



Country Guideline cases: benign and practical?

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Executive summary

In 2003 the Immigration Appeal Tribunal began issuing guidance cases to lay down authoritatively what is happening in different asylum-seeker producing countries so that asylum decision making would be more consistent. This report examines whether those guidance cases, Country Guideline cases, are fulfilling this function and whether in a fair and reasonable way.

The report concludes that many of the Country Guideline cases are deeply flawed in a number of key respects:

- Lack of proper referencing of the evidence considered, meaning cases cannot be challenged.
- Based on incomplete country information, with important and up-to-date evidence either not considered or ignored.
- Reasoning is sometimes obscure and it is difficult to fathom how the evidence considered led to the ultimate conclusion.
- Parties restrict themselves to submitting evidence and argument on the facts of the particular case. Some guidance cases go beyond these facts and are based on flimsy foundations.
- Thorough and definitive country guidance requires resources. These resources have not hitherto been provided by parties to all guideline cases so the Tribunal needs to be more pro-active.
- Expert evidence is routinely rejected rather than assimilated into an overall judgment.

A fundamental change of approach is required if the IAT is to produce effectively comprehensive guidance which is benign and practical rather than, as at present, inimical to individual justice.

Methodology

The Research and Information Unit at IAS provides IAS staff with fully researched court bundles for use in asylum and immigration appeals before the Immigration Appellate Authority, including the Tribunal, on a case by case basis. The bundles include an analytical summary of all relevant information whether it goes for or against the claimant's case. Determinations from the Tribunal and higher courts regarding country conditions are a key plank of such research. The three full-time researchers, with the help of interns, produce an average of 50 such bundles per month. Through this work, the researchers became aware of several Tribunal decisions which purported to give guidance on country conditions but which appeared seriously flawed and/or were based on very incomplete country information. Following the success of the analysis of the Home Office country reports,¹ and bearing in mind the potential injustices that would be caused by poor country guidance from the Tribunal, the project to examine the Country Guideline cases was initiated.

Initially, four workshops were organised on the topic for practitioners – two in London in July 2004 and two in Leicester in September 2004. Those who attended included a wide cross-section of the sector, including barristers, solicitors, NGO-workers, and members of the judiciary. We are very grateful for the lively participation and thoughtful comments that emanated from these discussions, and to those who were happy to continue the debate by email subsequently. In November, we presented our preliminary concerns to the vice-presidents of the Tribunal in an informal setting. We were very happy to note their openness to criticism and were grateful to hear their comments on those initial concerns. Whilst this report is the formal culmination of this consultative process, the recommendations and criticisms found in it are made in light of this ongoing discussion.

¹ Carver, N. (Ed.) 'Home Office Country Assessments: An Analysis' IAS (September 2003) and Carver, N. (Ed.) 'Home Office Country Reports: An Analysis' IAS (September 2004).

Out of the 300-odd Country Guideline cases existing in September and November 2004, around half were read or re-read specifically with the parameters of the project in mind. IAS staff and other practitioners, along with those who had participated in the workshops, were asked to highlight any Country Guideline cases they felt to be of specific concern.

A thematic approach was adopted rather than considering the cases country by country. By adopting a thematic approach, the writers wish to emphasise that criticisms and recommendations are not limited to the cases examined in detail in this report. Rather, the highlighted cases were chosen because they exemplified common themes and the same criticisms could be made of many of the Country Guideline cases. It would not be an adequate response simply to remove the cases which are highlighted as being seriously flawed as the problems are structural rather than individual.

Introduction

Country Guideline cases became ubiquitous in 2004. On 4th January 2005, 292 had been promulgated.² The Tribunal expects practitioners to be familiar with any relevant Country Guideline case and to trawl through the poorly constructed IAA website to find them, or to use the EIN subscription service. If a set of facts arising in the particular case before the Tribunal has previously been addressed in a Country Guideline case the Tribunal expects there to be argument on why the outcome of the Country Guideline case in question should not be followed.

This report analyses the theory and practice behind the making of Country Guideline cases through the prism of *S and Others* [2002] INLR 416, other judicial guidance and through first principles. The authors have found that many of the cases examined simply do not meet the high standards required. Rather than simply criticising, however, and in the knowledge that the practice of making 'factual precedents' is likely to continue under the new Asylum and Immigration Tribunal (AIT) from April 2005, we have sought to be constructive and have included recommendations. It is imperative that the highest and most rigorous standards of analysis are applied to what becomes a Country Guideline case and we seek to stimulate debate on how the current Tribunal and the new AIT may overcome a number of obstacles to accomplish this difficult task.

The first chapter examines the problems arising from and surrounding the concept of legal certainty in the asylum jurisdiction. The second chapter examines whether the Tribunal has fulfilled its duty to be 'effectively comprehensive', as required by the Court of Appeal in *S and Others v SSHD* when the Tribunal is setting a factual precedent. The third chapter looks at the challenges presented in seeking to set 'effectively comprehensive' factual

² 80% are in favour of the Home Office, 2% were remitted, leaving 18% in favour of the asylum claimant. These statistics include both asylum claimant and Home Office appeals. These figures are commensurate with overall success rates for asylum claimants but it is not possible easily to analyse whether the Country Guideline determinations favouring the Home Office tend to touch on broader issues affecting greater numbers of claimants than the Country Guideline determinations favouring asylum claimants.

precedents in an adversarial environment. The fourth and final chapter analyses the Tribunal's approach to expert evidence, specifically identified in *S and Others* as being crucial to setting sound precedents.

There are several themes underlying this report and emerging repeatedly in the different chapters. Perhaps the most important is that many of the problems discussed are inevitable in an adversarial legal environment where a binary yes/no decision is always required. Far too many of the Country Guideline cases examined, however, make the mistake of elevating these unavoidable and regrettable problems into unnecessary and damaging evils by attaching precedent value to entirely inappropriate determinations. The Tribunal has all too often failed to observe the rigours required by *S and Others*, a decision that is frequently referred to in this report and is the benchmark against which Country Guideline determinations have to be measured.

Certainty, consistency and justice

Colin Yeo*

This chapter looks at the concept of legal certainty and its application in Country Guideline cases. The first part examines the search for certainty by the Tribunal and the mechanisms it has adopted to try and impose greater consistency of decision-making on adjudicators by insisting on greater legal certainty with regards to country conditions. The chapter goes on to look at the concept of legal certainty and offers a reminder of the often misunderstood approach to certainty and fact-finding in asylum cases laid down in the leading case of *Karanakaran v SSHD* [2000] Imm AR 271, before moving on to consider the potential for conflict between judicial desire for greater legal certainty and the need for individual justice, a conflict explicitly and carefully considered in the case of *S and Others v SSHD* [2002] INLR 416. The problems arising from purporting to establish definitive facts at a given date in a constantly changing world are then examined. The chapter finishes by looking at the way that artificial certainty is cascaded by the Country Guideline system even where the Tribunal has stated that its findings are based on a lack of evidence or where a case has been used inappropriately to determine issues beyond the facts of the particular case. Several of these issues recur in later chapters but are examined here in the specific context of considering how the Tribunal's desire to achieve greater legal certainty and consistency of decision-making is affecting individual justice in other cases.

1.1 The search for certainty

The Immigration Appeal Tribunal has shown an increasing tendency under the Presidencies of Mr Justice Collins and Mr Justice Ouseley to seek to exert a high degree of control over the decision-making of adjudicators. In a series of

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judgments, culminating most recently in *P and M v SSHD* [2004] EWCA Civ 1640, the Court of Appeal has chastised the Tribunal for interfering too readily in adjudicators' findings.³ In *P and M* the Court re-emphasises the test formulated in *Subesh v SSHD* [2004] Imm AR 112 to be applied before the Tribunal can intervene and substitute its own decision for that of the adjudicator:

'The true distinction is between the case where the appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning and the application of the relevant law, require it to adopt a different view.'

This test applies to cases determined under the 1999 Act appeals regime when the Tribunal still enjoyed a full appellate jurisdiction rather than the more limited error of law jurisdiction introduced by the 2002 Act, but it also clearly holds lessons for the Tribunal about the nature of an error of law, a concept the Tribunal has interpreted remarkably liberally when overturning appeals allowed by adjudicators. Ultimately, this interventionist tendency has proven self-destructive and resulted in the Tribunal's abolition. Like Agamemnon, murdered in his bath after eventually returning victorious from Troy, it could be said the Tribunal's *hubris* has been its downfall.

Frustrated by the shortcomings of intervening in individual cases, the Tribunal adopted two principle means of control: the starred determinations, principally on legal issues, and Country Guideline cases, coupled with the organisation of the Tribunal into country groups. The starred determinations have a longer pedigree, the first being *Haddad v SSHD* (00/HX/00926) 15 February 2000. The concept of a 'country guideline' case first really emerged with the Tribunal's decision in *SSHD v S* (01/TH/00632) 1 May 2001, later *S and Others v SSHD* [2002] INLR 416 in the Court of Appeal, a case extensively referred to in this report, then later still *SK v SSHD* [2002] UKIAT 05613 (starred), again in the Tribunal. The Tribunal, chaired by the then President, Mr Justice Collins, sought to reach a definitive conclusion on the treatment of Serbs in Croatia in the year

³ See also, for example, *Oleed v SSHD* [2002] EWCA Civ 1906, *Koci v SSHD* [2003] EWCA Civ 1507, *Subesh v SSHD* [2004] Imm AR 112, *CA v SSHD* [2004] EWCA Civ 1165, *Ndlovu v SSHD* [2004] EWCA Civ 1567, *Pisa v SSHD* [2004] EWCA Civ 1443, *Nirmalanathan v SSHD* [2004] EWCA Civ 1380.

2001 by joining together several cases and using the mixed facts to examine a range of risk issues. The Court of Appeal overturned the decision on appeal in the judgment *S and Others* because two important reports had been overlooked and the Tribunal had therefore failed in its duty to be 'effectively comprehensive' when seeking to establish what the Court of Appeal calls a 'factual precedent', even though there was 'much force' in the Secretary of State's contention that the reports made no difference to the outcome of the case.

The Tribunal took *S and Others* and its later approval in *Shirazi v SSHD* [2003] EWCA Civ 1562 to be a green light to go ahead with other similar precedent cases, and the current system of designated Country Guideline cases emerged soon afterwards. When the designation was introduced, the Tribunal also trawled through its back-catalogue to pick out some of its old favourites in order to elevate them retrospectively to Country Guideline status. The criteria for designating individual cases as having 'Country Guideline' status have never been published, if such criteria exist at all, but it is known that the Tribunal has organised itself into country groups, believed to be chaired informally by a Tribunal Vice-President, to whom interesting-looking cases are perhaps referred or who co-ordinates the work of the group in some other way, including 'de-designating' cases that are deemed no longer to be appropriate as Country Guideline cases. The membership of the groups is believed to rotate.⁴

Greater transparency and consultation would have been helpful to the Tribunal's Country Guideline project. It is difficult to trust or have faith in the decision-making process when one is so unaware of what it is or what it involves, particularly when so many cases markedly favour the Home Office view of country conditions.

The most authoritative judgment on the subject of factual precedents is very clearly *S and Others*, in which the implications are carefully and explicitly considered, unlike in previous judgments. *S and Others* is also cited with approval in *Shirazi and Indrakumar v SSHD* [2003] EWCA Civ 1677. It could be

⁴ Information from conversations with members of the Tribunal and others in the sector.

argued, however, that *S and Others* is of limited relevance now because of the jurisdictional change under the 2002 Act. The judgment refers to binding precedents and errors, but that was while a factual error was sufficient for the Tribunal to intervene. Assuming that *S and Others* continues to support the proposition that factual precedents can be binding under the 2002 Act jurisdiction, it lays down very clear standards that have to be applied.⁵ As is examined below, the majority of Country Guideline cases do not meet those exacting standards.

1.2 Certainty and justice

In *S and Others*, Laws LJ explicitly recognises the potential conflict between certainty and individual justice at paragraph 26:

'Now, the notion of a judicial decision which is binding as to fact is foreign to the common law, save for the limited range of circumstances where the principle of *res judicata* (and its variant, *issue estoppel*) applies ... This principle has been evolved – we put the matter summarily – to avoid the vice of successive trials of the same cause or question between the same parties. By contrast, it is also a principle of our law that a party is free to invite the court to reach a different conclusion on a particular factual issue from that reached on the same issue in earlier litigation to which, however, he was a stranger. The first principle supports the public interest in finality in litigation. The second principle supports the ordinary call of justice, that a party have the opportunity to put his case: he is not to be bound by what others might have made of a like, or even identical case.'

He goes on to comment that the Tribunal's creation of a factual precedent that is binding on future similar cases 'to an extent sacrifices the second principle to the first' but that as long as a claimant can present new evidence and argue that his facts are different to those in the precedent, the sacrifice is not complete. He then continues:

⁵ This assumption may well eventually prove to be mistaken. The Court of Appeal has certainly endorsed the principle of the Tribunal offering country guidance and it seems unlikely that the Court would entirely resile from this position. However, it is extremely unlikely that the Court ever envisaged the formalised system the Tribunal has devised, the carelessness with which some of the guidance cases have been decided or the way in which guidance cases are used at LSC, adjudicator and Tribunal levels. The extent to which the Country Guidance cases should be considered binding is considered below.

'28. While in our general law this notion of a factual precedent is exotic, in the context of the IAT's responsibilities it seems to us in principle to be benign and practical. Refugee claims *vis-à-vis* any particular State are inevitably made against a political backdrop which over a period of time, however long or short, is, if not constant, at any rate identifiable. Of course the impact of the prevailing political reality may vary as between one claimant and another, and it is always the appellate authorities' duty to examine the facts of individual cases. But there is no public interest, nor any legitimate individual interest, in multiple examinations of the state of the backdrop at any particular time. Such revisits give rise to the risk, perhaps the likelihood, of inconsistent results; and the likelihood, perhaps the certainty, of repeated and therefore wasted expenditure of judicial and financial resources upon the same issues and the same evidence.

29. But if the conception of a factual precedent has utility in the context of the IAT's duty, there must be safeguards. A principal safeguard will lie in the application of the duty to give reasons with particular rigour. We do not mean to say that the IAT will have to deal literally with every point canvassed in evidence or argument; that would be artificial and disproportionate. But when it determines to produce an authoritative ruling upon the state of affairs in any given territory it must in our view take special care to see that its decision is effectively comprehensive. It should address all the issues in the case capable of having a real as opposed to fanciful bearing on the result, and explain what it makes of the substantial evidence going to each such issue. In this field opinion evidence will often or usually be very important, since assessment of the risk of persecutory treatment in the *milieu* of a perhaps unstable political situation may be a complex and difficult task in which the fact-finding tribunal is bound to place heavy reliance on the views of experts and specialists.'

The Court of Appeal concludes that although there is a risk that individual justice may be compromised by the concept of a factual precedent, as long as safeguards are followed – namely the duty on the Tribunal to be 'effectively comprehensive' and the right of an individual claimant to distinguish his case from any precedent – then factual precedents can be useful to all concerned. The safeguards are paramount in *S and Others*, which is why the appeal was remitted back to the Tribunal despite the fact the Court's tacit admission that the reports in question would make little or no difference to the ultimate outcome.

S and Others is not the only judgment of the Court of Appeal to consider the idea of a factual precedent, although it is certainly the most careful and

thorough analysis of the issue. In the earlier case of *Manzeke v SSHD* [1997] Imm AR 524 the Court had commented favourably on the idea:

'It will be beneficial to the general administration of asylum appeals for Special Adjudicators to have the benefit of the views of a Tribunal in other cases on the general situation in a particular part of the world, as long as that situation has not changed in the meantime. Consistency in the treatment of asylum seekers is important in so far as objective considerations, not directly affected by the circumstances of the individual asylum seeker, are involved.'

In *Shirazi v SSHD* [2003] EWCA Civ 1562 the Court went considerably further and actually criticised the Tribunal for allowing inconsistent lines of cases to develop:

'[29] The differentials we have seen are related less to the differences between individual asylum-seekers than to differences in the Tribunal's reading of the situation on the ground in Iran. This is understandable, but it is not satisfactory. In a system which is as much inquisitorial as it is adversarial, inconsistency on such questions works against legal certainty. That does not mean that the situation cannot change, or that an individual's relationship to it does not have to be distinctly gauged in each case. It means that in any one period a judicial policy (with the flexibility that the word implies) needs to be adopted on the effect of the in-country data in recurrent classes of case.'

These cases need to be read with two extremely important *provisos* in mind. Firstly, the cases were decided while the Tribunal still enjoyed a very wide jurisdiction (specifically referred to in *Manzeke*) and, secondly, the Court of Appeal in both cases explicitly states that flexibility is needed, strongly implying that there would be no error of law in failing to follow such precedents if reasons are given. The parentheses at the end of the above quotation from *Shirazi* makes this abundantly clear. In *Manzeke*, the Court also made it clear that guideline cases were relevant to future determinations but were certainly not determinative:

'[In *Senga*], the Tribunal gave careful consideration to the situation generally. The decision was made in the context of the facts of that particular case. This must always be remembered. However, consideration of those facts was dependent upon material placed before it from various bodies who were aware of the situation in Zaire at that time. The Tribunal's views as to those facts would be of assistance and

provide useful guidance to other Special Adjudicators and other Tribunals who were faced with similar situations. The fact that one Tribunal comes to a conclusion on the facts before it does not mean that any other Tribunal is bound to come to the same decision, but any later tribunal is entitled to have regard to the views of a decision, such as that given by the Tribunal in the Senga case ... The matters which had been decided in the Senga case were at least relevant to the decision which the Special Adjudicator and the Tribunal had to reach in this case.'

Despite the caution with which the Court of Appeal has endorsed the idea of country guidance, the Tribunal considers the formal Country Guideline cases to be binding,⁶ although from the practice of the Tribunal it seems clear that this means binding on adjudicators rather than the Tribunal itself, as the record of Country Guideline cases abounds with examples of contradictory findings and one case superseding another.⁷ The proposition that a determination of the facts of an individual case can lay down a legal precedent with which to disagree would amount to an error of law is a controversial one and must be read alongside the exhortations for flexibility in *Manzeke* and *Shirazi* and the safeguards emphasised in *S and Others*.

