though can only review country information after it has been produced; it has no prior input.

Difficult questions arise here for the Tribunal: how can it retain the perception of judicial independence if it invariably relies upon reports prepared by the government department which is a party to each appeal and also responsible for both initial decision-making and enforcing immigration control? On the other hand, given that immigration judges are not expected to have knowledge or experience of conditions in countries of origin, what other sources of information could be used? In light of the continuing refusal to establish an independent documentation centre, the Tribunal has had little option but to rely upon the reports. While recognising that they are “partisan” and “cannot be regarded as comprising *independent* evidence”, the Tribunal has noted that the reports are “little more than a compendium of material from other published sources” and provide a “reliable, reasonably impartial and up-to-date assessment”.⁶⁹ The Tribunal is not, however, itself able to assess the veracity of sources used in the reports. Furthermore, the Home Office’s assessment of country conditions can also condition the appeal process by requiring that claimants from designated safe countries may only

⁶⁶ N. Carver (ed.), *Home Office Country Assessments: An Analysis* (2003).

⁶⁷ Nationality, Immigration and Asylum Act 2002, s.142(3).

⁶⁸ See C. Woolf and N. Van Hear, “Commentary on Home Office CIPU Sri Lanka Country Report of October 2003” (2004); A. Abdi and R. Black, “Commentary on October 2003 CIPU Report on Somalia” (2004); A. Abdi and R. Black, “Commentary on October 2004 CIPU Report on Somalia” (2005) available from www.apci.org.uk/.

⁶⁹ *Devaseelan v Secretary of State for the Home Department (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* (Starred determination) [2003] Imm AR 1, 26; *AW v Secretary of State for the Home Department (Article 3 – Risk – General Situation) Somalia* [2003] UKIAT00111, para.25.

pursue their appeal from outside the UK.⁷⁰ As such “non-suspensive” appeals may increase appellants’ difficulties in establishing their credibility and maintaining contact with a representative, they may not provide a sufficient safeguard against inaccurate decision-making.⁷¹

4. Country Expertise

Given the concerns surrounding Home Office country reports, who else can be called upon to provide country information? One answer would be that as awareness of country conditions requires specialist knowledge, we should look to those with the requisite professional expertise. Many appellants do commission an expert, typically an academic or other expert with specialist knowledge of the particular country, to prepare a report on their home country.⁷² In comparison with ordinary civil litigation, where each party may each engage an expert or the court itself can appoint a single joint expert, in asylum cases experts are commissioned solely by the claimant while IND will invariably rely on its own country report.⁷³

The issue of the extent to which the Tribunal can rely upon such expert reports is though highly contentious: while country experts claim they possess specialist knowledge of the relevant country, the Tribunal has repeatedly questioned their objectivity. For instance, the Tribunal has roundly rejected the Court of Appeal’s view that it is “bound to place heavy reliance on the views of experts and specialists”.⁷⁴ In the Tribunal’s opinion, many experts “have their own points of view which their reports seek to justify.”⁷⁵ While the quality of country experts may vary, “all suffer from the difficulty that very rarely are they entirely objective in their approach...Many have fixed opinions about the regime in a particular country and will be inclined to accept anything which is detrimental to that regime.”⁷⁶ For the AIT, a country expert will frequently act more as an advocate than as an impartial witness.

⁷⁰ Nationality, Immigration and Asylum Act 2002, s.94; Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.27.

⁷¹ S. Woodhouse, *Annual Report of the Certification Monitor 2004* (2005) and *Annual Report of the Certification Monitor 2005* (2006).

⁷² Many country experts are listed in Immigration Law Practitioners’ Association, *Directory of Experts on Conditions in Countries of Origin and Transit* (1997).

⁷³ Civil Procedure Rules 1998, pt.35.

⁷⁴ *S. and Others v Secretary of State for the Home Department* [2002] INLR 416, 436 (Laws LJ).

⁷⁵ *Secretary of State for the Home Department v SK (Return – Ethnic Serb) Croatia CG* (Starred determination) [2002] UKIAT05613, para.5.

⁷⁶ *Slimani v Secretary of State for the Home Department (Content of Adjudicator Determination) Algeria* (Starred determination) (01TH00092), dated notified 12.2.2001, para.17. For a similar exchange of views, see *Karankaran*, n.19 above, 472, where Brooke LJ stated that it was “completely wrong” for the Tribunal to reject reports produced by four country experts as “pure speculation”, and *Karanakaran v Secretary of State for the Home Department* (00TH03086), date notified 12.9.2000 where the Tribunal subsequently determined that the views contained in the experts’ reports were contradictory, unsatisfactory and “profoundly unhelpful to a Tribunal that has to make its own evaluation”. Disagreement between the specialist tribunal, accustomed to dealing with a high volume of asylum appeals, and the Court of Appeal, a superior court but dealing