The frequent failure by the Tribunal to be 'effectively comprehensive' in Country Guideline determinations is examined in depth in another chapter but the example of *VD (Albania CG)* [2004] UKIAT 00115 (Trafficking) illustrates concisely the damage the imposition of artificial certainty through a Country Guideline determination can do to justice in individual cases. In this case, as is later examined in some detail, the Tribunal's analysis of the evidence before it is woefully incomplete and the Tribunal also goes on to make findings on issues that were not pertinent to the specific case before it and would not therefore

⁶ In *SSHD v AF (Afghanistan)* [2004] UKIAT 00284 (CG) a panel of the Tribunal chaired by Mr Freeman rather stridently opined that failure by an adjudicator to follow a Country Guideline determination would amount to an error of law. This is unusual in being so explicit but it is clear from the text of the CG determinations and from the Tribunal's practice in hearing argument in individual cases that the Tribunal considers CG cases binding on adjudicators.

⁷ See, for example, the series of Turkish cases concerning immediate risk on return concluding with *SSHD v IK* [2004] UKIAT 00312 (CG) and the recent previous 'definitive' cases it replaced: *HO (National Records) Turkey CG* [2004] UKIAT 00038, *SA (GBTS records) Turkey CG* [2004] UKIAT 00177, *LT (Internal flight - Registration system) Turkey CG* [2004] UKIAT 00175, *AG (GBTS, "tab" and other records) Turkey CG* [2004] UKIAT 00168, *KK (GBTS - Other information systems - McDowall) Turkey CG* [2004] UKIAT 00177, *MS (GBTS information at borders) Turkey* [2004] UKIAT 00192, *CE (KK confirmed - McDowall report) Turkey CG* [2004] UKIAT 00233.

have been prepared by the representative (the general risk of trafficking to a woman in Albania rather than the risk to the claimant). These findings have been elevated to Country Guideline status and must have been used in countless other Tribunal, adjudicator and Legal Services Commission decisions since, yet the methodology behind the original determination is highly questionable. The problem of cascading the artificial notion of certainty that is being peddled by the Tribunal in many Country Guideline determinations is revisited in the final section of this chapter.

1.3 *Ravichandran and flux*

As any practitioner in the field of asylum law will be very well aware, the risk to an asylum seeker is to be assessed as of today's date, whenever that might be. The principle dates back to the seminal case of *Ravichandran* [1996] Imm AR 97 and in its current incarnation is enshrined in law at s.85(4) of the Nationality, Immigration and Asylum Act 2002. This means that country conditions are always to be examined at today's date, assuming there is an extant appeal on the facts.⁸

Country Guideline cases are therefore, by their very nature, out of date on the day they are promulgated. The situation is even worse if the case was itself based on old, obsolete material, which is far from unknown. In *NL v SSHD (Pakistan CG)* [2002] UKIAT 04408 (Mental illness – Support for family), for example, the source relied upon almost exclusively is the CIPU 'Pakistan Country Assessment' from October 2001. However, as the hearing date was in August 2002, the edition of CIPU presented by the Home Office should have been that published in April 2002. The Tribunal must have been aware that a more recent report was available but no explanation is given in the determination as to why the more recent version was not used.⁹ There is no information given in this report specifically on mental health services in

⁸ The principle is somewhat complicated by the Court of Appeal's decision in *CA v SSHD* [2004] EWCA Civ 1165, which requires the Tribunal, under the 2002 Act appeals regime, to decide there was an error of law before it can make its own factual findings on appeal.

⁹ Presumably it was not presented by either party but this is hardly a sound basis for a Country Guideline case, as is discussed further in the later 'inquisitorial quality' chapter.

Pakistan, nor indeed on medical services. The overlooked April 2002 report does, however limited, contain three paragraphs on medical services.¹⁰

Further analysis of the sections of the CIPU report examined by the Tribunal in this case reveals the true extent to which the information presented was obsolete. Section 5.3.88 of the CIPU report is referred to in paragraph four of the determination. This section is taken from a single source numbered [12c] which, according to Annex D of the report, is 'Women in Pakistan' Research Directorate of the Canadian Immigration and Refugee Board. Source [12c] was published in June 1994 although it was completed in January 1994, eight years prior to the hearing date. Paragraph five of the determination refers to section 5.3.97 of the CIPU report. This section also comes from a single source numbered [2b], which Annex D links to the 'Pakistan Country Report on Human Rights Practices for 2000' US Department of State published in February 2001.¹¹ Whilst the report itself was published in February 2001 – eighteen months before the hearing date – the material within the report refers to 2000, over two years before the hearing date. Finally, section 5.4.38 of the report, referred to in paragraph nine of the determination, derives from source [20b] which is the final report of a 'Country of Origin Information Workshop in Bratislava held in December 1999' UNHCR/ACCORD published in May 2000. Again the publication date of this report is over two years prior to the hearing date whereas the material within the report refers to events in 1999 or before.

Matching the sources paraphrased by the CIPU report and referred to in the determination it becomes clear that the country information before the Tribunal was far from current. The two sources within the CIPU report upon which the Tribunal assesses the level of support services available to Pakistani women (paragraphs twelve-thirteen) are eight years and two years old respectively. The information quoted in rejecting the availability of an internal flight alternative for women in Pakistan – not, it should be added, on the basis of its outdated nature

¹⁰ 'Country Assessment for Pakistan' CIPU (April 2002), 4.72-4.74.

¹¹ 'Pakistan Country Report on Human Rights Practices for 2000' US Department of State, (February 2001)

(paragraph 9) – is three years old. The case is nevertheless a Country Guideline case, considered by the Tribunal to be binding on adjudicators.¹²

Of course, the burden rests with the claimant to prove his or her case. In some cases, recent information simply will not be available to the Tribunal and the determination will of necessity be based on potentially obsolete material. However, the Tribunal is compounding a necessity into an evil by elevating such cases to Country Guideline status and must, if injustice is not to be unnecessarily imposed on other claimants, be far more cautious about which cases are designated as being binding and be willing to 'de-designate' aging cases. Indeed, as is argued in the 'inquisitorial quality' chapter, there is a strong case to suggest the Tribunal is under a duty, particularly when setting a factual precedent, to examine the latest information.

The problem of rapidly dating decisions was recognised by the Court of Appeal in *S and Others*, and the Court observed that it is important that future adjudicators or tribunals are aware of the limitations of a factual precedent and are receptive to new evidence of changed country conditions:

'[27] ... an applicant will of course be heard on any facts particular to his case, and (as the IAT made clear) evidence as to any deterioration in the state of affairs in Croatia would be listened to.'

Some of the more recent Country Guideline determinations carry a form of 'health warning' at the beginning to stress this point. The text reads approximately as follows:

'This case is a country guideline (CG) case on the issue of whether failed asylum seekers per se face a real risk of serious harm upon return to the Democratic Republic of Congo (DRC). As such it is intended as definitive unless there is a change of circumstances materially affecting the treatment of failed asylum seekers upon return to the DRC.'¹³

¹² See the 'When' section of the 'effectively comprehensive' chapter for further examples, including one involving information dating to 1960 in a Country Guideline case: *WO (Nigeria CG) [2004] UKIAT 00277* (Ogboni cult).

¹³ *VL (Risk - Failed Asylum Seekers) Democratic Republic of Congo [2004] UKIAT 00007* (CG), paragraph 1

The backdated Country Guideline cases do not, of course, include an equivalent warning paragraph. Although the warning hardly solves the problems discussed, it is important that the Tribunal explicitly recognises in Country Guideline cases that country conditions can and do change and that it specifies the actual issue on which it is to be considered 'binding' – many Country Guideline cases make a whole range of factual findings which appear to be quite specific to the claimant before them, effectively and rather absurdly elevating all those findings into binding guidelines.¹⁴ The brief descriptors or labels attached to Country Guideline cases, usually just three or four words, are not an adequate explanation of the specific country findings that the Tribunal has elevated to binding status. The vast majority of cases can be compared unfavourably in this respect with paragraphs 1 to 3 of the original *SSHD v S* (01/TH/00632) 1 May 2001 or paragraphs 1 to 10 of *VL (Risk - Failed Asylum Seekers) Democratic Republic of Congo CG* [2004] UKIAT 00007.

By their nature, Country Guideline cases necessarily place a burden on the future claimant to distinguish his or her own case from the earlier one, yet the way the determinations have been written can make this virtually impossible. If the claimant does not know what evidence the Tribunal used to make its earlier decision, he or she cannot possibly point a future adjudicator or tribunal to different or new evidence and persuade them to depart from the earlier case. Sadly, the Tribunal routinely omit to reference their decisions properly, as is discussed in the 'effectively comprehensive' chapter. This is extremely effective in insulating such cases from future challenge by other claimants as well as breaching the enhanced duty to give reasons discussed in *S and Others*.

Unfortunately, it is the experience of practitioners that there is also a fairly widespread tendency to use Country Guideline cases as a shortcut to

¹⁴ There are many, many examples to choose from and the following are selected at random. In *AA (Vulnerable Female – Article 3) Ethiopia CG* [2004] UKIAT 00184 the Tribunal examines whether it would be a breach of Article 3 on the facts of the individual case for the claimant to be returned to Ethiopia. It is difficult to see how the case has general application or sets an 'effectively comprehensive' factual precedent of any value. In *FD (Sufficiency of protection-Roma-Munteanu) Romania CG* [2004] UKIAT 00001 the Tribunal holds that the claimant had not exhausted potential domestic remedies therefore it was not established on the facts that there was insufficient protection. Again, it is difficult to see how this case carries precedent value. It is simply an ordinary determination of the Tribunal.

determining a case as opposed to providing a useful and semi-authoritative description of country conditions. The judiciary operate under severe time constraints and a reference to a Country Guidance case is sometimes used as an alternative to giving reasons rather than as an aide to decision-making. If the facts are vaguely analogous with a Country Guideline case then the case will be dismissed unless the claimant can prove otherwise – as, of course, the vast majority of cited Country Guideline cases are against the claimant. This tendency extends right down the decision-making process even to the Legal Service Commission merits test for appeal funding. It is not unknown for the LSC or representatives with devolved powers to refuse funding on the basis of a Country Guideline case, rendering the cases eerily and dangerously self-protecting.

There is an eminently practical issue arising about what happens to old Country Guideline cases and when they actually become 'old' or are superseded.¹⁵ Given the fast pace of change in almost all asylum seeker producing countries, it might be thought to be absurd to be forcing claimants to distinguish their cases from a factual precedent that is two or three years, or even one year, old and which may itself have been based on evidence that was old at that time. Country conditions will inevitably have changed quite considerably, there will be new evidence and reports and there is a clear duty on any decision-maker to apply anxious scrutiny and examine the latest reports. However, the approach adopted by many adjudicators and panels of the Tribunal is to require the claimant to demonstrate that new country information contradicts an old case. In doing so, the Immigration Appellate Authority is clearly going further than the Court of Appeal intended in *S and Others* and is sacrificing individual justice on the false altar of legal certainty.

¹⁵ At the time of writing, for example, *FJ (Risk-return-Tuni) Somalia CG* [2003] UKIAT 00147 and *MM (Somalia CG)* [2003] UKIAT 00129 appear to have been significantly superseded by *MN (Somalia CG)* [2004] UKIAT 00224, which was based on additional and better evidence, but continue to be Country Guideline cases. Similarly, *SA (Somalia CG)* [2002] UKIAT 06665 appears to have been superseded (indeed, contradicted) by *NG (Somalia CG)* [2003] UKIAT 00011 yet remains a CG case. In none of these cases is reference made to the earlier decisions, unlike in other examples of cases being superseded, such as the string of Turkish cases culminating in *JK (Turkey CG)* [2004] UKIAT 00312 or *Gulati* [2002] UKIAT 02130, *K (Afghanistan)* [2003] UKIAT 00057 and the more recent *IB and TK (Afghanistan CG)* [2004] UKIAT 00150 (Sikhs – Risk on return – Objective evidence).

For example, the author is aware that the backdated Country Guideline decision of *RG (Risk-Return-Sikh) Afghanistan CG* [2002] UKIAT 02130 has been cited and relied upon on a number of occasions in unreported Tribunal determinations and in many adjudicator hearings. Over-reliance on this old decision actually formed a ground of appeal in the reported (but not Country Guideline) case of *IB and TK Afghanistan* [2004] UKIAT 00150, where the adjudicators were alleged not to have made independent findings of their own or made an assessment of the most up-to-date country information. The Tribunal implicitly upholds this complaint and gives careful consideration to a range of sources. At paragraph 39 the Tribunal finds that *RG* and another much-cited earlier case are effectively superseded as there is newer and more up-to-date evidence available which renders the earlier decisions 'unsafe'. This raises the question of exactly when *RG* became redundant and how often it was relied upon by adjudicators and the Tribunal after it had become redundant. Worse, *RG* remains a Country Guideline case but *IB and TK* does not have this status.

Country Guideline cases should be fixed with an expiry date of six months and should be 'de-designated' or removed when that date passes, although they have to be left on the record as reported determinations. Without this kind of safeguard the Tribunal imposes an unreasonable additional burden on claimants (particularly given the failings of the Country Guideline cases themselves) and irrevocably undermines the *Ravichandran* principle. At the very least the Tribunal should make known its policy on removing Country Guideline cases. Some cases had been removed towards the end of 2004 but many old cases remain, some being retrospective Country Guideline cases dating back to 2002. The rationale, if there is one, is elusive and the process appears quite random to the interested observer.

The Tribunal's reply to this general point is presumably that it is the duty of future claimants and their representatives to place more comprehensive evidence before a future panel of the Tribunal, in which case the new material will be considered. Such a response represents a dereliction of the Tribunal's

enhanced duty in Country Guideline cases and demonstrates an entirely unrealistic understanding of the capacity of claimants and representatives to challenge self-insulating precedents, given considerations on competence, funding and the Tribunal's own extremely poor referencing. The legal and practical arguments in favour of adopting a more inquisitorial approach are discussed in depth in a later chapter.

1.4 Artificiality of legal certainty

The concept of certainty lies right at the heart of Country Guideline cases. The whole purpose of a Country Guideline case is to impose a degree of certainty on an uncertain and often rapidly changing country situation. This is an artificial certainty, however, a legal construct akin to the elevation of probabilities to certainties by the standard of proof device: when the requisite standard is reached, that standard being more probable than not in a normal civil case, facts 'proven' to that standard somehow become 'established'. This is something of a quaint notion to anyone versed in an academic discipline other than the law.¹⁶ The adversarial nature of the common law legal system requires the preferring of one version of the facts over another and the winner takes all. An asylum case cannot be partially won: either the asylum seeker is granted asylum or he is not.

In asylum cases the fact-finding exercise is supposed to be very different and follow the approach laid down in *Karanakaran v SSHD* [2000] Imm AR 271. This point is examined in more detail in later chapters, but it is important to note now and in this context that the Court of Appeal was clearly alive to the problem of artificial certainty in *S and Others*, hence the caution with which the Court endorses the principle of a factual precedent.¹⁷ Many Country Guideline panels of the Tribunal appear to be blind to the issue.

¹⁶ For an excellent discussion of the conflict in approach between lawyers and others, see Anthony Good, *Expert Evidence in Asylum and Human Rights Appeals: an Expert's View* (2004) IJRL vol. 16, no. 3, 358, in particular paragraphs 29 to 46.

¹⁷ See the 'effectively comprehensive' chapter and the expert evidence chapter in which the proper approach is discussed and regarding the desirability, particularly in Country Guideline

The artificiality of the concept of legal certainty really matters in what Laws LJ called the 'exotic' notion of a factual precedent. On a case by case basis, there is no avoiding the need for a judge or tribunal to make what become concrete factual findings despite only being, say, 51% sure that they are 'true' – truth also being a somewhat quaint notion in itself to a non-lawyer.¹⁸ In *SSHD v Sivakumaran* [1988] Imm AR 147 the House of Lords held that a claimant needed to demonstrate to a 'reasonable degree of likelihood' that their fear was well-founded to succeed in a refugee claim. In *Karanakaran* the Court of Appeal developed this further by agreeing with the Tribunal's view in *Kaja* [1995] Imm AR 1 that the *Sivakumaran* approach imbues uncertainty with a 'positive role' in an asylum case. Facts do not need to be 'proven' as such; the decision maker must somehow assess, without the device of a standard of proof and using all relevant evidence, whether there is a reasonable degree of likelihood of future persecution.¹⁹

In setting a factual precedent, the judge or tribunal will not only impose this artificial certainty on the individual case – an unfortunate necessity in a legal context – but also on all subsequent similar cases. For example, in *SK v SSHD* [2002] UKIAT 05613 the Tribunal held that Serbs are not generally persecuted in Croatia. *SK* in fact includes a thorough examination of the issues and evidence, but many Country Guideline determinations do not.²⁰ The uncertainty of the original findings in many of the Country Guideline determinations, something this report seeks to highlight, is quickly forgotten by subsequent decision-makers, who take the decision to be definitive.²¹ The Tribunal need to be acutely conscious of the problem in designating any case a Country

cases, of seeking evidential synthesis rather than the simplistic preferring of one opinion or report over another.

¹⁸ See Anthony Good paper, *supra*.

¹⁹ *Karanakaran* is one of the most misused, misquoted and misunderstood cases in the asylum jurisdiction. It does not, as seems to be commonly thought, impose a lower 'standard of proof'. Rather, it suggests a sort of balancing exercise, where all relevant information and evidence is taken into consideration.

²⁰ See the 'effectively comprehensive' chapter for examples.

²¹ For an example of the danger of cascading artificial certainty, see *RG (Risk-Return-Sikh) Afghanistan CG* [2002] UKIAT 02130 and *IB and TK Afghanistan* [2004] UKIAT 00150, examined below.

Guideline case and subsequent users of the precedent must also be aware of the problem and be willing to and able to challenge a factual precedent.

1.5 Cascading artificial certainty

In any system where the burden rests on the claimant to establish his claim, there will inevitably be individual cases where the claimant is simply unable to do so for want of evidence. As is discussed in the chapter on the adversarial system, it has been recognised at paragraph 196 of the UNHCR Handbook and repeatedly in case law that this is a particular problem for asylum seekers.

Several worrying examples of poor factual findings in Country Guideline cases are highlighted in later chapters. For instance, the Tribunal's reliance on a misrepresented quote by CIPU from a US Department of State report in *SSHD v MG (Angola CG)* [2002] UKIAT 07360 – the difference between the words 'routinely' in the original and 'frequently' by CIPU – is used as what seems to be the sole evidence to justify a finding that has been elevated to a factual precedent and is therefore considered to be binding on future decision makers.²² The dubious preference given to the evidence of one rather questionable source over all other sources in *SSHD v K (Afghanistan CG)* [2003] UKIAT 00057 (Risk – Sikh – Women) is also considered by the Tribunal to be binding.²³ In these cases and many others, the Tribunal has failed to apply *S and Others* and *Karanakaran*, has made controversial findings and has then imposed these findings on all future decision makers. Artificial notions of certainty are very clearly being cascaded.