Turf warfare has then broken out with injuries to both parties: country experts dislike having their professional reputations publicly attacked while the AIT has been forced to place greater reliance on the Home Office's country reports. The Tribunal has even gone so far as to criticise an expert on the basis that their report did not demonstrate "an understanding of the legal concepts to be applied in evaluating risk."⁷⁷ Conscious that it does not want to cede any control over decision-making to country experts, the Tribunal has emphasized that for it to attach weight to a report depends upon the expert's demonstrable objectivity in addition to the requisite expertise.⁷⁸ In order to assess whether expert evidence is independent and reliable, the Tribunal will compare it with other sources of country information and then decide what weight it is to be accorded.⁷⁹

The Tribunal's concerns have not though gone unchallenged. Good, a social anthropologist and Sri Lankan country expert, has argued that the Tribunal's insistence on obtaining objective evidence with regard to conditions in countries of origin is mistaken as it is impossible to assemble objective evidence free from any prior theoretical framework.⁸⁰ The Tribunal may dismiss an expert's report on grounds of bias because it implicitly assumes that the report does not conform with established notions of objectivity but from an expert's perspective merely expecting such objectivity is hopelessly naïve as experts necessarily operate within explanatory paradigms in which facts are interpreted.⁸¹ For Good, the key point is that lawyers take matters which have been established to the appropriate standard of proof to be facts in an absolute sense whereas for anthropologists, "facts" are products of a particular theoretical approach; the "truth" is always more provisional and contested than legal processes habitually acknowledge.⁸² While tribunal members are knowledgeable of specific country conditions, they lack the necessary expertise to interpret their cultural significance. From this perspective, the Tribunal is to be criticized for its double-standards: while country expert reports are often rejected for their alleged partiality, the Tribunal often relies the Home Office's country reports even though they are merely compilations by UK based civil servants with no expertise on the country concerned.

with fewer asylum cases as a proportion of its general casework, has been a recurrent theme in this jurisdiction.

⁷⁷ *GH v Secretary of State for the Home Department (Former KAZ – Country Conditions – Effect) Iraq CG* [2004] Imm AR 707, 727.

⁷⁸ *ibid.*, 726-727.

⁷⁹ *AZ v Secretary of State for the Home Department (risk on return) Ivory Coast CG* [2004] UKIAT00170, para.49.

⁸⁰ A. Good, "Undoubtedly an expert"? Country experts in the UK asylum courts" (2004) 10 *Journal of the Royal Anthropological Institute* 113; A. Good, "Expert Evidence in Asylum and Human Rights Appeals: an Expert's View" (2004) 16 *IJRL* 358; A. Good, *Anthropology and Expertise in the Asylum Courts* (2007).

⁸¹ Cf. T. Kuhn, *The Structure of Scientific Revolutions* (1996).

⁸² Good traces the differential approaches between the tribunal and country experts to the basic differences in the professional training of lawyers and social scientists and suggests that this dispute is only one aspect of the continuing power struggle between the judiciary and professional experts. See generally C.A.G. Jones, *Expert Witnesses: Science, Medicine and the Practice of Law* (1994); M. Redmayne, *Expert Evidence and Criminal Justice* (2001).

While questions of credibility and prospective risk are for the AIT alone to determine, a proper expert understanding of what may be a complex situation in a particular country may be essential if the risk assessment is to be made on the best available information. This may be especially the case when existing country information contains important omissions, is out of date or merely details recent empirical facts and not the underlying causes of a conflict. As the Court of Appeal has recently reminded the AIT, while it is not bound to accept an expert's view, it should provide an adequate explanation for not accepting it.⁸³

While the Tribunal has been reluctant to change its attitude toward experts, it has developed its own technique for providing its views on country conditions: country guideline (CG) determinations. These determinations have enabled the Tribunal itself to assess country conditions and provide authoritative guidance on the "line" to be adopted toward certain claimants. The Tribunal has, for instance, issued country guidance on such diverse issues as: the risk of persecution to Christian apostates on return to Iran; whether removal to face imprisonment in the Ukraine would breach Article 3; and the current risk to a former member of the Lord's Resistance Army in Uganda.⁸⁴ The AIT has utilised a number of different techniques for assessing risk. One technique is to state that no individual will qualify for protection unless there is a change of conditions in the country concerned or special circumstances can be shown in the individual case.⁸⁵ Another has been to identify factors to be taken into account when assessing the risk of persecution on return.⁸⁶ Another has been to identify certain categories of person at particular risk.⁸⁷

A good illustration of the complexity of fact-finding and decision-making, country guidance also demonstrates the continuing political and legal controversy attached to the assessment of risk on return. Consider the protracted issue surrounding the risks facing returned Zimbabweans.

⁸³ *K v Secretary of State for the Home Department* [2005] EWCA Civ 1627. See also *Jasim v Secretary of State for the Home Department* [2006] EWCA Civ 342.

⁸⁴ See *Secretary of State for the Home Department v FS and others (Iran – Christian Converts) Iran CG* [2004] UKIAT00303; *PS v Secretary of State for the Home Department (prison conditions; military service) Ukraine CG* [2006] UKAIT00016; *PN v Secretary of State for the Home Department (Lord's Resistance Army) Uganda CG* [2006] UKAIT00022. Current country guideline determinations are available from the AIT's website.