In a number of Country Guideline cases, the Tribunal has found that there is insufficient evidence to support a claimant's contention and has therefore been forced in the individual case to dismiss the appeal. This is unavoidable in some

²² A related discussion of the Tribunal's use of semantic distinctions to undermine expert evidence is contained in the chapter on expert evidence.

²³ The Tribunal's thoughtful and thorough decision in *NS (Social Group – Women – Forced marriage) Afghanistan CG* [2004] UKIAT 00328 goes some way to reversing the earlier Country Guideline case. The subsequent case only serves to highlight the extreme inadequacies of the earlier determination, however, and causes one to wonder how many claims were dismissed in the meantime.

cases. Bizarrely, however, the Tribunal has then taken that lack of evidence and elevated its negative findings to Country Guideline status, thereby seeking to bind the IAA to a factual precedent based on the absence of evidence rather than the analysis of evidence. This is hardly what the Court of Appeal had in mind in *S and Others*.

For example, in *FE (Somalia CG)* [2003] UKIAT 00115 (Risk-minority group-Yemeni background) the Tribunal designates the case as being a Country Guideline one despite the central findings that:

‘There was no mention [in the CIPU report] of the Yemeni minority clan or the Ridaaci ... The Tribunal have not been pointed to any particular background evidence relating to the Ridaaci or a minority group comprising Yemeni Somalis to show that they are at any particular risk.’

Similarly, *MB (Latvia CG)* [2003] UKIAT 00209 (Homosexual – Military Service) is based on the absence of evidence, but the Tribunal goes further by commenting that it would expect there to be some from an organisation with unknown funding and resourcing and that certainly does not exist to meet the United Kingdom Immigration Appeal Tribunal’s evidential needs in determining asylum claims:

‘16. No evidence has been provided by the Appellant that a gay man, either in the military, or in prison, would receive worse treatment than a man who is not gay. We have been asked to simply accept that as true. We are not prepared to do that. Evidence is required and there is none. Had there been a serious problem we would have expected evidence to be forthcoming, in particular from the International Lesbian and Gay Association...

...

18. In our view there is no sufficient evidence, even on the Appellant’s own account, that he is at real risk of persecution, or ill-treatment amounting to a breach of Article 3 when he is returned to Latvia. We have found that there is little likelihood that he will be required to do his national service, or if he were, but refused, that he would be sentenced to a term of imprisonment. Even if we are wrong about that there is no evidence before us that the treatment the Appellant, as a gay man, would receive, either in the army or in prison, would amount persecution or a breach of his rights under Article 3. We cannot assume, with no evidence, that to be the case.’

A little research reveals that ILGA is a coalition of 400 organisations worldwide, of which one is based in Latvia.²⁴ ILGA have a request form for information and provide email, telephone and postal contact details. The Latvian organisation’s website is entirely written in Latvian, reasonably enough. It may well be the case that there is specific information available, but that neither the claimant’s representative nor the Tribunal has checked. The Tribunal’s passivity is regrettable but perhaps inevitable in an ordinary case, but it is very damaging in a Country Guideline case which imposes an additional burden of proof on future claimants.

In *WO (Nigeria CG)* [2004] UKIAT00277 (Ogboni cult) the Tribunal goes a lot further and states that it would definitely expect to find information about a secret society in unspecified types of ‘objective documentary evidence’:

‘[20] It is a central feature of the Appellant’s claim that the Ogboni were able to launch with impunity a series of direct, physical attacks upon him, his father, uncle, political associate, employees, home and other property, and that the final straw came when he apprehended that the Ogboni were intent upon having him taken into custody and murdered. If these were truly the sorts of activities in which the Ogboni are engaged in Nigeria, it frankly beggars belief that there would not be, amongst the objective documentary evidence, some express acknowledgement of the fact. Yet there is none.’

The claimant’s representative pointed out in this case that such murders could easily be hidden in the high numbers of politically-motivated murders and the various abuses committed by the police. The Tribunal addresses the point by going on to find that:

‘If any political violence in Nigeria has an Ogboni element, the objective materials would say so. Given the restricted ambit of the cult and the virile nature of the Nigerian press, silence on the issue cannot be ascribed to fear.’

Worse is the case of *TB (Albania CG)* [2004] UKIAT 00159, where the Tribunal holds that the absence of ‘objective’ evidence on blood feuds arising from traffic

²⁴ See www.ilga.org/aboutilga.asp. The Latvian organisation’s website is at: www.gay.lv.

accidents means that such blood feuds do not exist.²⁵ This was despite expert evidence before the Tribunal that traffic accidents have caused blood feuds and a comment in the 2002 Refugee Women and Domestic Violence Country Study on Albania that:

‘A blood feud can start over any number of causes – an toward advance to a woman or the killing of a sheep dog ... Even drivers responsible for traffic accidents have been killed by their victim’s families.’²⁶

It is unknown whether this report was before the Tribunal. The Tribunal’s comments are clearly not definitive and it is highly questionable whether the Tribunal should seek to impose its view of what conclusions to draw from an alleged lack of evidence. As with the other examples, the Tribunal assumes that evidence would be available without any recognition of the unlikelihood of such specific ‘objective’ evidence existing, but here actually rejects expert evidence on this basis. The example also highlights the problems arising from an adversarial environment and the Tribunal’s approach to claimants’ expert evidence, dealt with in subsequent chapters.

The Tribunal’s own answer to the use of these examples would presumably be that if evidence is produced, it will be considered. This does not explain why such cases have been elevated to Country Guideline status, though, where the duty to be ‘effectively comprehensive’ applies. The function of these negative findings is elusive and it is difficult to see what the Tribunal has added here to the determinations of adjudicators in individual cases. A precedent appears to have been set for its own sake.

The examples also highlight a common problem with Tribunal (and adjudicator) determinations, Country Guideline or not. The Tribunal sometimes slips into assuming that the world revolves around its evidential needs. The above comments indicate a profound lack of awareness on the part of the Tribunal of

²⁵ ‘[25] ...if there were any significant instances of blood feuds arising in the capital city of Albania, Tirana, following vehicular accidents of a kind with which we are here concerned, the Tribunal considers that there would be specific objective evidence of these.’

²⁶ Refugee Women’s Resource Project, ‘Refugee Women and Domestic Violence: Country Studies: Albania’ (September 2001, updated March 2002)

the kinds of evidence that are actually available for certain countries and covering certain issues. Tribunal members are accustomed to evidence being presented to them and may well as a result have a good knowledge of issues and events in many countries. This issue is more fully explored in the chapter on expert evidence, but it is crucial that the Tribunal is aware of the limits on its own knowledge and experience. Presumably, Tribunal members have little or no professional training or experience in researching and finding country evidence, nor do they have proper research resources.²⁷ Trained and professional human rights and academic researchers may be aware through hard-won experience of the kinds of evidence that are available but, with respect, the Tribunal is not. Reading the evidence presented to it in a bundle or even occasionally looking up internet reports from major human rights bodies does not impart research skills and this limited experience does not entitle the Tribunal to make judgments about the types of evidence that might be available.

In its misplaced enthusiasm to set factual precedents on common asylum issues, the Tribunal has rushed headlong into selecting inappropriate cases, has proceeded to determine them in ways that do not meet the stringent standards of *S and Others* and has ignored the realities of the adversarial system (discussed in depth in later chapters). These flawed cases then become binding and future claimants have to distinguish their own cases, despite the fact that the Country Guideline case is based on no submissions and often drastically incomplete evidence. This is at a time when the Legal Services Commission imposes strict limits on case preparation time and the number of unrepresented claimants is rising. The Country Guideline determinations load the already weighty burden of proof further against future claimants with similar facts. Country Guidance cases should not be lightly issued and should not be issued at all where the findings are as speculative and incomplete as is the case with the above examples.

²⁷ Research resources ought to include proper internet research skills, access to academic databases and to a number of subscription-only information sources. Even database sites like EIN and ECOI.net are far from comprehensive.

1.6 Conclusion

The Tribunal, adjudicators and representatives need to be more aware of the artificiality of the whole concept of legal certainty in asylum cases and the danger that Country Guideline cases will propagate artificial notions of certainty that are actually based on no evidence, incomplete evidence and/or out-of-date evidence, findings made on points that did not arise in the appeal in question and, on top of all this, inadequate analysis of the evidence that is presented to the Tribunal in an individual Country Guideline case. *S and Others* recognised that the 'exotic' notion of a factual precedent carried dangers with it. The Tribunal has failed, spectacularly so in some cases, to respect the careful and considered guidance given by the Court of Appeal.

The Tribunal needs to be willing to remove 'CG' designation from cases when it is appropriate to do so and keep the Country Guideline cases under active review. It also needs to be far more willing *not* to go ahead and designate an individual case as having Country Guideline status if it transpires during or before the hearing that for one of many reasons it would not be appropriate to do so.

An 'effectively comprehensive' analysis?

Natasha Carver*

'...when [the Immigration Appeal Tribunal] determines to produce an authoritative ruling upon the state of affairs in any given territory, it must in our view take special care to see that its decision is effectively comprehensive. It should address all the issues in the case capable of having a real, as opposed to fanciful, bearing on the result and explain what it makes of the substantial evidence going to each such issue.'

S & Others [2002] INLR 416, 29

When the Court of Appeal approved in *S & Others* of the Immigration Appeal Tribunal (IAT) producing factual precedent determinations regarding country conditions rather than more conventional legal precedents, it specified that the IAT would need to take particular care to be thorough in its examination of the issues – the key phrase being 'effectively comprehensive'. This approach was accepted and approved by the Tribunal in *SSHD v VL (Democratic Republic of Congo CG)* [2004] UKIAT 00007 (Risk – Failed Asylum Seekers) where the Tribunal quotes from *S & Others* and comments that 'having been tasked with reaching an authoritative decision on this issue, we saw it as essential to ensure we took cognisance of all materials having a bearing on the issue.'²⁸ However, the analysis of the materials before the IAT in the majority of the three hundred-odd Country Guideline cases²⁹ frequently falls considerably short of 'comprehensive'. This is partly explained by the practice of retrospectively making cases into Country Guideline cases. It is also applicable to many of the decisions heralded even before their hearings as Country Guideline cases.

One of the two primary reasons given for the practice of Country Guideline cases is to ensure consistency in decision-making (the other being to save

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²⁸ *SSHD v VL (Democratic Republic of Congo CG)* [2004] UKIAT 00007, paragraph 1

²⁹ There were just under 300 at the time of writing. This figure varies as cases are promulgated and some are removed.

public time and money by avoiding the need to revisit country conditions repeatedly). As the Master of the Rolls, Lord Woolf, stated in *Manzeke v SSHD* [1997] Imm AR 524, 'consistency in the treatment of asylum seekers is important in so far as objective considerations, not directly affected by the circumstances of the individual asylum seeker are involved'.³⁰ This was further elucidated by the Court of Appeal in *S & Others*: 'such revisits give rise to the risk, perhaps the likelihood, of inconsistent results; and the likelihood, perhaps the certainty, of repeated and, therefore, wasted expenditure of judicial and financial resources upon the same issues and the same evidence'.³¹ In *Shirazi v SSHD* [2003] EWCA Civ 1562 the Court of Appeal was highly critical of the Tribunal for allowing the development of lines of very different findings based on similar facts. The relevant paragraph from the judgment of Laws LJ is worth quoting in full:

'I accept readily that it is not a ground of appeal that a different conclusion was open to the tribunal below on the same facts, nor therefore that another tribunal *has* reached a different conclusion on very similar facts. But it has to be a matter of 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 tribunals. The latter seems to me to be the case in relation to religious apostasy in Iran. The differentials we have seen are related less to the differences between individual asylum-seekers than to differences in the Tribunal's reading of the situation on the ground in Iran. This is understandable, but it is not satisfactory. In a system which is as much inquisitorial as it is adversarial, inconsistency on such questions works against legal certainty. That does not mean that the situation cannot change, or that an individual's relationship to it does not have to be distinctly gauged in each case. It means that in any one period a judicial policy (with the flexibility that the word implies) needs to be adopted on the effect of the in-country data in recurrent classes of case.'³²

It seems safe to assume that the Court is here and elsewhere encouraging consistently *good* decision making, which is behind the enhanced duty to be 'effectively comprehensive' discussed in *S & Others*. In order for the IAT to establish credibly that the Country Guideline cases promote consistency and that this is a positive virtue, it must produce cases characterised by a thorough

³⁰ *Bambagu Manzeke v SSHD* [1997] Imm AR 524, decision of Lord Woolf, MR.

³¹ *S & Others* [2002] INLR 416, paragraph 28.

³² *Shirazi v SSHD* [2003] EWCA Civ 1562, paragraph 29.

and meticulous approach to the country of origin materials. If there is no consistency in the quality of analysis, consistency in decision-making becomes injurious rather than virtuous.

The central premise on which *S & Others* reached the Court of Appeal was that the Tribunal had failed to take into account two reports by the UN Special Rapporteur on the situation in Croatia. The submission by Nicholas Blake QC for the claimants was that the two reports 'were material of very considerable importance in the context of these appeals, cutting across the grain of other material on which the IAT particularly chose to rely ... [I]t was incumbent on the IAT to state in express terms what it made of them.'³³ The Court of Appeal agreed with this submission, clarifying that while the reports 'were merely one piece of evidence' and 'there was no obligation to refer to every piece of evidence', this particular case was different because the Tribunal intended it to be 'determinative' i.e. to be a Country Guideline case, and as such they had an added duty to make sure the decision was 'effectively comprehensive'.³⁴ The Court of Appeal went on to give guidance on what constitutes 'effectively comprehensive' analysis of material. The key factors can be summarised as follows and are addressed in the following distinct sections:

2.1 **What?** – Referencing of materials in determinations.

2.2 **When?** – Using the most recent reports.

2.3 **Why?** – Giving reasons for preference of one source over another.

2.4 **How?** – Relationship between the materials considered and the conclusions reached.

Many Country Guideline cases fail to meet these four requirements for an effectively comprehensive analysis. In particular, the Tribunal systematically fails in its duty to scrutinise country of origin evidence with even-handed

³³ *S & Others* [2002] INLR 416, paragraph 16.

³⁴ *S & Others* [2002] INLR 416, paragraphs 24-32.

thoroughness. The Tribunal frequently ignores the most recent and most relevant material in preference for material submitted by the Secretary of State, to which it rarely gives any scrutiny whatsoever. This preference persists even when the source material of the Secretary of State is before the Tribunal and it conflicts with the Secretary of State's interpretation or 'spin'. It is often difficult and sometimes impossible to see how conclusions were reached based on the material in question. Lastly, it is common to find evidence submitted on behalf of the claimant rejected out of hand with little or no explanation.

2.1 What? – Referencing of materials in determinations

In order for the Tribunal to establish that it has given comprehensive consideration to the objective materials before it, the first simple step is to list those materials. There are several Country Guideline cases where this is done and this simple recitation immediately informs the practitioner of the breadth of material considered by the Tribunal.³⁵ This practice also has the added value of highlighting to other representatives what material was not in front of the Tribunal.³⁶ In *S & Others*, no reference whatsoever to the two key reports of the Special Rapporteur had been made at Tribunal level. Nicholas Blake QC for the claimants noted that it appeared from the determination that the IAT had not read the reports at all.³⁷ This was in effect the sole basis for the Court of Appeal's decision to remit the case to be re-heard by the Tribunal.

The Tribunal itself has criticised Adjudicators for failing to reference the evidence on which the decision is based. In *SSHD v FM (Kosovo CG)* [2004] UKIAT 00081 (FIA – Mixed Marriage – Albanian – Ashkaelian) the Tribunal comments 'the Adjudicator not only failed to identify the sourcing of the

³⁵ See for example *NM v SSHD (Zimbabwe CG)* [2002] UKIAT 04263 (MDC).

³⁶ Although it should be noted that the Tribunal have encouraged Adjudicators to refer to certain key human rights reports (they list UNHCR, US Department of State, and Amnesty International) even if their attention has not been drawn specifically to them: '[there is] documentation which all Adjudicators should pay regard to in every asylum appeal which comes before them whether their attention is drawn to it or not. They are aware of it and therefore must take it into account. If they do not do so they have not give the appeal that anxious scrutiny which is required in every determination.' *Sukhera* 13018 (23 February 1996), quoted in Symes, M. and Jorro, P., *The Law Relating to Asylum in the UK* (London 2000), p.688-689.

³⁷ *S & Others* [2002] INLR 416, paragraph 12.

objective material upon which she relied but failed to correlate her assessment of the background material to her conclusion that the respondent would be at risk on return.³⁸ However, the same criticism can be levelled at the Tribunal itself, even in cases that it has deemed sufficiently 'comprehensive' to elevate to Country Guideline status. In *A v SSHD (Ethiopia CG)* UKIAT 00046 (Ethnicity – Eritrean – Country Conditions) the Tribunal provided what appears to be a complete list at the outset, but then engaged in substantial analysis of an unnamed article which claimed that the peace process between Ethiopia and Eritrea had broken down.³⁹

'Mr. McCarthy submitted that the word "*breakdown*" in this article is significant. We do not, however, consider that the evidence is that the peace process has "*broken down*", although we accept that there are problems with the peace process. ... It is presumptuous to suggest that, simply because the article on page 146 uses the word "*breakdown*", this means that the peace process has indeed broken down.'⁴⁰

As can be seen above, this discussion was heavily semantic in nature. The Tribunal decided that the use of the phrase 'breakdown' with reference to the peace process did not actually mean the peace process had broken down, thereby dismissing a key plank of evidence submitted on behalf of the claimant.⁴¹ The article in question is not listed at the outset nor is any full information on its provenance supplied in the body of the determination.⁴² This is far from the worst example and at least the Tribunal did attempt to list relevant material at the outset, unlike in many other Country Guideline cases. It could be argued that a list of materials before the Tribunal is unnecessary if the Tribunal makes it clear which documents it is relying on when it reaches its conclusions and gives its reasons for attaching less weight to those it does not rely on. However, this fails to present the complete picture to the future claimant or practitioner, who will not be able to tell whether the case can be challenged

³⁸ *SSHD v FM (Kosovo CG)* [2004] UKIAT 00081 (FIA – Mixed Marriage – Albanian – Ashkaelian), paragraph 24 and see 19.

³⁹ See *A v SSHD (Ethiopia CG)* UKIAT 00046, paragraphs 9, 30-32.

⁴⁰ *A v SSHD (Ethiopia CG)* UKIAT 00046, paragraph 31.

⁴¹ Further examples of the Tribunal's use of semantic distinctions are discussed at

⁴² It seems likely, following some clues in the determination and an internet search, that this article is 'Clash on tense Horn border' [BBC News](#) (3 November 2003), however, this cannot be confirmed with any confidence.

because the materials before the Tribunal were not comprehensive. It also undermines faith in whether the Tribunal has reached a fair decision.

2.2 When? – Using the most recent reports

The two reports of the UN Special Rapporteur stood out for consideration in *S & Others* not just because of their provenance, but because they constituted the most recent material before the Tribunal. The Court of Appeal commented:

'In the circumstances we entertain no doubt but that, if the IAT's duty to give reasons in a determination of this kind is of the nature and quality we have sought to describe, its failure to explain what it made of the [Special Rapporteur] reports means that the duty has not been fulfilled. The position is the more stark given the IAT's own observation at paragraph 25 of the S determination, "[s]ince the situation is somewhat fluid and improvements are undoubtedly occurring, it is necessary to look particularly at the most recent reports".⁴³

This comment goes right to the core of the IAT's somewhat unusual judicial powers in that it is not only able to consider material that was not before the Adjudicator, but indeed has an obligation to consider the most recent material available. *Ravichandran v SSHD* [1996] Imm AR 97 established this principle, which was then enshrined in law at s.77 of the Immigration and Asylum Act 1999, and then at s.85 of the Nationality, Immigration and Asylum Act 2002.

In *VD v SSHD (Albania CG)* UKIAT 00115 (Trafficking) a complete list of the material before the IAT is helpfully provided. This included a report from the European Commission dated 30th March 2004. The case was heard on the 5th April 2004 and this report was the most recent before the Tribunal. Indeed, apart from the US Department of State report of February 2004 (on conditions in 2003), it was the only report before the Tribunal from 2004. There is no further reference to this report in the text of the determination and it seems clear from the text that its contents were not considered, just as was the case with Special Rapporteur reports in *S & Others*. Faith in the Tribunal's conclusions that there is sufficiency of protection for victims of trafficking is inevitably

⁴³ *S & Others* [2002] INLR 416, paragraph 31.

severely undermined by this; a very recent report from a very respectable source which directly addresses the issues under discussion (the rule of law in Albania, practical realities and government strategies) is not even quoted once. Instead the Tribunal chose to rely largely on the CIPU (Country Information and Policy Unit) report (dated October 2003, over six months before the hearing and quoting largely from reports produced earlier that year) and the US Department of State report. Faith in this determination is lost even further upon reading the European Commission report, as it provides information on the state of policing, corruption and impunity that paints a far more negative picture of the availability of protection than that given in the CIPU report,⁴⁴ and clarifies the views of the US Department of State.⁴⁵ Obviously it is arguable whether a thorough reading of the report would have made for a different conclusion, but the fact that it was not even considered or referenced means that *VD v SSHD* (Albania CG) UKIAT 00115 (Trafficking) is not sufficiently authoritative to warrant Country Guideline status and comply with the decision in *S & Others*.

A further issue which arises in relation to the *Ravichandran* principle is the complete absence of recent material at a hearing. It is a clear failure of duty to

⁴⁴ The sections on trafficking in the 'Albania Country Assessment' CIPU (October 2003) were specifically criticised by UNHCR Tirana, which urged CIPU to add to paragraph 6.113 'Particularly problematic was the government's reluctance to recognise that Albania continues to be a major country of origin' and at 6.115 to add 'prosecution of traffickers continued to be the weakest link in the system' and that 'the absence of a witness protection system [...] hindered investigations'. See 'CIPU response to APCI Consultation reply, Consultee: UNHCR Tirana: received 30 January 2004' Advisory Panel on Country Information: 2nd Meeting (2 March 2004), Annex <http://www.apci.org.uk/>

⁴⁵ For example: *On Policing and Corruption*: 'The police remain weak. Training activities have not yet had the expected impact and need to be continued. Community policing has to be strengthened.' [4.4.4]; 'At the present stage, the police are not able to satisfactorily guarantee consistent enforcement of the law in accordance with international standards, and public confidence in the police remains low.' [4.4.4]; *Corruption in Albania remains a serious problem*. According to the 2003 Transparency International Corruption Perception Index, Albania has a score of 2.5 out of 10 (where a country free of perceived corruption receives 10 points on the scale), ranking 92 out of 133 countries.' [2.1.2]. *On Prosecution/Impunity*: 'The rule of law in Albania remains deficient. Albanian law enforcement bodies do not yet guarantee consistent enforcement of the law, in accordance with international standards. Widespread corruption and organised crime continue to be serious threats to the stability and progress of the country. Further efforts are needed to ensure respect of human rights.' [2.1]; 'The overall performance of the judicial system is poor, as is its perception amongst the general public.' [2.1.2]; 'Little progress has been made in Albania as regards general respect for the rule of law. The rule of law remains adversely affected by the weaknesses of the judicial system and public administration as well as organised crime and corruption.' [2.1.2]; 'Prosecution is slow.' [4.4.5] See 'Albania: Stabilisation and Association Report 2004' European Commission (30 March 2004).

set a binding factual precedent based on out-of-date material. In many cases the material is two or three years old, with the worse offender using material over forty years old.⁴⁶

2.3 Why? – Reasons for preferring one source over another

The Court of Appeal stated in *S & Others* that the Tribunal would need to 'explain what it makes of the substantial evidence going to each ... issue' when setting factual precedents. This approach was again implicitly and explicitly accepted in *SSHD v VL (Democratic Republic of Congo CG)* [2004] UKIAT 00007: 'in seeking to assess the new evidence to hand since *M*, we have asked ourselves the following question. What sources among the many placed before us can we attach most weight to and why?'⁴⁷ However, the Tribunal frequently fails to take this crucial step in explaining what it makes of the evidence before it on each of the central issues. For example, in *AM v SSHD (Afghanistan CG)* [2004] UKIAT 00004 (Risk – Warlord – perceived Taliban) the relevant section reads:

'Mr Keating sought to persuade us that materials before the Adjudicator other than the CIPU October 2002 report and the Human Rights Watch did compel a different conclusion. We fail to see this.'⁴⁸

There is no further discussion of these other materials, what they were, what they said, why the Tribunal felt that they led to the same conclusion or anything else relating to this. Whilst this level of comment might be acceptable in an 'ordinary' Tribunal case, it is not sufficient in a case which sets factual precedents and does not meet the standards required by the Court of Appeal.

In *S & Others* the Court of Appeal indicated that reports from prominent bodies should be examined and reasons should be given why, if this is the case, one source may be preferred over another. Furthermore, if a source is found to be deficient in some way, case law has it that the source should not be discarded

⁴⁶ See *WO v SSHD (Nigeria CG)* [2004] UKIAT 00227 (Ogboni cult), discussed later.

⁴⁷ *SSHD v VL (Democratic Republic of Congo CG)* [2004] UKIAT 00007, paragraph 51.

⁴⁸ *AM v SSHD (Afghanistan CG)* [2004] UKIAT00004 (Risk – Warlord – perceived Taliban), paragraph 19.

in its entirety, but that less weight should be attributed to the report and the conclusions should be reached taking all the evidence together as a whole.⁴⁹ The Tribunal must seek a synthesis of the evidence, not simply prefer one report over another. This point was made by Laws J in *R v Immigration Appeals Tribunal, ex p Demisa*:

‘...not necessarily to decide which of conflicting documentary evidence was to be preferred but where there were divergent opinions from reputable human rights organisations about the conditions in a country this may well be sufficient to indicate the presence of a risk of persecution. ...Rather we must examine in depth whether the documents are inconsistent and assess for ourselves whether there is a serious possibility that documents apparently inconsistent may nevertheless be credible. In other words we must apply the *Kaja* test to the documentary evidence as much as to the other evidence.’⁵⁰

As Sedley LJ said in *Karanakaran* [2000] Imm AR 271, ‘everything capable of having a bearing has to be given the weight, great or little, due to it’.⁵¹ The Country Guideline cases examined below reveal a shocking disregard for this approach. The material of the Secretary of State is consistently given preference over all other material, even when it is lacking in relevance, detail and/or is older than other material before the Tribunal. When sources are considered by the Tribunal to have applied the ‘wrong test’ or to have ‘an axe to grind’, their evidence is usually rejected altogether. The Secretary of State’s evidence appears to be regarded as unimpeachably neutral.

Treatment of reports from the Home Office Country Information and Policy Unit (CIPU)

Discussion over the country material relating to each central issue of a case will necessarily involve some consideration of the provenance of that material. Interpreting from the starred decision *A v SSHD (Pakistan)* [2002] UKIAT

⁴⁹ ‘The joint judgement observed that giving greater weight to one matter indicated that less weight was being given to another, but that attribution of lesser weight was not the equivalent of rejection.’ Brooke LJ commenting on the Australian case of *Wu Shan Liang* [1996] 185 CLR 259 in *Karanakaran* [2000] Imm AR 271, paragraph 82.

⁵⁰ Quoted in *Hassen* (15558), quoted in Symes, M. and Jorro, P., *The Law Relating to Asylum in the UK* (London 2000), p.728

⁵¹ *Karanakaran* [2000] Imm AR 271, paragraph 137.

00439,⁵² the Court of Appeal in *Farshid Shirazi v SSHD* [2003] EWCA Civ 1562 commented that, when considering documents produced on behalf of the claimant, in the majority of cases ‘the issue is not whether the document in question is forged or authentic, but whether it is reliable or not. This distinction is vital. Documents produced may be on the right paper, even with the right stamps or signature but may be unreliable because of the way in which they are procured.’⁵³ In the same manner, this point embraces so-called ‘objective’ country materials so that a source of information, be it an expert, a human rights organisation or a news article, has to prove not authenticity, but reliability. As stated by the Tribunal in *SSHD v S*:

‘In all cases, we have to distil the facts from the various reports and documents. Bodies responsible for producing reports may have their own agenda and sources are not always reliable: People will sometimes believe what they want to believe and, aware of that, those with axes to grind may feed willing recipients. Many reports do their best to be objective. Often and inevitably they will recount what is said to have happened to individuals. They will select the incidents they wish to highlight. Such incidents may be wholly accurately reported, but not always. This means that there will almost always be differences of emphasis in various reports and sometimes contradictions. It is always helpful to know what sources have been used, but that may be impossible since, for obvious reasons, sources are frequently anxious not to be identified. We are well aware of criticisms that can be and have been levelled at some reports and are able to evaluate all the material which is put before us in this way.’⁵⁴

Whilst this approach is applied scrupulously to material submitted on behalf of the claimant, the same cannot be said for that submitted by the Secretary of State. The CIPU (Country Information and Policy Unit, part of the Immigration and Nationality Directorate of the Home Office) Assessments, Reports and Bulletins have previously been accepted without question as reliable documents, despite the fact that they are produced by one side in an adversarial process. In the starred determination *Devaseelan v SSHD* [2002] UKIAT 00702, the Tribunal panel deconstructed a report adduced on behalf of the claimant from the Medical Foundation and specifically found that it could not

⁵² Previously *Tanveer Ahmed*.

⁵³ *Farshid Shirazi v SSHD* [2003] EWCA Civ1562, paragraph 62.

⁵⁴ *SSHD v S* (01/TH/00632) 1 May 2001, paragraph 19.

be regarded as objective evidence because it was written as a response to Home Office refusals of Sri Lankan claimants:

'We must also add that this Report is structured as a reply to (or rebuttal of) the Home Office's reasons for refusing many Tamil asylum claims. Nobody could regard the whole report as anything other than partisan. It is written against the Respondent, by those who have taken the side of Appellants. In its proper place, it is none the worse for that. But it should not under any circumstances be regarded as 'objective evidence'.⁵⁵

This was then compared directly with the Home Office material submitted on behalf of the Secretary of State:

'We note that the CIPU Bulletin is also a partisan document, in that it comes from an organ of the Respondent. It is, however, little more than a compendium of material from other published sources, which are listed in the bibliography. They range from reports of international organs, through various governmental bodies in Britain and abroad, to news reports around the world. The Bulletin is arranged in such a way that the source of each statement in it can readily be traced.⁵⁶

Another example can be found in *Badzo v SSHD* [2002] UKIAT 04946 where the Tribunal stated that it considered counsel for the claimant to be 'wrong to stigmatise the CIPU report in the grounds of appeal as being self-serving.' In the Tribunal's opinion, the CIPU report 'offers a balanced, objective and proportionate summary of evidence provided from a wide variety of sources, often with different viewpoints. The quotations are properly cited and can be checked against the references given.'⁵⁷ In this instance CIPU was being compared against 'selective quotations from academics or journalists without indication of their viewpoint or background, or from Roma or Roma related sources that cannot be considered as entirely objective'.⁵⁸

Both of these cases were heard before the first substantial critical appraisal of the CIPU reports was produced by IAS (the first in September 2003 and the

⁵⁵ *Devaseelan v SSHD* [2002] UKIAT 00702 (13 March 2002), paragraph 74.

⁵⁶ *Devaseelan v SSHD* [2002] UKIAT 00702 (13 March 2002), paragraph 75.

⁵⁷ *Badzo v SSHD* [2002] UKIAT 04946 (23 October 2002), paragraph 16.

⁵⁸ *Badzo v SSHD* [2002] UKIAT 04946 (23 October 2002), paragraph 15.

second in September 2004).⁵⁹ Following these reports and the subsequent work of the Secretary of State's Advisory Panel on Country Information (APCI) it can no longer be asserted with any faith that 'the source of each statement in [CIPU] can readily be traced' or that CIPU reports offer 'a balanced, objective and proportionate summary of evidence'. Indeed, despite major improvements seen between the April 2003 Country Assessments and the April 2004 Country Reports, it was still found that 12 out of the 23 Reports assessed were too unreliable to be used with any confidence. The Tribunal and wider judiciary continue, however, to rely on CIPU reports as if CIPU were an independent body and, often, as though the material contained in the reports was of impeccable quality.⁶⁰

Following the production of these two critical analyses by IAS, it has become more common to see the claimant's representative raising objections to the CIPU report. Within the Country Guideline cases a pattern emerges that suggests the Tribunal will only adopt an approach of doubt towards the CIPU report (although rarely even then at the same level of scrutiny applied to material submitted on behalf of the claimant) if such a doubt is raised as an issue. The following cases are illustrative.

SSHD v DM (Albania CG) [2004] UKIAT 00059 (Sufficiency of Protection – PSG – Women – Domestic Violence):

'In this connection we have been referred by Miss Brown to the latest October 2003 Albania Country Report produced by the Country Information and Policy Unit. This is a fully sourced report. It was before Mrs Charlton-Little. She did not seek to make any submissions to us that it was not to be relied on.'⁶¹

⁵⁹ See Carver, N. (Ed.) 'Home Office Country Assessments: An Analysis' IAS (September 2003) and Carver, N. (Ed.) 'Home Office Country Reports: An Analysis' IAS (September 2004). The points made in this research have been taken up by the Advisory Panel on Country Information, see www.apci.org.uk

⁶⁰ This is seen implicitly in the many Country Guideline cases cited below, and also on occasions explicitly, see for example *Saber v SSHD* (Ct of Sessions) [2004] INLR 222-231 'If for example, an adjudicator were to accept evidence from an appellant that was expressly contradicted by all sources of independent information such as the CIPU assessments, the Tribunal might well disturb the adjudicator's finding.'

⁶¹ *SSHD v DM (Albania CG)* [2004] UKIAT 00059 (Sufficiency of Protection – PSG – Women – Domestic Violence), paragraph 15 (emphasis added)

HF v SSHD (Somalia CG) [2002] UKIAT 05520 (Persecution – Discrimination – Yibir – Occupation – Caste):

‘Mr Rhys-Davies criticised the Adjudicator for her heavy reliance upon the CIPU material, but as Mr Ekagha observed, Mr Rhys-Davies himself relied upon the CIPU material quite extensively in his submissions to us. The reason of course is that the CIPU reports draw upon many other sources, representing a variety of opinions and is properly sourced so that the conclusions can be evaluated in the light of their provenance. That is why CIPU reports are so useful and why they are so often quoted.’⁶²

SSHD v VL (Democratic Republic of Congo CG) [2004] UKIAT 00007 (Risk – Failed Asylum Seekers):

‘Mr Buckley also sought support from the latest CIPU materials, the April 2003 and October 2003 Assessments in particular. The criticism made of CIPU that it had not appended the Dutch and Belgian reports with their Bulletin was misplaced: the Bulletin was referenced and in any event both documents had been provided to the Tribunal. [...] Regarding the criticism made that CIPU was selective, even if that were true (which he did not accept) the Tribunal in this case had been provided with all the relevant source documents themselves.’⁶³

The above case forms an exception, in that it is very rare for the Tribunal to have in front of it the source material that the CIPU reports rely on.⁶⁴ Without these primary sources, a Tribunal’s scrutiny of CIPU reports, if it does occur, is necessarily shallow. For example in *AW v SSHD (Somalia CG)* [2003] UKIAT 00111 (Article 3 – Risk – General Situation), where the Tribunal does consider the Home Office to be a partisan source, it states:

‘Nevertheless, it is clear from its terms that it is well-researched and fully sourced throughout. It attempts to provide a balanced assessment of the current position in Somalia, drawing for its information on a number of normally reliable and impartial sources. We are therefore satisfied that it

⁶² *HF v SSHD (Somalia CG)* [2004] UKIAT 05520 (Persecution – Discrimination – Yibir – Occupation – Caste), paragraph 12.

⁶³ *SSHD v VL (Democratic Republic of Congo CG)* [2004] UKIAT 00007, paragraph 22

⁶⁴ A frequent exception to this is the ‘Country Reports on Human Rights Practices’ from the US Department of State.

provides a reliable, reasonably impartial and up-to-date assessment of the current general position in Somalia.’⁶⁵

The Tribunal may observe that the report is sourced, but it is not in a position to know or investigate just how poorly sourced the report may be.⁶⁶ The Tribunal may observe that the report carries a range of opinions from reputable sources, which indeed it does, but it is not in a position to know or investigate how selectively these sources have been quoted, often to the extent of complete misrepresentation.⁶⁷ The Tribunal may observe that a particular sentence in a

⁶⁵ *AW v SSHD (Somalia CG)* [2003] UKIAT 00111 (Article 3 – Risk – General Situation), paragraph 25.