⁸⁵ See, e.g. *TJ v Secretary of State for the Home Department (Risk – Returns) CG Sri Lanka* [2002] UKIAT01869.

⁸⁶ See, e.g. *Secretary of State for the Home Department v IA HC KD RO HG (Risk – Guidelines – Separatist) Turkey CG* [2003] UKIAT00034; *HM v Secretary of State for the Home Department (Risk factors for Burmese citizens) Burma CG* [2006] UKAIT00012.

⁸⁷ See, e.g. *IN v Secretary of State for the Home Department (Draft evaders – evidence of risk) Eritrea CG* [2005] UKIAT001606; *KS v Secretary of State for the Home Department (Minority Claims – Bajuni – ability to speak Kibajuni) Somalia CG* [2004] UKIAT00271; *DW v Secretary of State for the Home Department (Homosexual Men – Persecution – Sufficiency of Protection) Jamaica CG* [2005] UKAIT000168; *AB and DM v Secretary of State for the Home Department (Risk categories reviewed – Tutis added) Democratic Republic of Congo CG* [2005] UKIAT00118.

Between 2002 and 2004, IND did not forcibly remove failed Zimbabwean applicants in light of the deteriorating situation in that country.⁸⁸ However, the government lifted its moratorium on removals because of concerns that it was acting as a pull factor for unmeritorious claims but again came under pressure to stop enforcing removals.⁸⁹ The AIT subsequently issued country guidance, drawing on expert evidence, that any failed applicant, however unmeritorious their claim, could not be safely returned. Moreover, this determination was highly critical of the Home Office's "alarming" lack of interest in the process by which failed claimants are forcibly returned and of a Home Office fact-finding mission to Zimbabwe which "may have had existing policy in mind rather more than the discovery of new facts."⁹⁰ The minister objected on the basis that this would leave the system open to abuse.⁹¹ After the Court of Appeal sent the case back to the AIT, the Tribunal reversed its position.⁹² Unsuccessful applicants returned involuntarily would not face a risk of persecution but the Tribunal did identify more specific risk categories.⁹³ Country guidance therefore highlights the Tribunal's role in influencing asylum policy.

While country guideline determinations enable the Tribunal to provide authoritative guidance on such issues, the principal motivating impetus behind the project has been the need to minimize inconsistency in the assessment of country conditions, for which the Tribunal had received criticism from the higher courts. In 1997, the Court of Appeal stated that it would be beneficial for the general administration of asylum appeals if the Tribunal gave its views on the general situation in a particular country; consistency in the evaluation of objective considerations is important to the integrity of the adjudication process.⁹⁴ While the Tribunal did provide such guidance, different tribunals continued to reach different conclusions on the same countries.⁹⁵ In 2003, the Court of Appeal again expressed "concern that the same political and legal situation, attested by much the same in-country data from case to case, is being evaluated differently by different

⁸⁸ Hansard HC Deb., vol.426, col.78WS, November 16, 2004 (Minister for Citizenship and Immigration).

⁸⁹ Hansard HC Deb., vol.435, cols.1023-1035, June 27, 2005.

⁹⁰ *AA v Secretary of State for the Home Department (Involuntary returns to Zimbabwe) Zimbabwe CG* [2005] UKAIT00144, paras.146 and 155.

⁹¹ See "Zimbabwe deportation policy in chaos after tribunal ruling", *The Times*, 15th October 2005.

⁹² *AA v Secretary of State for the Home Department; LK v Secretary of State for the Home Department* [2006] EWCA Civ. 401.

⁹³ *AA v Secretary of State for the Home Department (Risk for involuntary returnees) Zimbabwe CG* [2006] UKAIT00061. See also *SM and Others v Secretary of State for the Home Department (MDC – internal flight – risk categories) Zimbabwe CG* [2005] UKIAT00100.

⁹⁴ *Manzeke v Secretary of State for the Home Department* [1997] Imm AR 524, 529 (Lord Woolf MR) and 532 (Brooke LJ).

⁹⁵ For instance, in 2002 one tribunal panel, decided that a low level supporter of a Kurdish separatist political party would not face a real risk of persecution on return to Turkey (*Polat v Secretary of State for the Home Department* [2002] UKIAT04332); in 2003, a differently constituted panel arrived at exactly the opposite conclusion (*Hayser v Secretary of State for the Home Department* [2003] UKIAT07083).

tribunals.”⁹⁶ The principal reason for any inconsistency arises from the nature of the task: it is evident that different immigration judges may reach different conclusions concerning the risk of persecution when evaluating the same country evidence. The problematic nature of evaluating the significance of facts is further underlined.