⁶⁶ ‘Paragraph 1.2 of the ‘Scope of the Document’ [CIPU April 2004] states that: a) ‘All information in the Report is attributed, throughout the text, to original source material’ Paragraph 1.4 of the ‘Scope of the Document’ states that: b) ‘The great majority of the source material is readily available in the public domain’ and ‘Copies of other source documents, such as those provided by government offices, may be provided upon request.’ Paragraph 1.5 of the ‘Scope of the Document’ states that: c) ‘All sources have been checked for currency, and as far as can be ascertained, contain information, which remained relevant at the time this Report was issued. Some source documents have been included because they contain relevant information not available in more recent documents.’ Paragraph 1.6 of the ‘Scope of the Document’ states that: d) ‘Where sources identified in this Report are available in electronic form the relevant link has been included.’ **None of the above statements is accurate for any of the 23 Country Reports checked by IAS.** In the ‘Report of Advisory Panel on Country Information consultation exercise on CIPU Country Reports October 2003’ CIPU respond to this criticism by commenting ‘Although errors of this kind do not, in our view, compromise the fundamental integrity of the Reports, they may undermine confidence in them and must be eradicated as far as possible’. While IAS is very happy to note CIPU’s determination to rid the report of these sourcing errors, we still believe that when a considerable amount of the material in a given Report is wrongly sourced, this completely undermines the integrity of that Report. [...] If an expert before the Immigration Appeal Tribunal were to produce a report claiming that conditions in detention in France, for example, amounted to a breach of Article 3, and the IAT found that over 50% of the material did not come from the credible source that the expert had cited, the court would be unlikely to give much weight to the evidence of the expert, and the thesis that detention conditions in France were inhuman and degrading would remain unproven. When it is found that these credible sources actually state the opposite, as is often the case in CIPU Reports, the expert report would have to be considered as fundamentally flawed, lacking in integrity and would therefore be rejected in its entirety. The same would apply to a journalist writing an article, an academic writing a research paper or a student writing an essay. It is extremely difficult to understand why CIPU maintains that such errors do not affect the overall reliability of the reports.’ Carver, N. (Ed.) ‘Home Office Country Reports: An Analysis’ *IAS* (September 2004), pp.12-13 (emphasis added).

⁶⁷ ‘In the [CIPU April 2004] Nigeria Country Report, on five separate occasions, CIPU have added sentences that give a significantly better impression of internal security than that contained in the source material. Three of these statements give evidence to the effect that the Nigerian police reacted in a timely and fair manner, one that the police were justified in their use of force, and the other that the government relies less than previously on the armed forces. On all of these occasions, it is claimed that this is the opinion of a particular source. However, not only was this opinion **not** offered by these sources, the opposite was true: the sources all testified to the inefficiency of the police, their unjustified use of force and the increase of reliance on the armed forces. This is such a serious breach of objectivity that it means the Nigeria Country Report is not a reliable document on which to assess asylum claims if those claims involve the question of availability of state protection, or police or state abuse.’ Carver, N. (Ed.) ‘Home Office Country Reports: An Analysis’ *IAS* (September 2004), pp.7-8 (original emphasis).

CIPU report emanates from a particular source, but it is not in a position to know whether this is actually the case (IAS found around 30% of the material from the April 2004 reports did not in fact come from the source claimed).⁶⁸ The Tribunal may observe the date of the sources used by CIPU, but it is not in a position to know or investigate how often the CIPU report misrepresents the date of the document in question.⁶⁹ A quote from the starred decision of *Kacaj* [2002] Imm AR 213⁷⁰ could well be applied to the CIPU reports:

'The so-called summary is in fact a distillation of all the observations favourable to Ms. Kacaj's claim rather than an objective summary. We deprecate the submission of a document in such a form since it is misleading and the adjudicator persuaded by it to find it unnecessary to look at the source documents to which it refers. Naturally, representatives are entitled to identify and draw attention to passages in reports which assist their case, but they must make it clear that this is what they are doing.'⁷¹

The CIPU reports summarise country conditions in a manner that is misleading and favourable to the Secretary of State, making country conditions appear more positive than the sources of the report indicate.⁷² This is done in such a manner that the judiciary in general find it unnecessary to look at the source documents to which the reports refer. The reports do contain a disclaimer which reads: 'This Country Report has been produced by the Country Information and

⁶⁸ 'All reports contain unattributed statements. Some of these are literally left without a source, others have been credited to a source which does not give the relevant material as claimed. In some Country Reports this is so endemic as to give the reader serious doubts about the validity of the report. In the Iran Country Report in sections five and six alone there are 35 mis-sourced statements and 12 unsourced statements. In the Angola Country Report (sections 5, 6 and Annexes) there are 27 mis-sourced statements. In the Somalia Country Report there are 15 mis-sourced statements. In the Iraq Country Report, mis-sourcing or misunderstanding the source accounts for 30% of the information checked. [...] Of particular concern is Serbia and Montenegro (including Kosovo) which is so badly sourced and edited as to raise serious doubts about the validity of the whole report.' Carver, N. (Ed.) 'Home Office Country Reports: An Analysis' *IAS* (September 2004), p.13.

⁶⁹ 'In the Nigeria Country Report, there were many times when the footnote had been amended to make the material from the US Department of State report for 2003, when in actual fact it was a direct quote from 2002 or 2001. With regard to Serbia and Montenegro (including Kosovo) there have been 21 documents released on the Amnesty International website on these countries since last year and not one of them is used or referenced in CIPU's April 2004 Report. Use of out of date material is also particularly problematic in the Algeria and Iran Country Reports.' Carver, N. (Ed.) 'Home Office Country Reports: An Analysis' *IAS* (September 2004), p.14.

⁷⁰ *SSHD v Klodiana Kacaj; Klodiana Kacaj v SSHD* [2002] Imm AR 213.

⁷¹ *Kacaj* [2002] Imm AR 213, paragraph 31.

⁷² Of the April 2004 CIPU reports of particular concern are: Afghanistan, Albania, Angola, China, Colombia, Congo (Republic of), Eritrea, Iran, Iraq, Nigeria, Sri Lanka, Zimbabwe. See Carver, N. (Ed.) 'Home Office Country Reports: An Analysis' *IAS* (September 2004).

Policy Unit, Immigration and Nationality Directorate, Home Office, for use by Home Office officials involved in the asylum / human rights determination process.⁷³ The fact that the reports are produced for their own officials, however, appears rarely to register with the Tribunal. Under a guise of balanced reporting and objectivity, the case for the Secretary of State is made.⁷⁴ If the Tribunal perseveres in its assumption that CIPU is accurate and balanced then the only way to dislodge this blind faith is for the claimant's representative to conduct hours of painstaking research. This is, of course, difficult if not impossible within Legal Services Commission funding restrictions.⁷⁵ What the Tribunal could do is apply the same standard of doubt to the CIPU reports as is applied to other sources. Despite the criticisms raised by IAS and the overwhelming evidence presented to and highlighted by the Advisory Panel on Country Information on the matter of bias in CIPU reports,⁷⁶ the Tribunal persists in accepting the Secretary of State's word as verbatim truth, unless specifically challenged with strong evidence by the claimant's representative. This often equates to the CIPU report being given the most weight out of all the reports before a Tribunal in any one case, even when that same Tribunal has accepted it to be wrong in particular instances.⁷⁷ The same cannot be said for the reports of experts and many other bodies – as soon as one 'mistake' has been made (i.e. to apply the 'wrong test'), the Tribunal dismisses the evidence of the whole report, or give it so little weight as to render it worthless.⁷⁸ To return to the Tribunal's language in *SSHD v S*, CIPU, just like any other report producing-body, 'have their own agenda and sources [which] are not always reliable.' They may 'do their best to be objective' but they 'will select the incidents they wish to highlight'.⁷⁹

⁷³ 'Country Reports' *CIPU* (April 2004), s.1.1 Scope of Document.

⁷⁴ The Secretary of State has openly declared his case to reduce the number of asylum seekers. See 'Home Office Autumn Performance Report 2004' www.homeoffice.gov.uk/docs3/autumnperformreport2004.pdf

⁷⁵ As the Tribunal itself stated as long ago as *Thivagurajah Balachandran v SSHD* (17 December 1999) 20262 'It is for the parties to put before the Tribunal the material upon which they seek to rely in order to persuade the Tribunal that they have a good case.'

⁷⁶ See information under 2nd and 3rd meetings on www.apci.org.uk

⁷⁷ Dr Hugo Storey, Vice-president to the IAT, speaking at the IAS Conference in Leicester (September 2004) confirmed that even when particular passages of the CIPU report were found to be lacking, the Tribunal was still entitled in his opinion, to rely on other parts of the CIPU report.

⁷⁸ See the discussion in the chapter in expert evidence.

⁷⁹ *SSHD v S* (01/TH/00632) 1 May 2001, paragraph 19.

Given the above, Country Guideline cases that rely solely or mainly on CIPU reports have to be viewed in an extremely critical light, especially those that rely on the CIPU Assessments produced prior to October 2004, when some improvements were noticeably made. Due to resource constraints, it has not been possible to establish just how many of these there are, nor to research the issues in all of these cases, but a few examples serve to illustrate their diversity and frequency.

In *SSHD v MG (Angola CG)* [2002] UKIAT 07360 the Tribunal appears only to have had the CIPU Assessments of Angola of April and October 2002 before it by way of country of origin material. In assessing prison conditions in Angola it relies solely on the CIPU reports which in turn rely exclusively on the US Department of State report for 2001. The case was heard on 19th December 2002, some twelve months, therefore, after the period of assessment ended. Far worse, the US Department of State report has been selectively quoted and several key sentences have been omitted by CIPU. Language has also been altered so that where the US Department of State reads 'prison officials **routinely** beat detainees',⁸⁰ the CIPU reports read 'prison officers ... **frequently** beat inmates'.⁸¹ Whilst such a subtle change may appear innocuous to a lay person, those involved in asylum and human rights law are aware that this is a significant difference. 'Routinely' could imply systematic, regular beatings and even official sanctioning, whereas 'frequently' suggests that such activity happens often but at random and on the whim of an individual prison guard.⁸² The determination is now a factual precedent for the proposition that prison conditions in Angola are not bad enough to meet the Article 3 threshold.

⁸⁰ 'Country Reports on Human Rights Practices for 2001' US Department of State (March 2002), Angola, s.1c.

⁸¹ 'Angola Country Assessment' CIPU (April 2002), s.4.40 ; and 'Angola Country Assessment' CIPU (October 2002), s.5.26.

⁸² This is a controversial area of law but the leading case is *Batayav* [2003] EWCA Civ 1489. See also *Harari* [2003] EWCA Civ 807 and for the Tribunal's view see *BE (Iran)* [2004] UKIAT 00183: 'It is clear that in order to show prison conditions would give rise to a real risk of serious harm, it is necessary to show a consistent pattern of gross, flagrant or mass violations of the human rights of prisoners'.

Another example is found in *WO v SSHD (Nigeria CG)* [2004] UKIAT 00227 (Ogboni cult). The basis for the decision that there is no evidence of murderous activities by the Ogboni, that it does not have significant power in Nigerian civil society and it only operates within the Yoruba tribe, is the CIPU report of April 2004. Out of the five paragraphs in this report which deal with the Ogboni, four of them rely on – as cited by CIPU – 'The Yoruba Ogboni Cult in Oyo Peter Morton Williams'.⁸³ No date is given for this report by CIPU, but in fact it is dated 1960.⁸⁴ The other two sources used in the five paragraphs, both from the Canadian Immigration and Refugee Board, are dated May 1991 and May 1993. The Tribunal's findings on these matters in this case are primarily based on a report written in 1960, with supportive evidence from reports which were thirteen years and eleven years old at the date of the hearing. This case is a current Country Guideline case which today (December 2004) sets the benchmarks by which similar cases stand or fail.

In *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214 (Kosovo – Roma) the grounds of appeal included the point that the Adjudicator failed to take note of the relevant CIPU report, and hence the Tribunal concentrates on that report.⁸⁵ It goes on, however, to base its conclusions almost entirely on that report, at the expense of relevant material from other bodies such as UNHCR, Human Rights Watch and the Parliamentary Assembly for the Council of Europe. In the CIPU report, the Tribunal reads evidence from two reputable sources – the US Department of State report and the UN Interim Administration Mission in Kosovo – that the 'number of incidents of violence against minorities had decreased significantly' and that whilst there was still a 'low level background of inter-ethnic violence, most crime was now considered to be

⁸³ 'Country Report on Nigeria' CIPU (April 2004), Annex D – References to Source Material, source 85.

⁸⁴ Morton-Williams, P. 'The Yoruba Ogboni cult in Oyo' AFRICA, Vol. 30, Issue 4 (1960), pp. 362-374.

⁸⁵ 'The Secretary of State's grounds of appeal allege, in summary, that there was a failure by the Adjudicator to consider some of the relevant background material, in particular the relevant CIPU Paper on Serbia and Montenegro which was in the bundle before him on the Secretary of State's behalf. It was also said that he had not made credibility findings on a number of relevant issues. [...] We accept that first point and Miss Chuni could scarcely resist it. The Adjudicator's consideration of the background material was inadequate; he had ignored the relevant CIPU Paper. He gave no reason for doing so. We have accordingly examined all the background material.' *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214, paragraphs 11-12.

economically motivated.⁸⁶ Both of these are reported accurately, but CIPU have not updated the material – the UN Interim Administration Mission in Kosovo dated October 2002 (CIPU used the July 2002 report) notes that ‘there were again ethnically motivated crimes’.⁸⁷ CIPU asserts that inter-ethnic violence was of a ‘low-level’ and this translates into the Tribunal’s conclusion that the incidence of attacks against the Roma ‘does not appear to be high.’⁸⁸ In a non-exhaustive list of selective security incidents involving minorities, UNHCR listed 136 separate incidents between January 2003 and April 2004 (with the March violence contained in a separate appendix).⁸⁹ It might be the case that the Tribunal’s conclusions could be justified. As with many other Country Guideline findings, however, the failure to analyse and engage with the evidence in a critical manner leaves the reader confident neither that the conclusions reached are justified nor justifiable (see below for further discussion on this point).

The CIPU report in question in *FD* is credited by the Tribunal for ‘draw[ing] on a wide range of sources including UNHCR and Amnesty International’⁹⁰ and yet, rather contrarily, the opinion of UNHCR was actually rejected by the Tribunal⁹¹ and other sources presented by the claimant’s representative were ignored in the Tribunal’s analysis or openly dismissed (see below). The Tribunal’s criticism of the Adjudicator concerning his use of the CIPU report is as follows:

‘The Secretary of State’s grounds of appeal allege, in summary, that there was a failure by the Adjudicator to consider some of the relevant background material, in particular the relevant CIPU Paper on Serbia and Montenegro which was in the bundle before him on the Secretary of State’s behalf. It was also said that he had not made credibility findings on a number of relevant issues. ... We accept that first point and Miss Chuni could scarcely resist it. The Adjudicator’s consideration of the background material was inadequate; he had ignored the relevant CIPU

⁸⁶ *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214, paragraph 25, based on ‘Serbia and Montenegro Country Assessment’ CIPU (October 2003), s.K.6.31.

⁸⁷ ‘Report of the Secretary General on the UN Interim Administration Mission in Kosovo’ *United Nations* (9 October 2002).

⁸⁸ *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214, paragraph 50.

⁸⁹ ‘Update on the Kosovo Roma, Ashkaelia, Egyptian, Serb, Bosniak, Gorani and Albanian communities in a minority situation’ *UNHCR* (1 June 2004) Appendix 1: Non-exhaustive list of selected security incidents involving minorities, January 2003 – April 2004

⁹⁰ *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214, paragraph 43.

⁹¹ See *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214, paragraph 54.

Paper. He gave no reason for doing so. We have accordingly examined all the background material.’⁹²

The Tribunal appears to be specifically criticising the Adjudicator for taking the information straight from the ‘horse’s mouth’, rather than through the CIPU distillation. It is not clear why a selective compilation of parts of sources such as UNHCR would be more reliable than those sources themselves. Nor is it clear why weight should be placed on those sources which are effectively ‘approved’ by CIPU but not on those which it has ignored.

Similarly, in *SSHD v YP (Sri Lanka CG)* [2003] UKIAT 00145 (Maintenance – Detention records), the Tribunal criticises the Adjudicator for choosing not to rely on the CIPU report:

‘[The Adjudicator’s] analysis ... starts with the observation that “the CIPU report of April 2002 suggests that peace process is in place and therefore it is safe to return Tamils to Sri Lanka. This document is general in nature and only has a small section on the peace process.” He then appears to ignore what was in the CIPU report but devoted a number of pages of the determination to a summary of a report from the Refugee Council of the United Kingdom. In the light of this he concluded that “The peace process, if there is one, is fragile; many previous peace agreements were dishonoured by the Sinhala government; therefore asylum seekers may be unwilling to trust the Sinhala government any more..... the Armed Forces of the Sri Lankan state and the LTTE on the ground level do not appear to observe the letter let alone the spirit of the agreement; there continues to be violations of human rights by both the combatants; the Respondent will be a returnee on temporary documents indicating a failed asylum seeker; therefore I find it is reasonably likely that he will be stopped, interrogated and/or detained.”’⁹³

There were other failings with regard to the Adjudicator’s determination, but there is nothing in the quoted passage to indicate that the Adjudicator’s reasoning here at least was flawed. The objection of the Tribunal appears to be nothing other than its preference for the CIPU report over other reports, in this case a report of the Refugee Council, even though the CIPU report contained little information of relevance to the issue.

⁹² *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214, paragraphs 11-12.

⁹³ *SSHD v YP (Sri Lanka CG)* [2003] UKIAT 00145 (Maintenance – Detention records), paragraph 6.

In *HR v SSHD (Colombia CG)* [2002] UKIAT 05736 (UP – FARC) the Tribunal concludes from ‘the absence of references to problems for UP [Unión Patriótica] members’ since 1997 that the claimant (a UP member) is not at significant risk’.⁹⁴ This conclusion, along with a lack of other up to date information, is based on the CIPU report of April 2002 which states that ‘since 1999 the UP has faded from any position of political significance and has not featured as being active in any news report’.⁹⁵ This statement is hugely misleading and is repeated in the April 2004 CIPU report and those in between.⁹⁶ Despite the lack of prominent political activity, members of the UP continue to be killed and ‘disappeared’ and are at risk, according to the US Department of State, the UN High Commission for Human Rights (UNHCHR), Amnesty International, and UNHCR. The US Department of State and Amnesty International both go on to give specific examples of individuals ‘disappeared’,⁹⁷ as well as concurring with the UN report that ‘the political persecution of members of some parties continued, especially members of the Unión Patriótica, who suffered assassinations and threats.’⁹⁸ UNHCR state that UP members remain ‘at heightened risk’ and that ‘in spite of a government protection programme instigated in 2001, some 100 members were killed in the last two years [2000-2002].’⁹⁹

Treatment of reports from the US Department of State

In several of the cases where the Tribunal relies on documentation other than the CIPU report, this includes or is often primarily the ‘Country Reports on Human Rights Practices’ produced by the US Department of State.¹⁰⁰ Reading many Country Guideline cases, it quickly becomes clear that the Tribunal has – in common with the CIPU reports – great faith in the US Department of State reports, despite the fact that they are unsourced. In *Lahori v SSHD* [1998]

⁹⁴ *HR v SSHD (Colombia CG)* [2002] UKIAT 05736 (UP – FARC), paragraph 11.

⁹⁵ *HR v SSHD (Colombia CG)* [2002] UKIAT 05736 (UP – FARC), paragraph 10.

⁹⁶ No report was produced for Colombia in October 2004.

⁹⁷ ‘Urgent Appeal UA 101/03’ [Amnesty International](#) (16 April 2003)

⁹⁸ ‘Report of the UNHCHR on the human rights situation in Colombia’ [United Nations](#) (24 February 2003), 114.

⁹⁹ ‘International protection considerations regarding Colombia asylum-seekers and refugees’ [UNHCR](#) (September 2002)

¹⁰⁰ See *VD v. SSHD (Albania CG)* UKIAT 00115.

G0062 the Tribunal stated that it ‘place[s] the US State Department reports at a particularly high level of reliability’ as ‘a very careful review of how the reports are prepared, on what basis, who is consulted and the use to which the reports are put, can all be found in the Foreword and Appendix to each volume.’¹⁰¹ This much is certainly true; the Preface to the reports for 2004 specifies that:

‘Throughout the year, our embassies collect the data contained in it through their contact with human rights organizations, public advocates for victims, and others fighting for human freedom in every country and every region of the world. Investigating and verifying the information requires additional contacts, particularly with governmental authorities. Such inquiries reinforce the high priority we place on raising the profile of human rights in our bilateral relationships and putting governments on notice that we take such matters seriously. Compiling the data into a single, unified document allows us to gauge the progress that is being made. The public release of the Country Reports sharpens our ability to publicize violations and advocate on behalf of victims. And submission of the reports to the Congress caps our year-round sharing of information and collaboration on strategies and programs to remedy human rights abuses – and puts us on the path to future progress.’¹⁰²

The preface, however, exposes several weaknesses not considered in *Lahori*. The reason for producing the reports is made clear above and, in much more detail, in the ‘Overview and Acknowledgements’ section. The reports are written for a political purpose, as part of a global agenda to enhance and further the spread of democratic capitalism across the world. They are explicitly used by the US government ‘for shaping policy, conducting diplomacy and making assistance, training and other resource allocations.’¹⁰³ Following the information-gathering role of the embassies, they are scrutinised by the various bodies of the State Department in Washington.¹⁰⁴ This political aspect to the report has been remarked upon several times by US domestic observers. Most notably, the Lawyers Committee for Human Rights has ‘expressed reservation with respect to the reporting of human rights issues in a number of particularly sensitive countries where the United States itself now has reason to feel

¹⁰¹ *Lahori v SSHD* [1998] G0062

¹⁰² ‘Country Reports on Human Rights Practices 2003’ [US Department of State](#) (25 February 2004), Preface.

¹⁰³ ‘Country Reports on Human Rights Practices 2003’ [US Department of State](#) (25 February 2004), Overview and Acknowledgements.

¹⁰⁴ ‘Country Reports on Human Rights Practices 2003’ [US Department of State](#) (25 February 2004), Overview and Acknowledgements.

vulnerable to international criticism'.¹⁰⁵ Human Rights Watch comment on specific country reports where they feel the US political agenda has clouded any 'objective' vision.¹⁰⁶ But perhaps most significantly of all, the US courts have noted their concerns about the lack of objectivity shown in the reports, significantly in cases which involved asylum or deportation issues.¹⁰⁷

The second weakness revealed in the 'Preface' and 'Overview and Acknowledgements' to the 'Country Reports on Human Rights Practices' is the methodology used. Both of these sections specify that the reports are reliant on the United States embassy in the given country for the first crucial stage of information gathering. No mention is made of what process is used in countries where the United States does not have an embassy. It has become apparent during the debate over the alleged weapons of mass destruction in Iraq over the last two years, and over the initial response to the events of 11th September 2001 when it emerged that the FBI and CIA lacked Arabic, Farsi and Pashto speakers, that US 'on-the-ground knowledge' is strikingly weak in countries where it does not have an embassy.¹⁰⁸ In several cases, particularly where the government of the country concerned is hostile to US policy (see for

¹⁰⁵ 'A Review of the State Department Country Reports on Human Rights Practices' before the Committee on International Relations, Subcommittee on International Terrorism, Non-Proliferation and Human Rights' Lawyers Committee for Human Rights (30 April 2003).

¹⁰⁶ Of the 2002 reports, Human Rights Watch specifically mention: Afghanistan, for overstating human rights progression since the fall of the Taliban; China, with reference to the sections on AIDS/HIV and Tibet; Colombia; Nigeria, for insufficiently addressing impunity for security forces; Pakistan. See 'Critique of State Department's Human Rights reports' Human Rights Watch (4 April 2003). Of the 2001 reports, Human Rights Watch criticise the reports on Afghanistan, for failure to give sufficient attention to past and present abuses by the Northern Alliance; Colombia, for inflating the military's progress in cutting ties with the paramilitaries; DR Congo; Israel/Palestine; and Nigeria, for the lack of cover of the Nigerian government's failure to prevent or investigate human rights abuses by security forces.) 'US State Department reports critique' Human Rights Watch (4 March 2002).

¹⁰⁷ 'There is perennial concern that the [State] Department softpedals human rights violations by countries that the United States wants to have good relations with' *Gramatikov v. INS*, 128 F.3d 620 (7th Cir.1997); and 'such letter [sic] from the State Department do not carry the guarantee of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world... No hearing officer or court has the means to know the diplomatic necessities of the moment in light of which the statements must be weighed.' *Kasravi v INS*, 400 F 2d 675, 677 n.1 (9th Cir 1968). Both quoted in Symes, M. and Jorro, P., The Law Relating to Asylum in the UK (London 2000), p.726.

¹⁰⁸ See Norton-Taylor, R. and Hopkins, N. 'Secret services struggle to get up to speed' The Guardian (16 October 2001); Campbell, D. and Connolly, K. 'FBI failed to find suspects named before hijackings' The Guardian (25 September 2001); and Beaumont, P. 'CIA gets go ahead for a return to murderous Cold War tactics' The Guardian (23 September 2001).

example the report on Iraq for 2002 or the current Iran report), the tendency is, arguably, to over-emphasise the level of human rights abuses, most likely the result of over-reliance on dissidents and exiles with their own agendas. In other cases, however, this means a frightening reliance on the government of the particular country.¹⁰⁹ In all of the reports, it must be remembered, the information is not just scrutinised by Washington, but the information is verified through in-country governmental contacts.¹¹⁰

Treatment of primary source material

The Tribunal consistently approaches reports other than those of CIPU and the US Department of State with thorough scrutiny. Given that Country Guideline cases seek to impose certainty on precarious situations which are often impossible to view entirely objectively, all of the reports under consideration will have some kind of subjective slant. This idea was aired by the Tribunal itself – *Lahori v SSHD* [1998] G0062 states:

'No document is absolutely unbiased, except that we would prefer, to rephrase it, to say every report proceeds from some viewer stand point. Once one knows that stand point, it is then much easier to assess the weight of the statement in relation to other evidence. There are cases of clear bias where the "axe to grind" affects objectivity to a serious degree.'¹¹¹

This point is also made in *NM v SSHD (Zimbabwe CG)* [2002] UKIAT 04263 (MDC) where it was agreed at the outset that 'in considering this evidence we should take into account the purpose of the reports'.¹¹² The previously quoted

¹⁰⁹ The clearest example of this is the US Department of State report for Georgia for 2000 which, with no presence on the ground, was strongly supportive of the Georgian government perspective on the breakaway region of Abkhazia. This is in complete opposition to a report from a UK Parliamentary delegation, which, having visited the region largely supported the claims of the Abkhazians. The US Department of State in turns out, far from being unable to send officials to Abkhazia, chose not to, in case this was misconstrued as some sort of recognition of Abkhazia's de facto independence. See 'Post-war developments in the Georgian-Abkhazian dispute' UK Parliamentary Human Rights Group (June 1996), 12.

¹¹⁰ 'Country Reports on Human Rights Practices 2003' US Department of State (25 February 2004), Preface: 'Investigating and verifying the information requires additional contacts, particularly with governmental authorities.'

¹¹¹ *Lahori v SSHD* [1998] G0062

¹¹² *NM v SSHD (Zimbabwe CG)* [2002] UKIAT 04263 (MDC), paragraph 12. The reports referred to were: 'Zimbabwe Country Assessment' CIPU (April 2002), 'Zimbabwe: What Next?'

comments of the Deputy President with regard to material from the Medical Foundation in *Devaseelan v SSHD* [2002] UKIAT 00702 confirm this rigorous scepticism, at least in relation to evidence submitted by claimants. In the better cases, sound reasoning is given for why a particular report from a particular organisation may be found to be wanting, and no objections can be raised.¹¹³ However, the norm is for reports to be dismissed out of hand with no more than cursory reasoning.

Such cursory reasoning is most often displayed in relation to campaigning organisations. The Tribunal indicates that because a report comes from a source which has first-hand involvement in the subject matter, it cannot be reliable. Hence in *Badzo v SSHD* [2002] UKIAT 04946 reports from Roma or Roma-related sources 'cannot be considered as entirely objective'.¹¹⁴ The logic runs: Tom is a paraplegic residing in Bath, *ergo*, Tom cannot be a reliable source of information on facilities for paraplegics in Bath. Of course, the purpose of the organisation in question and of the information produced should always be borne in mind, as the Tribunal frequently reminds itself in relation to claimant evidence, but just because an organisation has first-hand involvement in the subject matter does not mean it is automatically biased or cannot shed light on the situation.¹¹⁵ In cases concerning Roma such as *Badzo* there is no

International Crisis Group (14 June 2002), "We Will Make Them Run" Physicians for Human Rights of Denmark (21 May 2002), 'Political Violence Reports' Zimbabwe Human Rights NGO Forum (19 March 2002 and 28 March 2002), and a 'letter from the Home Office indicating that returns of failed asylum seekers to Zimbabwe continued to be suspended'.

¹¹³ See for example the examination of the material from Bail for Immigration Detainees in *SSHD v VL (Democratic Republic of Congo CG)* [2004] UKIAT 00007.

¹¹⁴ *Badzo v SSHD* [2002] UKIAT 04946 (23 October 2002), paragraph 15.

¹¹⁵ It is also the case that when the report writers have a particular advocacy objective (apart from those from governmental sources), the Tribunal approaches them with caution. Perhaps the most excessive example is found in the criticism of Amnesty International in *Lahori*: 'There are cases of clear bias where the "axe to grind" affects objectivity to a serious degree. An example sometimes quoted has been that Amnesty International, in its total opposition to capital punishment. This is an example of the sort of axe to grind which even Adjudicators have from time to time allowed to influence their attitude to Amnesty International, but having identified this, an evaluation of Amnesty International reports can be made.' (*Lahori v SSHD* [1998] G0062) That the UK Government abolished the death penalty for murder in 1965, and went on to make an international commitment to the permanent abolition of the death penalty on 20 May 1999, through ratification of Protocol 6 to the European Convention on Human Rights, does not prevent the Tribunal here from imputing Amnesty International with a political opinion that amounts to extremism (having an 'axe to grind'). Thankfully the views of the Tribunal in *Lahori* can be nullified by that of Buxton LF in *R v Special Adjudicator, ex p 'K'* (FC3 1999/5888/4; 4 August 1999) who commented that Amnesty International was 'recognised as a responsible, important and well-informed body' and that Immigration tribunals would 'always give

justification for ignoring evidence from Roma-related sources simply because they are Roma-related. In instances where bias is evident due to the nature of the organisation, the correct approach is for less weight to be given to the evidence, although the evidence should still be considered¹¹⁶ – and, as argued above, this approach should also be applied to government sources. The Home Office's openly declared interest to reduce the number of asylum-seekers is as relevant, if not more relevant, than the Medical Foundation's interest to document and support survivors of torture.¹¹⁷ The norm in approach to such organisations, however, is for complete rejection, rather than qualified assessment.

In *SSHD v K (Afghanistan CG)* [2003] UKIAT 00057 (Risk – Sikh – Women) the Tribunal preferred the evidence of the (male) Norwegian Ambassador on changes to Afghan women's lives in the post-Taliban era, to that of the Chief of the Afghan Women's Association:

'...the Chief of the Afghan Women's Association (AWA) said ... that no serious changes in the lives of women have taken place and that women are still being mistreated for not wearing a burka. ...AWA are quoted as saying that there is no security for women at any level, that if women go to the bazaar without wearing a burka, they risk threats or - if nobody interferes - actual physical punishment. **These assertions by AWA run counter to the objective evidence and what is known about the situation of women under Taliban rule.** It is also at odds with the observation of the Norwegian Ambassador ... that he believed that he had noticed significant changes in the overall street picture in the last 6

consideration to their reports'. Buxton LF refusing permission to move for judicial review in *R v Special Adjudicator, ex p 'K'* (FC3 1999/5888/4; 4 August 1999) quoted in Symes, M. and Jorro, P., The Law Relating to Asylum in the UK (London 2000), p.726. See also *Mario* (16307; 6 March 1998): 'We have to say that in so far as there is a conflict between the report of the State Department and the AI and Human Rights Watch reports (and we do not think there is a major division of opinion here), we to an extent feel more comfortable with the well documents and source reports of the Non Governmental Organisations. The US State Department is not sourced.'

¹¹⁶ 'Needless to say, as the High Court of Australia observed in *Wu Shan Liang*, when assessing the future, the decision-maker is entitled to place greater weight on one piece of information rather than another. It has to reach a well-rounded decision as to whether, in all the circumstances, there is a serious possibility of persecution for a Convention reason, or whether it would indeed be unduly harsh to return the asylum-seeker to the allegedly "safe" part of his/her country. This balancing exercise may necessarily involve giving greater weight to some considerations than to others, depending variously on the degree of confidence the decision-maker may have about them, or the seriousness of their effect on the asylum-seeker's welfare if they should, in the event, occur.' Brooke LJ in *Karanakaran v SSHD* IATRF-990759-C (25 January 2000), paragraph 103.

¹¹⁷ With reference to *Devaseelan v SSHD* [2002] UKIAT 00702 (13 March 2002).

months as regards the situation of women. Other sources are quoted as saying that the situation of women in Afghanistan has improved.' (emphasis added)¹¹⁸

The highlighted sentence claims that the assertions of the Afghan Women's Association 'run counter to the objective evidence'. The Tribunal in this case had only three reports before it, two from the Danish Immigration Service and the CIPU Afghanistan Country Report of April 2003.¹¹⁹ All three therefore were from bodies whose openly declared objectives are to reduce the number of asylum seekers.¹²⁰ Notwithstanding that, the Tribunal's claim is not true anyway – not only is no mention made of what 'objective evidence' the AWA statements run counter to, but the evidence from all three reports actually corroborates what the AWA claimed. Indeed, the first of these had even been quoted earlier by the Tribunal:

- CIPU report as quoted by the Tribunal: 'even in Kabul, **women face constant threats to their personal security** from other civilians as well as from armed men belonging to various political factions'.¹²¹
- Danish Immigration Service May 2002 Report: 'The human rights advisor for UNAMA (United Nations Assistance Mission to Afghanistan) judged that **the physical safety for women in most areas of Afghanistan is extremely difficult** [and] pointed out that **women still wear a burka for their own safety**, which also applies for urbanised wealthy women.' All five sources consulted for the section on conditions for women in this report stated that women had to wear a burka for their own safety.¹²²

¹¹⁸ *SSHD v K (Afghanistan CG)* [2003] UKIAT 00057 (Risk – Sikh – Women), paragraph 14.10 (emphasis added).

¹¹⁹ Both the quote from the Norwegian Ambassador and AWA are found in 'Report on fact-finding mission to Kabul and Mazar-i-Sharif, Afghanistan and Islamabad, Pakistan 22 September - 5 October 2002' *Danish Immigration Service* (March 2003).

¹²⁰ See 'Blair's asylum pledge defended' *BBC News Online* (10 February 2003); and 'Home Office Autumn Performance Report 2004' where the Home Secretary David Blunkett confirms that the Home Office have been meeting their targets to reduce the intake of asylum seekers; and 'Denmark: hard times for asylum seekers and refugees' *Statewatch* (13 February 2002) <http://www.statewatch.org/news/2002/feb/13denmark.htm>

¹²¹ *SSHD v K (Afghanistan CG)* [2003] UKIAT 00057 (Risk – Sikh – Women), paragraph 14.8; and 'Afghanistan Country Report' *CIPU* (April 2003), s.6.68.

¹²² 'Report on fact-finding mission to Islamabad and Peshawar, Pakistan and Kabul, Afghanistan 5 – 19 May 2002' *Danish Immigration Service* (10 September 2002), s.IV.3.1.

- Danish Immigration Service October 2002: 'The Director of the Secretariat of the human rights commission and the Commissioner estimated that it would take a very long time to develop a system which protects young girls and women against violations. ...In general, **the situation of women continues to be very bad**. ...The Deputy Minister for Women's Affairs said that the authorities are unable to guarantee the security of women – but that applies equally to the security of men. However, it is not possible for single women to return to Afghanistan.'¹²³

The final report quoted also contains detailed evidence from UNHCR Kabul stating unequivocally that 'families with a female sole provider ... now have no protection'¹²⁴ and also gives several examples of the justice system being deeply ingrained with gender-specific abuse.¹²⁵ Indeed, the only evidence in the three reports before the Tribunal that runs counter to the assessment of the AWA is the opinion of the Norwegian Ambassador. No indication is given by the Tribunal as to why a male foreign Ambassador living in a compound in Kabul might be more knowledgeable or more aware of the situation for women in post-

¹²³ 'Report on fact-finding mission to Kabul and Mazar-i-Sharif, Afghanistan and Islamabad, Pakistan 22 September - 5 October 2002' *Danish Immigration Service* (March 2003), s.4.8 and 4.81. The report also states that the Deputy Minister for Women's Affairs said that women 'were not allowed to go out alone' let alone with or without a burka. 'Report on fact-finding mission to Kabul and Mazar-i-Sharif, Afghanistan and Islamabad, Pakistan 22 September - 5 October 2002' *Danish Immigration Service* (March 2003), 4.4.