The pragmatic solution of the country guideline determination has enabled the senior AIT judiciary to ensure like treatment of like cases by signalling the broad approach to be adopted by immigration judges toward certain nationalities and countries.⁹⁷ As the AIT has noted, country guideline determinations ensure that generally recurring factors relating to country conditions are periodically the subject of careful and authoritative assessment.⁹⁸ Conscious of the ever-present risk of multiple appeals further prolonging the decision-making process, the higher courts have been keen to legitimise this distinctive technique in the asylum fact-finding process because of its “very great importance...in achieving consistency in decision-making.”⁹⁹ For Laws LJ, while the notion of a factual precedent is “exotic”, in the context of the AIT’s responsibilities, the production of country guideline determinations is both “benign and practical” as it is an important function of the specialist tribunal to give such guidance.¹⁰⁰ The Tribunal must though ensure that its guidance “is effectively comprehensive.”¹⁰¹

The country guideline project has though not been unproblematic. First, while intended to reduce the risk of inconsistency, there is the pervasive risk that claims will not be considered on their own individual circumstances but on the basis of categorisation which undermines the principle of individualised risk assessment. An adverse country guideline determination may, for instance, lead to a refusal of legal aid, a certification by the IND that a claim is manifestly unfounded or the Administrative Court declining a judicial review challenge. Furthermore, country guideline determinations appear to detract from the need to assess risk on the basis of facts in existence at the date of decision: if asylum decisions should be reached on the basis of current and not historical facts, then the application of a previous country guideline determinations runs the risk of evaluating the reasonable likelihood of future persecution on out of date country information.¹⁰² The Tribunal has emphasized though that country guidance is not set in stone; the system does not have the rigidity of legally binding precedent but the

⁹⁶ *Shirazi v Secretary of State for the Home Department* [2004] 2 All ER 602, 611 (Sedley LJ).

⁹⁷ Country guideline determinations are determined by a legal panel of the AIT. In recognition of the importance to be attached to such determinations, Parliament has provided for a direct right of appeal to the Court of Appeal as opposed to a review by the Administrative Court, which is the remedy available from the determination of a single immigration judge. See the Nationality, Immigration and Asylum Act 2002, s.103E as inserted by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.26.

⁹⁸ *KA v Secretary of State for the Home Department (draft-related risk categories updated) Eritrea CG* [2005] UKAIT00165, para.10.

⁹⁹ *R. (Iran) & Others v Secretary of State for the Home Department* [2005] INLR 633, 662 (Brooke LJ).

¹⁰⁰ *S & Others*, n.74 above, 435 (Laws LJ).

¹⁰¹ *ibid.*, 436 (Laws LJ).

¹⁰² See C. Yeo (ed.), *Country Guideline cases: benign and practical?* (2005).

flexibility to accommodate individual cases, changes in country conditions and fresh evidence.¹⁰³ Country guideline determinations are therefore not accurately understood as “factual precedents”. However, since 2005 the system has been formalised and country guideline determinations have a statutory underpinning; any failure to follow an apparently applicable country guideline determination is likely to be an error of law.¹⁰⁴ To what extent can country guideline determinations produce an agreeable compromise between consistency and the correct assessment of each individual appeal?

Secondly, the appropriateness of adversarial procedures for promulgating country guidance might be questioned especially when the guidance might be determinative of subsequent appeals. After all, representatives to the instant case may neither be able nor sufficiently prepared to present all the relevant country information raising the risk that the Tribunal’s guidance is not effectively comprehensive; the Tribunal has though made few steps toward a more proactive, inquisitorial approach.¹⁰⁵

Thirdly, there is the contested legitimacy of country guideline determinations. In seeking to justify its role in promulgating country guidance, the Tribunal has drawn upon the familiar and broader justification that, as a tribunal, it possesses its own specialist expertise.¹⁰⁶ According to a senior immigration judge, the Tribunal is “recognised as possessing its own level of expertise as a specialist tribunal, not only in the legal issues for its determination, but also in its knowledge of country situations”.¹⁰⁷ Elsewhere, the Tribunal has noted that it “builds up its own expertise in relation to the limited number of countries from which asylum seekers come.”¹⁰⁸ However, the concern here is that judicial declarations of expertise in country of origin information merely because Tribunal members have determined many asylum appeals may not be warranted and may become unjustifiably self-

¹⁰³ In *NM and Others v Secretary of State for the Home Department (Lone Women – Ashraf) Somalia CG* [2005] UKIAT00076, para.140, the Tribunal stated that applicable country guideline determinations should be followed unless: (i) there is evidence that circumstances have changed; (ii) significant new evidence shows that the views originally expressed require revision or refinement; or (iii) the passage of time or substantial new evidence warrants a re-examination of country conditions.

¹⁰⁴ Asylum and Immigration Tribunal, *Practice Directions* (2005), para.18.4. Under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Sch.2, para.22(1), the Tribunal’s practice directions may “require the Tribunal to treat a specified decision of the Tribunal as authoritative in respect of a particular matter.” According to the AIT, in *HGMO v Secretary of State for the Home Department (Relocation to Khartoum) Sudan CG* [2006] UKAIT00062, para.142: “[t]here is thus a statutory basis that underpins the CG system and which requires Country Guidance issues to be treated by all divisions of the Tribunal as authoritative.”

¹⁰⁵ For discussion, see A. Shah, “‘An Inquisitorial Quality’: are country guideline cases appropriate in an adversarial legal system?” in C. Yeo, n.102 above.