¹²⁴ 'Report on fact-finding mission to Kabul and Mazar-i-Sharif, Afghanistan and Islamabad, Pakistan 22 September - 5 October 2002' *Danish Immigration Service* (March 2003), 4.5.1.

¹²⁵ For example: 'The source had several examples of families where the men who had given information about such situations [human rights violations] had been subjected to mass rapes of their wives and daughters as reprisals' [4.1]; 'Councils of elders rule on many cases involving property disputes and sexual matters. One example quoted was the case of a married woman who had been raped, where it was ruled that the offender's family should give the victim's family a young woman as compensation. ...the sources ... thought it would take a long time to build up a system that protects girls against such injustices.' [4.4]; The Deputy Minister for Women's Affairs said that in cases where a woman is caught in adultery, the spouse decides the punishment.' [4.4]; [T]he source mentioned a case where a police officer on several occasions imprisoned the father of a young woman he wanted to marry, but who did not wish to marry the police officer. The family complained, and the Minister of Justice referred the matter to court, but without doing anything else. A month later, the girl had still not received any decision by the court against the man, and the father was still being detained (illegally). [4.4]; The British embassy advised that a delegation of UK Members of Parliament had inspected a prison for women, and that the women were said to have been imprisoned for acts which are not considered to be an offence in Western countries, such as leaving their husband [4.8]; 'Report on fact-finding mission to Kabul and Mazar-i-Sharif, Afghanistan and Islamabad, Pakistan 22 September – 5 October 2002' *Danish Immigration Service* (March 2003).

Taliban Afghanistan than an organisation which specifically exists for women in Afghanistan and is (and has been since 1965) involved in 'women's rights at an ideological level as well as being involved in social work'.¹²⁶ Nor is there any information given in the quoted report on the experience of the Norwegian Ambassador in Afghanistan, any interviews he may have conducted with women, or relevant trips he may have made. The report does contain detailed information on the work of the AWA.¹²⁷ How the assertions of AWA alter from 'what is known about the situation of women under Taliban rule' is not specified and cannot be substantiated – and therefore also cannot be contradicted by later claimants.

At the end of the same paragraph the Tribunal asserts that 'other sources are quoted as saying that the situation of women in Afghanistan has improved.'¹²⁸ Three sources, other than the Norwegian Ambassador, stated that the situation had improved for women, but all three qualified their statements with indications that this improvement was only relative to the absolutely dire situation for women under the Taliban, meaning that the situation for women was still extremely poor.¹²⁹ Other sources, including AWA, an unnamed international source, International Crisis Group and UNHCR indicated either that the situation had not improved or had improved negligibly.¹³⁰ Once again, it is difficult to have confidence in the Tribunal's conclusions when the findings appear to

¹²⁶ 'Report on fact-finding mission to Kabul and Mazar-i-Sharif, Afghanistan and Islamabad, Pakistan 22 September - 5 October 2002' Danish Immigration Service (March 2003)

¹²⁷ 'Report on fact-finding mission to Kabul and Mazar-i-Sharif, Afghanistan and Islamabad, Pakistan 22 September - 5 October 2002' Danish Immigration Service (March 2003)

¹²⁸ *SSHD v K (Afghanistan CG)* [2003] UKIAT 00057 (Risk – Sikh – Women), paragraph 14.10.

¹²⁹ 'The EU's special representative said that there has been some improvement in the situation of women since the fall of the Taliban.' However, the same source also 'found it difficult to say whether the development can be expected to continue in a positive direction ... The source said that the development might not necessarily be heading in the right direction and pointed out that a department had been set up within the Ministry for Islamic Affairs for the promotion of virtue and the combat of vice, something which recalls unpleasant associations with the religious police of the same name under the Taliban.'; The programme manager with DACAAR [Danish Committee for Aid to Afghan Refugees] found that 'there had been certain improvements for women [...] but in general the source believed that the situation of women in Afghanistan is only marginally better'; 'ACBAR [Agency Coordinating Body for Afghan Relief] believed that the situation for women in Afghanistan has improved' but pointed out that 'many women are still wearing a burka for security reasons.' 'Report on fact-finding mission to Kabul and Mazar-i-Sharif, Afghanistan and Islamabad, Pakistan 22 September - 5 October 2002' Danish Immigration Service (March 2003), 4.8.

¹³⁰ 'Report on fact-finding mission to Kabul and Mazar-i-Sharif, Afghanistan and Islamabad, Pakistan 22 September - 5 October 2002' Danish Immigration Service (March 2003), 4.8.

conflict with the evidence and the *prima facie* conflict is not at least addressed by the Tribunal.

If the AWA had been found to be biased in some manner (and the Norwegian Ambassador had also been assessed and been found to be more reliable), then the correct approach would have been to consider evidence from both sources within the wider picture of information supplied by other sources. As Simon Brown LJ observed in *Ravichandran*, the question of whether someone was at risk of persecution for a Convention reason 'should be looked at in the round, and all the relevant circumstances taken into account'.¹³¹ Or, similarly, Brooke LJ in *Karanakaran*: 'attribution of lesser weight was not the equivalent of rejection'.¹³² The Norwegian Ambassador stands out as a lone voice in the evidence before the Tribunal in this case, however, and yet the evidence of AWA was rejected completely.

Sometimes the rejection of information from campaigning organisations is more subtle. In *SSHD v BS (Zimbabwe CG)* [2002] UKIAT 06461 (Liberty Party – CIO – Airport) there had been evidence before the Adjudicator from the Zimbabwe Association with regard to the procedure of returning failed asylum seekers. The evidence quoted in the IAT decision was:

'The passport of the deportee is put in an envelope addressed to the Chief Immigration Officer (Harare), together with a passenger list. These documents are taken to immigration before the passengers disembark. The Central Intelligence Organisation at Harare see the passenger list in the Chief Immigration Officer's office before the passengers come into immigration. For deportees the passport will be with the Chief Immigration Officer, meaning that the CIO will have knowledge of the deportee. This results in the deportees being in a very vulnerable position. The Central Intelligence Organisation have an office at the airport, they watch arrivals and departures, they have free access to every office at the airport. The Chief Immigration Officer is also directed by the Central Intelligence Organisation.'¹³³

¹³¹ *Ravichandran* [1996] Imm AR 97, paragraph 109.

¹³² Brooke LJ commenting on the Australian case of *Wu Shan Liang* [1996] 185 CLR 259 in *Karanakaran v SSHD* IATRF-990759-C (25 January 2000), paragraph 82.

¹³³ *SSHD v BS (Zimbabwe CG)* [2002] UKIAT 06461, paragraph 6.

The IAT found that the Adjudicator had been wrong to find this statement of any significance as it 'merely confirmed a standard procedure for the return of deportees.'¹³⁴ Whilst it may have been evidence that the Tribunal could conclude did not put the individual claimant at risk on return, considering the case is a Country Guideline case about risk on return to a failed asylum seeker being deported and passing through immigration controls, it cannot rationally be said to have no significance to the issues at stake.

As with experts, sources are also criticised by the Tribunal for applying the 'wrong test' and their evidence is accordingly rejected. Whilst the case might conceivably be arguable for experts familiar with legal proceedings, it is particularly unreasonable to apply this approach to reports written by human rights bodies, NGOs and others. On several occasions, the Tribunal appears to forget that such reports were not written specifically for the Immigration Appeal Tribunal. They are normally written with an entirely different audience in mind and many of these organisations may not be aware that their reports are used in this specific context. Indeed, it is only the CIPU reports which are written for the purpose of examining asylum claims.¹³⁵

An example of this is found in *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214. The Tribunal comments that it does 'not give the same weight [as to CIPU and UNHCR] to the disputed claims of the ERRC, nor to the recommendation of the Parliamentary Assembly of the Council of Europe, which seems to require "guarantees" of safety, which is not the relevant test.'¹³⁶ Discussion of the Tribunal's expectation that experts and others use the 'relevant' legal test or language and the tendency to reject evidence (despite the language of 'weight' deployed by the Tribunal in doing so) rather than seek to assimilate it into a proper analysis is found in the chapter on expert evidence. Suffice it to say here, the Tribunal's assertion that the Parliamentary Assembly of the Council of Europe required 'guarantees' of safety is based on a misreading of the document. The quoted passage – 'Roma constitute a

¹³⁴ *SSHD v BS (Zimbabwe CG)* [2002] UKIAT 06461, paragraph 12.

¹³⁵ The issue of the Tribunal's use of semantics to dismiss expert and other evidence is discussed in depth in the chapter on expert evidence.

¹³⁶ *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214, paragraph 46.

particularly vulnerable group of the displaced population. In Kosovo, their security cannot be guaranteed'¹³⁷ – does not form part of the actual recommendation, but is by way of introduction.¹³⁸ Despite the Tribunal's assertion to the contrary, the Parliamentary Committee was writing with specific reference to the 1951 Refugee Convention and the European Convention on Human Rights – quite clearly the 'relevant' tests.¹³⁹

In *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214 there were divergent opinions between governmental and international sources. As such, the Tribunal was under a duty to explain why it preferred some material or sources over others. The UNHCR and the Parliamentary Assembly of the Council of Europe strongly indicated that minorities, particularly Serbs and Roma, faced what they considered a real risk of persecution in Kosovo. The selection of materials quoted in the CIPU report appeared to indicate some risk, but not a significant risk. This discrepancy itself, it could be argued, should have

¹³⁷ 'Recommendation 1633 (2003)' Parliamentary Assembly of the Council of Europe, paragraph 3.

¹³⁸ The actual recommendation reads as follows: 'Therefore, the Assembly recommends that the Committee of Ministers: i. urge the member states of the Council of Europe who are hosting Roma from Serbia and Montenegro, including Kosovo, to ensure: a. that any decision on a forced return of Roma to Serbia and Montenegro is taken on a case-by-case basis taking into account all the relevant circumstances; in particular, humanitarian grounds should be considered as a sufficient justification for granting a residence permit; b. that every Roma who seeks international protection is given access to fair and effective asylum procedures; c. that there are no forced returns of Roma originating from Kosovo either to Kosovo or to Serbia and Montenegro, as long as the security situation in Kosovo does not allow for their return; d. that Roma representatives are given an opportunity to be involved, in an advisory capacity, at an early stage of preparation for a possible forced return of Roma; e. that forcibly returned Roma are in possession of appropriate documents which will enable them to be recognised as full citizens upon their return; f. that the procedures for deportation comply with international law and take into account recommendations included in Recommendation 1547; g. that they contribute financially to the setting-up and implementation of effective reintegration programmes for returning Roma. These programmes should also be supported by funding for the new wider Roma strategy.' 'Recommendation 1633 (2003)' Parliamentary Assembly of the Council of Europe, paragraph 9.

¹³⁹ 'As concerns the decision itself, it is essential that in consequence it does not deprive foreigners of their rights as guaranteed by several Articles of the European Convention of Human Rights, in particular Article 3 ...; Article 5 ..., Article 8 ... and Article 14 ... Provisions related to (the need for) international protection, and particularly the non-refoulement principle, are contained in the 1951 Geneva Convention relating to the status of refugees which is applicable to all Council of Europe member state as signatories of this instrument. ... The jurisprudence of the European Court of Human Rights indicates that a state is to all extents and purposes responsible for the situation of a foreigner on his return to another state. Authorities have a real responsibility to ensure that a person they expel are treated with respect and dignity in the country of destination.' 'Forced returns of Roma from the former Federal Republic of Yugoslavia, including Kosovo, to Serbia and Montenegro from Council of Europe member states' Parliamentary Assembly of the Council of Europe (31 October 2003), paragraphs 24-25.

been enough to indicate a risk of persecution on the lower standard of proof that is required in asylum appeals.¹⁴⁰ The evidence from UNHCR was in the form of a January 2003 Position Paper and a March 2004 supplement which briefly described the events in March 2004, but stated that a full assessment was not yet available.¹⁴¹ The report from the Parliamentary Assembly of the Council of Europe was just two months old at the hearing. The Tribunal chose to rely instead on the findings of CIPU, which selectively quoted UN material over two years old.¹⁴² Furthermore, both the UNHCR and the Committee on Migration, Refugees and Demography, who drafted the recommendation of the Parliamentary Assembly of the Council of Europe, had on-the-ground experience in Kosovo. UNHCR write:

'The information contained in the respective UNHCR position papers were the results of intense and detailed information-gathering exercises by [the 120] UNHCR field staff [in Kosovo]. Information would have included that provided by members of the Kosovan minority communities themselves, with whom our Field Office staff work on a daily basis. UNHCR's main partners in the region, such as the Organisation for Security and Co-operation in Europe (OSCE),¹⁴³ the United Nations Mission in Kosovo (UNMIK), the Kosovo Force (KFOR), and implementing partners would also have been consulted. However, any external information would also be cross-checked by UNHCR Field staff, in order to ensure that the final document accurately represented UNHCR's understanding of the situation.¹⁴⁴ The final document then undergoes an authorisation process by UNHCR Headquarters in Geneva before it is released to the general public.'¹⁴⁵

¹⁴⁰ '[W]here there is a divergence of specialist opinion as to the objective situation in the country from which the asylum claimant is in flight, it is proper to give the appellant the benefit of the doubt.' *Anandarajay* 18242 quoted in Symes, M. and Jorro, P., The Law Relating to Asylum in the UK (London 2000), p.728.

¹⁴¹ See *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214.

¹⁴² See above.

¹⁴³ OSCE and UNHCR produce publications concerning the assessment of the situation of ethnic minorities in Kosovo, the most recent having been published in March 2003 to cover the period May – December 2002.

¹⁴⁴ As an example, in relation to the comments in UNHCR's papers on the security situation in Kosovo, our colleagues would *inter alia* systematically go through all daily reports on security incidents (which are produced by UNMIK) plus any other incidents brought to UNHCR's attention, and would then conduct a through follow-up for each to assess the action taken by the Kosovan authorities. Our colleagues inform us that they also tried to focus upon incidents that are not reported to the relevant authorities, through interviews with community leaders and affected individuals themselves.

¹⁴⁵ UNHCR Letter re *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214 dated 16 December 2004.

The Committee on Migration, Refugees and Demography have been following the situation in the Balkans since the start of the conflict and the recommendation followed a fact-finding mission on the Roma in Serbia and Montenegro, which took place in March 2003. This was supplemented with more recent information from a range of national and international NGOs and relevant sources from the authorities in Kosovo.¹⁴⁶ The draft report prepared by the Committee's 83 members had to take into account dissenting voices after significant debate. It would then have been debated (in public) in the Parliamentary Assembly of the Council of Europe. The Council is required to vote on the recommendation and the text must be approved with a mandatory two-thirds majority. At least twenty representatives or substitutes of four nationalities and two political parties must sign a written declaration.¹⁴⁷ The CIPU report, on the other hand, was compiled by a low-grade civil servant sitting at a desk in Croydon with no experience whatsoever in Kosovo or even the surrounding area. Editorial oversight is minimum and the report would have been checked briefly by only one pair of eyes before being released.¹⁴⁸ IAS found errors in 94 of the paragraphs in the Kosovo section of the April 2004 equivalent, which was released with the editing notes still in place and was the most poorly sourced of all the 23 reports examined.¹⁴⁹

The Tribunal acknowledged UNHCR's superior position in relation to CIPU (although not that of the Parliamentary Assembly of the Council of Europe).¹⁵⁰ It also considered that the position in the CIPU and the UNHCR were basically the same, with one key difference: UNHCR offered a 'clear recommendation about return whereas the CIPU contains no such conclusion; as is normal with such reports, it leaves the question of safety on return to those who have to

¹⁴⁶ 'Forced returns of Roma from the former Federal Republic of Yugoslavia, including Kosovo, to Serbia and Montenegro from Council of Europe member states' Parliamentary Assembly of the Council of Europe (31 October 2003), paragraphs 1-3.

¹⁴⁷ 'Assembly procedure' Parliamentary Assembly of the Council of Europe (undated), s.12. <http://assembly.coe.int/Main.asp?link=/AboutUs/procedure.htm>

¹⁴⁸ 'Report of Advisory Panel on Country Information consultation exercise on CIPU Country Reports October 2003' APCI 2.1 (2 March 2004) www.apci.org.uk

¹⁴⁹ Carver, N. (Ed.) 'Home Office Country Reports: An Analysis' IAS (September 2004).

¹⁵⁰ 'The UNHCR Paper is derived from its sources in the field and they must be well placed to provide sound information; it would then have been through a process of consideration through the UNHCR hierarchy, so it should be regarded as a responsible, well researched and considered analysis.' *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214, paragraph 43.

make the decisions'.¹⁵¹ If the CIPU report was offering the same evidence as UNHCR – and UNCHR state specifically (as quoted by the Tribunal) 'members of all minority groups, particularly ... Roma ... should continue to benefit from international protection in countries of asylum' – then the Tribunal's conclusions that it is safe to return a Roma is essentially based on **none** of the reports before it.

2.4 How? – Relationship between materials considered and conclusions reached

The fifth aspect of an 'effectively comprehensive' analysis is to explain clearly how conclusions were reached based on the evidence before the court.¹⁵² This point was recently reiterated by the Court of Appeal in *Pisa v SSHD* [2004] EWCA Civ1443, a case that was remitted to the IAT for failing to explain its conclusions with regard to the country of origin material that was before it. The Tribunal's decision appeared to rest solely on the claimant's personal narrative. Lord Justice Buxton commented:

'I do not think, therefore, with respect, that in the circumstances of the case the Tribunal's judgment was adequately reasoned. It may be that if they had set out their reasoning in more detail it would be clear that they had reached a conclusion that was not only justified but inevitable, but that is not shown on the face of this determination. I therefore see no alternative in this case but to allow this appeal to the extent of remitting the case for redetermination by a differently constituted body of the Immigration Appeal Tribunal.'¹⁵³

Many of the cases that currently stand as Country Guideline cases remain challengeable on this basis. That they were not actually challenged reflects the weakness of the Country Guideline system rather than the soundness of the decision. The quality of the representative, the limitations of Legal Aid, and the Tribunal's penchant for widening its decisions to include factual findings on

¹⁵¹ *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214, paragraph 45.