¹⁰⁶ See, e.g. Sir Andrew Leggatt, *Tribunals for Users – One System, One Service* (2001), para.1.12.

¹⁰⁷ J. Barnes, “Expert Evidence – the Judicial Perception in Asylum and Human Rights Appeals” (2004) 16 *IJRL* 349.

¹⁰⁸ *SK*, n.75 above, para.5.

reinforcing. The fact that the Tribunal has determined many asylum appeals from a particular country may equally induce a case-hardened approach which needs to be supplemented by expert evidence. For Good, Tribunal members are not, irrespective of claims to the contrary, experts on country conditions: the interpretation of facts is as important as the knowledge of facts, which is why specialist country expertise is so essential.¹⁰⁹ From this perspective, country guideline determinations are, absent greater input from professional experts, deeply problematic as the Tribunal lacks sufficient expertise with which to interpret the cultural significance of facts. The AIT has though yet to experiment with integrating country experts more fully into the country guidance process either through court appointed experts or a special advocate figure.

5. Risk and Adjudicative Legitimacy

Some general points might be distilled from the discussion so far. Asylum adjudication is a complex and intrinsically problematic form of case-management risk assessment requiring binary decisions within a highly political context. The ongoing controversy over who is a refugee arises from the lack of any external, objective standard against which to assess the correctness of decisions. As an adjudicatory norm, accuracy is simultaneously fundamental but also permanently elusive. From one perspective, this uncertainty is emblematic of the “asylum lottery” but from another perspective, it arises from the very nature of the risk assessment task inherent in asylum adjudication. At the level of individual decision-making this means that much may depend on the judgment of the decision-maker. As risk scholars have emphasized, any form of risk assessment, irrespective of context, is dependant upon the ascription of value, not just probability, to potential outcomes.¹¹⁰ In other words, decision outcomes are inevitably conditioned by the degree of weight decision-makers are willing to place on the protection of foreign nationals relative to that of maintaining immigration control. Such sentiments appear to be shared by some decision-makers themselves who have recognised that making the right decision on future risk can be very difficult but this itself raises the question what is meant by the “right” decision.¹¹¹

At the level of policy debate, the point familiarly made is that while the UK should accept genuine asylum applicants, the problem is with those non-genuine applicants who are misusing the process. The difficulty with this though is that, as the preceding discussion indicates, determining who is genuine and non-genuine is hardly self-evident. Having unpacked the task of adjudicating asylum claims, it can be seen that decisions are contingent on many and various different factors.

Given this context, how are we to assess and ascribe legitimacy to decision-making? It is here that the idea of competing models of adjudication is relevant as there are different understandings of legitimacy in this context of

¹⁰⁹ Good, n.80 above.

¹¹⁰ See M. Douglas and A. Widavsky, *Risk and Culture: An Essay on the Selection of Technological and Environmental Dangers* (1982), pp.80-81; J. Steele, *Risks and Legal Theory* (2004), p.25.

¹¹¹ Talbot, n.60 above, 31.

case-management risk. The tensions between IND, the AIT and experts may be viewed as a struggle between competing models – bureaucratic, legal and professional judgment – of adjudicative legitimacy. Each model illustrates a different and competing way of handing the risk assessment task. Furthermore, these models are highly competitive; achieving an agreeable compromise between their distinct values is difficult to attain and likely to appear to be incoherent. In other words, trade-offs between the competing legitimising values are inevitable. While this approach has been utilised to analyse administrative-legal decision-making systems, it also seems appropriate when focusing on case-management risk regimes.¹¹² As Fisher explains, disputes over risk are endemic and self-generating because the assessment of risk will always involve the assertion of one culture over another.¹¹³

The bureaucratic model, the purpose of which is to implement policy, prioritises the values of efficiency and accuracy. Whereas the AIT solely determines appeals regarding immigration status, IND is also concerned with the implementation of decisions either by granting some form of leave or enforcing removal. From this perspective, legitimacy stems from effective implementation of policy. By contrast, the legal model adopts a very different conception of legitimacy. As its principal goal is dispute resolution, the legitimacy of the legal model is derived from the operation of a fair and independent decision-making process. The goal of the professional judgment model is service to the client; asylum applicants are treated as patients requiring treatment through the application of specialist, professional knowledge. Identification of such models, however, raises questions as to both their appropriateness and operation.

The appropriateness of the bureaucratic model arises from the policy dimension of asylum adjudication. As there is legitimate public concern as to the integrity of immigration control, it is appropriate that the task of determining asylum claims be allocated to the public agency responsible to ensure the effective achievement of public goals. However, IND has experienced difficulties in achieving the bureaucratic model's promise of accurate and efficient decision-making and has been repeatedly criticised for variable decision-making quality making as well as its inefficiencies, delays and poor enforcement. The concerns here are familiar: decisions taken by low-level, poorly trained staff under immense pressure to turnaround claims quickly are unlikely to be of uniformly high quality.¹¹⁴ Furthermore, there are more general concerns that bureaucratic decision-making may exhibit its more pathological tendencies: the inclination toward rigid and narrow decision-making at the expense of the circumstances of individual cases and

¹¹² Competing decision-making models can be identified in other case-management risk contexts. See, e.g. J. Peay, *Tribunals on Trial: A Study of Decision-Making under the Mental Health Act 1983* (1989); N. Padfield, "The Parole Board in Transition" [2006] *Crim LR* 3.

¹¹³ E. Fisher, "The Rise of the Risk Commonwealth and the Challenge for Administrative Law" [2003] *PL* 455 at 470.

¹¹⁴ See House of Commons Home Affairs Committee, *Asylum Applications* (2003-04 HC 218), paras.118-145; Amnesty International, *Get it right: how Home Office decision-making fails refugees* (2004).

a focus on process and on politically driven organisational imperatives rather than quality.

To its credit, IND has instigated a number of initiatives designed to raise decisional quality including: (i) both internal and external quality assurance of initial decisions by the Treasury Solicitor; (ii) a quality initiative project with the UNHCR; (iii) a “new asylum model” under which a single case-worker is responsible for handling the same case throughout the whole process; and (iv) the Legal Services Commission is to pilot new arrangements which will “front-load” the provision of legal advice and assistance to ensure the reality of the shared duty to ascertain and evaluate facts through joint-working between representatives and IND.¹¹⁵ The purpose of getting more decisions right first time is to avoid lengthy and costly appeal proceedings; speedier and better quality decisions are of benefit not only to the public interest but also genuine claimants.

One particular issue of concern has been that as a directorate within the Home Office, IND has clearly been placed under considerable political pressure to process asylum claims as speedily as possible to reduce the opportunity for abusive claimants to prolong the determination of their claim. Moreover, ministerial rhetoric that many claims are abusive may provide a steer for the front-line decision-makers. Consequently, there have been repeated calls for the transfer of decision-making to an independent agency immune from such political pressure. Such a move, if taken, would represent a step away from the bureaucratic model toward the legal model. Ministers have though resisted this suggestion on the basis that they must retain ultimate political responsibility for decision-making while the courts have held that asylum decisions are excluded from the scope of the right to a fair trial under Article 6 ECHR and therefore need not be taken by a body independent of the executive.¹¹⁶ More recently, the Home Office has announced its intention to establish IND as an executive agency but it remains to be seen how this will affect the culture of decision-making.¹¹⁷

What of the further justification for the bureaucratic model: its focus on policy implementation? It is only the bureaucratic model that focuses on policy implementation rather than other values but there is again a mismatch between promise and performance. The removals process is under-resourced and there is a considerable backlog of failed applicants to be removed; “on current performance, it will take many years to remove failed asylum

¹¹⁵ National Audit Office, no.3 above, pp.41-43; UNHCR, *Quality Initiative Project: A UNHCR review of the UK Home Office Refugee Status Determination Procedures* (2005); Home Office, *Controlling our borders: making migration work for Britain* (Cm 6472, 2005), pp.35-36; Legal Services Commission, *Improving asylum decisions through early advice and representation* (2006).

¹¹⁶ *Maaouia v France* (2001) 33 EHRR 42; *MNM v Secretary of State for the Home Department (Surendran guidelines for Adjudicators) Kenya* (starred determination) [2000] INLR 576. Compare this approach to Article 6 ECHR with that adopted by the courts in the context of sentencing decisions, see *R. (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.

¹¹⁷ Home Office, *Fair, effective, transparent and trusted: Rebuilding confidence in our immigration system* (2006).

seekers, undermining the whole asylum application process.”¹¹⁸ The tensions here between IND’s attempts to enforce removal and the legal model are evident: repeated criticism of its failure to remove, has prompted IND to engage in a more expedited, rushed removal process following long delays within its decision-making, which has also been criticised.¹¹⁹

The principal alternative to the bureaucratic model – the legal model – has some clear advantages. Individualised adjudication seems particularly appropriate for enabling individuals to participate in “yes-no” questions.¹²⁰ Furthermore, an independent appellate process can insulate decision-making from political pressures. The legal model can then ameliorate the concerns regarding decision-making quality by providing a fair, judicial process. At the same time, however, the legal model can increase costs and add delays which hinder effective implementation. Unsurprisingly, the legal model has then been particularly susceptible to changes introduced by the executive. Concerned at the length and cost of the appeal process, the government has reduced legal aid entitlement and continually reformed the appeal process to reduce delays.¹²¹ While the government’s notorious attempt to oust judicial review was aborted, onward rights of challenge from AIT decisions are more limited than in any other jurisdiction through short time-limits and retrospective legal aid arrangements.¹²² This in turn has put the legitimizing values of the legal model – independence and fairness – under particular

¹¹⁸ House of Commons Public Accounts Committee, *Returning failed asylum applicants* (2005-06 HC 620), p.4. See also National Audit Office, *Returning failed asylum applicants* (2005-06 HC 76); C. Phuong, “The removal of failed asylum seekers” (2005) 25 LS 117.

¹¹⁹ See *JM v Secretary of State for the Home Department (Rule 62(7); human rights unarguable) Liberia (Starred determination)* [2006] UKAIT00009, para.33: “A very small proportion of those who lose immigration and asylum appeals are ever subject to involuntary removal; when removal does take place it is often a very considerable time after the appeal decision.”; *R. (Collaku) v Secretary of State for the Home Department* [2005] EWHC Admin 2855, para.14: “The Home Office practice involving delay in deciding a claim but then of arresting and serving the refusal at one and the same time with a view to removal within a day or two, often at weekends and frequently early in the morning, is one that is to be deplored” (Collins J). There also continue to be examples of the Home Office removing applicants despite injunctions from the Administrative Court prohibiting removal: see, e.g. “Mother of three was deported after court ruled she could stay”, *The Times*, August 16, 2006.

¹²⁰ J. Jowell, “The Legal Control of Administrative Discretion” [1973] *PL* 178 at 198-199. For the same reason, alternative dispute resolution mechanisms, such as mediation or conciliation, would appear to have little, if any, potential role in this context.

¹²¹ See House of Commons Constitutional Affairs Committee, *Immigration and Asylum: the Government’s proposed changes to publicly funded immigration and asylum work* (2002-03 HC 1171); *Asylum and Immigration Appeals* (2003-04 HC 211); R. Thomas, “Evaluating tribunal adjudication: administrative justice and asylum appeals” (2005) 25 LS 462.

¹²² On the ouster clause, see R. Rawlings, “Review, Revenge and Retreat” (2005) 68 *MLR* 378. On the new review and reconsideration process, see House of Commons Constitutional Affairs Committee, *Legal aid: asylum appeals* (2004-05 HC 276); The Tribunals Service, *The AIT Review Report* (2006), chs 8 and 9; R. Thomas, “After the ouster: review and reconsideration in a single tier tribunal” [2006] *PL* 674.

strain. The Tribunal has come under great pressure to process appeals quickly. Novel aspects of this jurisdiction – legislative intervention with the Tribunal’s fact-finding role through section 8, the refusal to establish an independent documentation centre, non-suspensive appeals – threaten the perception of judicial independence. The actual workings of IND – variously described in the law reports as “verging on the contumacious”, “notoriously inefficient” and “a public disgrace” – have also presented real difficulties.¹²³ In the occasional extreme case, there has been “an unacceptable disdain by the Home Office for the rule of law”.¹²⁴ Moreover, in light of the politicised context of asylum, the legal model is under constant pressure to yield to the broader public and political perception that most claimants are in reality economic migrants. At the same time, it may be questioned whether the legal model possesses the appropriate expertise with which to assess country conditions.

What then of the professional judgment model? The argument in favour of this model is that experts, unlike IND caseworkers and immigration judges, possess specialist, expert judgment. Only country experts, it is argued, have the necessary knowledge with which to interpret the cultural significance of facts affecting the risk of persecution on return. From the perspective of this model, tribunal members are unable to claim expertise in country conditions or medical assessments because they lack the necessary knowledge and training, the influence of the professional judgment model has though been constrained. The Tribunal’s scepticism toward expert evidence is explicable on the basis that a move toward greater reliance on such experts would result in a concomitant reduction in the tribunal’s own control over the determination process. A greater role for medical expertise could – given a sympathetic doctor-patient relationship – result in more generous decisions as could reliance on country experts given claimants’ selection of experts with views favourable to their case.

Perhaps it is too easy to ascribe the Tribunal’s scepticism solely to its wish to retain influence over decision-making. Underlying the tension between the AIT and experts is a profound difference of method toward fact-finding. Experts are accustomed to making intuitive, professional judgments relying on their accumulated knowledge. For the Tribunal, this type of intuitive fact-collecting subject to professional judgment eschews precisely the systematized fact-finding procedures that the legal model values. The Tribunal is then highly sceptical of placing greater reliance on experts as it would result in decisions based on more subjective and intuitive modes of decision-making and therefore also more inconsistency and unpredictability.

¹²³ *Benkaddouri v Secretary of State for the Home Department* [2004] INLR 1, 3 (Sedley LJ); *M v Secretary of State for the Home Department (Chad)* [2004] UKIAT00044, para.4; *Secretary of State for the Home Department v Akaeke* [2005] Imm AR 701, 704 (Carnwath LJ).

¹²⁴ *R. (Karas and Miladinovic) v Secretary of State for the Home Department* [2006] EWHC Admin 747, para.87 (Munby J). For recent illustrations of IND’s “conspicuous unfairness” see, e.g. *R. (Rashid) v Secretary of State for the Home Department* [2005] Imm AR 608; *R. (S) v Secretary of State for the Home Department* [2006] EWCA Civ 1157.

There are also obvious concerns over the quality of some experts given the Tribunal's view that medical reports are often of variable quality and that country experts are not even self-regulated. The Tribunal has been able to limit the influence of medical experts by stressing that it is always ultimately for immigration judges to decide what, if any, weight should be attached to their evidence. Similarly, while country guideline determinations buttress a key legal principle – treat like cases alike – they may also serve to constrain the influence of country experts by ensuring that immigration judges follow the Tribunal's own assessment of country conditions rather than that of experts. The Home Office has only been prepared to make very limited concessions to professional treatment model by allowing country experts to comment on its country reports through the APCI while the Tribunal has been able effectively to limit the influence of medical and country experts.

In summary, the compromise between the competing models seems highly unsatisfactory. The bureaucratic model is the predominant model but suffers from inefficiency. The high risk nature of asylum adjudication seems to justify reliance on legal processes but the legal model has been constrained. Equally, both the bureaucratic and legal models have limited the influence of experts.

6. Conclusion

Asylum adjudication is quite unlike most other decision-making systems. Few other processes are regularly required to produce decisions which have such serious consequences for an individual; it is no exaggeration to state that in some cases, the life of the claimant will depend on the outcome reached. At the same time, the government has consistently argued that the decision process is unusual in that a small but significant minority of claimants seek to exploit the process in order to extend their stays in the UK for as long as possible. Few other systems are subject to such constant political and broader public pressure to succumb to the view that many, if not most, claimants are unmeritorious and are merely seeking to exploit and abuse the system; while there is sometimes social and media pressure for a criminal court to secure a conviction, this is at least an intermittent rather than a constant occurrence. Indeed, it might be argued that the pressures in the context of asylum adjudication are more prominent and potentially more damaging precisely because of the difficulties in gathering hard and reliable evidence as to the risks facing claimants.

It is unlikely that there is any simple panacea for the problems presented here. As an exemplar of case-management risk, asylum adjudication requires the decision-maker to assess prospective risk when the actual risks may be unknowable. Furthermore, enough has been said to demonstrate that the Home Office's management of the process has only compounded the problems. Placing immense pressure on decision-makers to ensure that claims are processed as quickly as possible has only served to heighten concerns as to the quality of decisions. Nevertheless, it is possible to advance the following suggestions as to how some of the difficulties might be ameliorated in practice.

First, the assessment of credibility. "Hard-law" measures such as section 8 seem far too blunt an instrument to be of assistance in the sensitive task of fact-finding and have rightly been criticised as an attempt to interfere with

this task in order to produce negative decisions for claimants. An obvious alternative is the utilisation of more appropriate “soft-law” techniques such as guidelines setting out best practice to provide guidance to decision-makers on how to approach the task of assessing credibility. To date, the AIT has only issued gender guidelines.¹²⁵ Why could not IND and the AIT agree guidelines on the assessment of credibility? Such guidelines would not, of course, resolve the difficulties associated with assessing credibility but they might provide a more appropriate framework for this task. Moreover, the guidelines could be augmented by good quality training to enhance decision-making.

Secondly, the quality of country information could be improved further. Here the Home Office’s stubborn refusal to establish an independent documentation centre presents an obstacle to improving the quality of country information. However, it might be asked: if the Home Office continues to maintain that its country reports are independent, what then is to be gained from its intransigence toward an independent documentation centre? Such a centre could be established on a statutory basis to collect and disseminate country information with input from all interested parties (Home Office, UNHCR and NGOs) and ensure independent analysis of country information. Equally, improvements could also be made at the Tribunal level. Country guideline determinations seem here to stay. If so, then surely this justifies either the establishment of a research unit within the AIT to compile extensive country materials or a court appointed expert to assist the Tribunal in providing comprehensive country guidance. In particular, there is a need for more mutual understanding between the Tribunal and country experts: little can be lost here if both seek to have a constructive dialogue concerning their respective roles in providing good quality country of origin material.

Thirdly, long overdue structural reform of the Home Office is now underway.¹²⁶ Establishing IND as an executive agency along with an independent immigration regulator might act as a catalyst for improving performance and accountability structures. Clearly the rate of removals needs to improve. The large-scale failure to remove failed applicants threatens to undermine the necessity for the risk assessment task. But at the same time, more could be done to monitor the safety of returnees. Why couldn’t UK overseas missions work together with NGOs and the International Organisation for Migration to monitor whether or not returnees face the persecution or ill-treatment for which they sought asylum?

While these proposals might improve asylum decision-making, it should not be forgotten that the uncertainties presented by the case-management risk assessment required by asylum adjudication are permanent and not transient obstacles. Ultimately, it is impossible to assess the correctness of decisions

¹²⁵ N. Berkowitz and C. Jarvis, *Gender Guidelines* (2000). By contrast, Canada’s Immigration and Refugee Board has issued various guidelines on *inter alia* assessing credibility and weighing evidence.

¹²⁶ See Home Office, n.117 above; House of Commons Home Affairs Committee, *Immigration Control* (2005-06 HC 775) and Home Office, *The Government Reply to the Fifth Report from the Home Affairs Committee on Immigration Control* (Cm. 6910, 2006).

where the “truth” is unknowable. As the evaluation of “facts” can be conditioned by the decision-maker’s own values, it behoves decision-makers to investigate and scrutinise their own predispositions as carefully as the factual basis of each asylum claim.