¹⁵² *S & Others* states that the IAT must 'explain what it makes of the substantial evidence going to each [major] issue'. See *S & Others* [2002] INLR 416, paragraph 29.

¹⁵³ *Pisa v SSHD* [2004] EWCA Civ 1443, paragraph 31.

issues that have little or no direct bearing on the claimant's case, all contribute to this problem.¹⁵⁴

In *VD v SSHD* [2004] (Albania CG) UKIAT 00115 it is not just the most recent and, arguably most relevant report that is overlooked (see above), but material is ignored that goes against the Tribunal's findings within the reports that are considered. This decision makes findings on risk of being trafficked and sufficiency of protection for victims and potential victims of trafficking within Albania. There are many criticisms that can be made with regard to the analysis on risk of being trafficked, not least the Tribunal's employment of its own amateur statistics skills which results in some very unmathematical conclusions.¹⁵⁵ However, it is the analysis of sufficiency of protection available for victims and potential victims of trafficking which is the most lacking with regard to comprehensive analysis. When considering the risk of being trafficked, the Tribunal relied on information from three reports: the CIPU report of October 2003, the US Department of State 'Country Report on Human Rights Practices for 2003' (dated February 2004), and a UN/OSCE report entitled 'Trafficking in Human Beings in South Eastern Europe' of November 2003. When considering sufficiency of protection, the Tribunal relied only on the first two. As well as overlooking the report of the European Commission, the Tribunal also chose to ignore the document produced by the US Department of State on the very topic under discussion: 'Trafficking in Persons Report: Albania' of 11 June 2003. Furthermore, the UN/OSCE report is not quoted at all when considering sufficiency of protection. The evidence of the UN/OSCE report overwhelmingly suggests that there are serious protection problems for victims of trafficking.¹⁵⁶ Indeed, it is the only report which gives any details on

¹⁵⁴ See 'inquisitorial quality' chapter on the problems associated with an adversarial environment.

¹⁵⁵ This is a difficult point to explain concisely, but anyone with any training in statistical methodology would realise how absurd the Tribunal's extrapolations are in cases such as *VD* and *GH Iraq CG* [2004] UKIAT 00248.

¹⁵⁶ 'Despite the change in government policy and the well-developed NPA support for the victims of trafficking in Albania is still delivered by international organisations and GOS with a very limited (although growing) support from the government (p.41); According to NGOs, the new anti-trafficking legislation, although a step in a right direction, does not yet offer a final solution to the issue of trafficking. Firstly, judges and prosecutors do not understand the new articles in the Criminal Code and do not know how to use them. The law contains no definition of trafficking, so it is often confused with smuggling or illegal border crossing. Secondly, the

the witness protection programme and the capacity and workings of the shelters available to actual or potential trafficking victims.¹⁵⁷ Whereas CIPU and the US Department of State mention these two aspects, they do so in brief form. Despite coming to the conclusion that there was sufficiency of protection in Albania for victims of trafficking, that the shelters were adequate and that risk of being re-trafficked was minimal, the Tribunal neither addressed nor assessed this detailed evidence.

In *SSHD v K (Afghanistan CG)* [2003] UKIAT 00057 the Tribunal made it clear which sections of the Danish Immigration Report that it was relying on, but, apart from the comment from the Afghanistan Women's Association examined above, information which went against the Tribunal's findings was ignored. The determination makes selective use of several sections of the September/October 2002 Danish report regarding the position of women in Afghanistan who have no male relatives or social networks. The Tribunal comments:

'The Danish fact-finding report of September 2002/ October 2002 also refers to observations made to the mission about the situation of women without male relatives or without access to a network in their

legislation does not include provision for confiscating assets derived from trafficking (p.39); In 2002 150 family visits were conducted. In 90 cases the women were still at home. In 60 cases, however, the women were not at home and according to Vatra staff, **these women had been re-trafficked.**' (p.43). 'Trafficking in Human Beings in South Eastern Europe' UN/OSCE (November 2003).

¹⁵⁷ 'The Vatra shelter in Vlora should be seen and treated, for the clarity of the definition, as a transit place for women coming back after being deported or stopped when trying to migrate ('potential' victims of trafficking') rather than as a shelter for the victims of trafficking (p.41); The Vatra Shelter identified the police directorates in Berat, Durres and Gjirokaster as refusing to cooperate. The police in those towns claim that women do not want to go to the shelter, but prefer to stay at the police station while their identity is verified, after which they are sent directly back home (p.41); The women and girls usually stay at the shelter only for a couple of days, long enough for them to be identified and for their families to be informed on their whereabouts. Standard procedure at the shelter is to contact the woman's family and ask them to come to the shelter and take their relative home. The rationale behind this procedure is the fear that the women might be picked up by traffickers if left to go off on their own. [...] Women are not allowed to leave the shelter without proper documents, so they have to wait for their families to arrange and bring the papers. [...] Although staying in a friendly and safe environment with well trained and understanding staff is definitely much better than being detained at a police station, the legal grounds of such a procedure are unclear. [...] In this shelter women are not free to leave when they want, which is clearly a violation of their rights (p.43); According to NGO's, those women and girls who are sent directly home are often later re-trafficked (p.41); NGOs are also concerned about the absence of a witness protection law and the lack of legal assistance and representation for witnesses in trafficking cases.' (p.39). 'Trafficking in Human Beings in South Eastern Europe' UN/OSCE (November 2003).

neighbourhood to protect them. On page E146, an international source is quoted as advising that women who have no male relatives for protection have serious problems, that it is necessary in the cities to have a network in the neighbourhood in order to get protection. However, we are not told who this source is. We have already stated, in paragraph 14.10 above, that we considered that the observations of AWA are at odds with the rest of the objective evidence. In the absence of any information as to the identity of the international source cited, the weight we are able to attach to their advice is necessarily limited. We have noted that the UNHCR, Kabul, stated that women are unable to move without male relatives. However, this appears to be within the context of UNHCR's efforts to move female staff from other areas to a better job in Kabul. This paragraph also states that it is not possible for women to be a female breadwinner for a family. We are not sure if this is attributed to the UNHCR. We assume it is.¹⁵⁸

There was no evidence before the Tribunal that women could live without male support. There was evidence from an unnamed international source that they could not. There was evidence from UNHCR Kabul – and the Tribunal has specifically praised UNHCR as a source¹⁵⁹ – that they could not. The Tribunal distorts UNHCR's position by claiming that the thesis that women are unable to move without male support is in the context of female employees of UNHCR attempting to move to better jobs in Kabul, but UNHCR actually state unequivocally that 'Women are unable to move without having male relatives. Even the UNHCR cannot move locally employed women from other areas to better positions in Kabul, unless they have male relatives in Kabul with whom they can live'.¹⁶⁰ The implication is clearly that if UNCHR cannot manage to move women without male support, then it is really not possible. Furthermore, in the same section of the same report, UNHCR gives extensive details as to why this is the case regarding women's vulnerability and lack of protection, and makes an absolutely clear case that women (especially returnees) cannot live without male protection or networks of relatives.¹⁶¹ After a detailed examination

¹⁵⁸ *SSHD v K (Afghanistan CG)* [2003] UKIAT 00057, paragraph 14.12.

¹⁵⁹ For example: 'The UNHCR Paper is derived from its sources in the field and they must be well placed to provide sound information; it would then have been through a process of consideration through the UNHCR hierarchy, so it should be regarded as a responsible, well researched and considered analysis.' *SSHD v FD (Serbia and Montenegro CG)* [2004] UKIAT 00214, paragraphs 43.

¹⁶⁰ 'Report on fact-finding mission to Kabul and Mazar-i-Sharif, Afghanistan and Islamabad, Pakistan 22 September - 5 October 2002' Danish Immigration Service (March 2003), s.4.5.1.

¹⁶¹ 'UNHCR, Kabul said that fundamental protection is dependent on personal and social networks. The source advised that the availability of networks in the form of relatives is vital for

of this case it appears that the Tribunal had decided the outcome before reading the three reports and then selectively quoted from those reports to justify its finding. This certainly does not make for the 'comprehensive analysis' required by Country Guideline cases.

Another example of selective use of evidence on the part of the Tribunal is found in *SSHD v DM (Albania CG)* [2004] UKIAT 00059 (Sufficiency of Protection – PSG – Women – Domestic Violence). Again, the Tribunal fails in the requirement to 'explain what it makes of the substantial evidence going to each issue'.¹⁶² Here the Tribunal is referred by the Secretary of State's representative to the CIPU report for Albania of October 2003, specifically to the sections which confirm that the police 'have been receiving training since September 2000 on issues of gender and have been provided with guidance under international conventions and domestic law on the treatment of women who are victims of domestic violence and trafficking'.¹⁶³ This is taken from section 5.32 of the CIPU report which is referencing an OSCE news article of September 2000.¹⁶⁴ The important difference between the two is the use of

a person's ability to live in a given area...the source stressed that generally speaking, it is necessary for Afghans to have relatives in the area where they wish to settle. This is even more so for women. Women are unable to move without having male relatives. Even the UNHCR cannot move locally employed women from other areas to better positions in Kabul, unless they have male relatives in Kabul with whom they can live.... The source believed that it might be possible for large families with a number of males to move to places, where they do not already have relatives or clan members. For families, where the head of the family is female, this option does not exist.' and 'An international source said that the old patterns, enabling families to protect each other, have been upset, because so many people have been displaced and because of the economic situation, which makes it impossible for them to provide protection due to poverty. This means that the families with a female sole provider - widows - or children living alone, now have no protection...In the towns a network in the neighbourhood is necessary in order to get protection. As regards personal networks in the town, many of the people who have returned - and who do not have a network - are especially at risk of being raped and assaulted. But it is even worse in the rural areas - particularly for women. The source mentioned that there are particularly vulnerable groups who are the subject of injustices irrespective of their ethnicity, but where the actual reason appears to be the person's lack of network. In this connection the source pointed out that it is a misconception that there has been a change in this situation just because the Taliban has been defeated.' and 'Concerning the importance of networks, DACAAR [Danish Committee for Aid to Afghan Refugees] said that persons/families without networks are extremely vulnerable and exposed. There is no judicial or police protection in the country, only personal networks.' 'Report on fact-finding mission to Kabul and Mazar-i-Sharif, Afghanistan and Islamabad, Pakistan 22 September – 5 October 2002' Danish Immigration Service (March 2003), s.4.5.1.

¹⁶² *S & Others* [2002] INLR 416, paragraph 29.

¹⁶³ *SSHD v DM (Albania CG)* [2004] UKIAT 00059, paragraph 15.

¹⁶⁴ 'Rights of Women to be included in police training in Albania' OSCE Press Release (1 September 2000).

future and past tenses – the OSCE article states that gender training **will become** part of police training at an unspecified point in the future; the CIPU report states, without evidence of this, that it actually **became** part of police training in September 2000.¹⁶⁵ The case was heard on 15 March 2004, some three weeks after the publication date of the 2003 US Department of State reports, but the Tribunal makes no reference to this or any other report being put before it. It is clear, however, that the Adjudicator (and hence the Tribunal) had the 2002 US Department of State report to consider. This 2002 report states clearly 'Most of the country's 13,000-member police force remained largely untrained despite assistance received from foreign governments'. The report goes on to specify that during 2002 only 462 police officers received such training of which 'respect for human rights' was a part, although no mention is made of training on issues of gender or domestic violence in international or domestic law. It also specifies that 'the overall performance of law enforcement remained weak'.¹⁶⁶ The CIPU report itself quotes from this source commenting that 'a serious problem affecting public order and internal security is the fact that police officers are largely untrained, ill paid and often unreliable'.¹⁶⁷ Undoubtedly in this case, the Adjudicator's determination was flawed, but the Tribunal also fails to follow the guidelines laid down in *Horvath* – whilst the technical legal position is examined in some detail, no assessment is made of the practical realities of law enforcement. The Tribunal quotes selectively from an inaccurate and unreliable CIPU report and fails to consider the evidence which goes against its desired conclusion, particularly as regards recourse to protection for victims of domestic violence, the very issue for which the case was designated a Country Guideline case.

In DG v SSHD (Iraq CG) [2002] UKIAT 06874 (Due Process – KAA) only the April 2002 CIPU was adduced as evidence by both the Home Office and on behalf of the claimant. Heard on 21 November 2002, the Tribunal was happy to make a finding that prison conditions in Northern Iraq would not amount to a breach of Article 3 of the ECHR on the 'totality of the evidence'. The 'totality of

¹⁶⁵ *Ibid.*; and 'Country Assessment for Albania' CIPU (October 2003), 5.32.

¹⁶⁶ 'Country Reports on Human Rights Practices 2002: Albania' US Department of State (31 March 2003), s.1c.

¹⁶⁷ 'Country Assessment for Albania' CIPU (October 2003), 5.31.

the evidence' before it was two paragraphs from the CIPU Assessment from April 2002. These in turn quoted – selectively – from two sources: a report from the 'Netherlands Delegation' (from the Netherlands Ministry of Foreign Affairs) of April 2000 and the US Department of State report for 2001. Happy to elevate this case to Country Guideline status on the basis of two paragraphs, the Tribunal states:

'If he were to receive a custodial sentence, although we accept that prison conditions are poor, the objective evidence also suggests that prison conditions have improved over recent years owing to the intervention of the ICRC ... Therefore, on the totality of the evidence, we find that were the appellant to be returned to Iraq, there are no reasonable grounds for believing that he would suffer ill-treatment in breach of Article 3 of the ECHR. Accordingly his appeal is dismissed.'¹⁶⁸

At paragraph 13 the Tribunal quotes the evidence that they rely on from the April 2002 CIPU Assessment of Iraq. The selectivity of its approach is quite astonishing. Both paragraph 13 and the final conclusion at paragraph 16 comment on the improvement in recent years owing to the work of the ICRC. But the sentences in the CIPU Assessment immediately prior to the comment on the work of ICRC state categorically:

'Conditions in prisons in Northern Iraq do not meet international requirements as laid down in 1955 in the United Nations minimum standards for the treatment of prisoners. Human rights violations do occur upon arrest and during detention. Conditions of hygiene in the prisons leave much to be desired.'¹⁶⁹

The subsequent paragraph then states that 'both the PUK and the KDP reportedly maintain private, undeclared prisons, and both groups reportedly deny access to ICRC officials. There were reports that authorities of both the PUK and KDP tortured detainees and prisoners'.¹⁷⁰ It is difficult to see how the evidence relied upon is used to justify the conclusion in the individual case, never mind to set a factual precedent binding on future cases.

¹⁶⁸ *DG v SSHD (Iraq CG)* [2002] UKIAT 06874 (Due Process – KAA), paragraph 16.

¹⁶⁹ 'Country Assessment for Iraq' *CIPU* (April 2002), 4.52.

¹⁷⁰ 'Country Assessment for Iraq' *CIPU* (April 2002), 4.53.

2.5 Conclusion

First-instance decision-making in the UK has been proved to be shockingly poor. In a report entitled 'Get it right: How Home Office decision making fails refugees' of February 2004, Amnesty International detailed the flaws of the system, including the failure by Home Office officials to use any country information whatsoever – at best, minimal reference to the CIPU report is made.¹⁷¹ This aspect of failure in first-instance decision-making was highlighted again by IAS and the Refugee Council in September 2004,¹⁷² and by IAS in December 2004.¹⁷³ This has a significant impact on asylum claims both with regard to the stress of refusal caused to the applicant, and in relation to the subsequent increase in public cost due to the number of successful appeals. A comparison with France is instructive: in 2003, the UK recognised 1.2% of Afghani claimants as refugees at the first instance compared to France's recognition rate of 18.9%; the UK recognised 6.1% of Colombian claimants, compared to 28.2% in France; and only 4.3% of Iranian claimants were recognised at first instance decisions in the UK compared to 16.6% in France.¹⁷⁴ The individual claimant – and indeed the entire system – relies heavily, therefore, on the appeal structure currently in place.¹⁷⁵ This places a significant degree of legal and ethical responsibility on the Immigration Appeal Tribunal to 'get it right' when analysing country conditions. Country Guideline cases determine not just one claim, but dictate whether similar cases will even reach the appeal courts. Such cases must therefore be thorough and comprehensive in the assessment of country conditions. The examples used above illustrate that the IAT is failing to examine country conditions in accordance with the safeguards recommended by the Court of Appeal, which has rapped the knuckles of the Tribunal over this point not just once, but on

¹⁷¹ 'Get it right: How Home Office decision making fails refugees' *Amnesty International* (9 February 2004).

¹⁷² Carver, N. *InExile* Issue 33 (September 2004).

¹⁷³ 'Home Office tells 'foolhardy' asylum seekers: 'It's your own fault you've been persecuted' *Glasgow Herald* (26th December 2004), p.5.

¹⁷⁴ Figures from UNHCR.

¹⁷⁵ This was acknowledged in *Karanakaran and Ravichandran*; the appeal tribunal is 'best regarded as an extension of the initial decision-making process'. *Karanakaran v SSHD* IATRF-990759-C (25 January 2000), paragraph 137.

several occasions.¹⁷⁶ Of most concern is the repeated failure to give equal scrutiny to all material produced and to consider the evidence relating to country information 'in the round'. Whilst on occasions it does seem that this is the result of preconceived ideas, in the majority of cases it appears to reflect a lack of the necessary enhanced diligence and application and lack of research and evaluation skills. An over-reliance on the material produced by the Secretary of State frequently leads to findings of fact on a country situation which do not take into account the most recent and most relevant evidence. Similarly, the favouritism towards the source which is most well-known by Tribunal members, that is to say CIPU reports, frequently means that other reports from respected bodies are little utilised or digested only to a shallow level. These failings show that it is not just at the first instance decision where the UK is failing in its duty to examine asylum applications with the 'most anxious scrutiny'.¹⁷⁷ Asylum seekers coming to the UK after April 2005 are faced with a loss of appeal rights. Unless the new Asylum and Immigration Tribunal applies rigorous standards where the IAT has not, the asylum seeker will have even less chance of a considered hearing. The system of Country Guideline cases as it currently stands contributes to the denial of due process for many claimants.

¹⁷⁶ See *S & Others, Shirazi, Karanakaran, Pisa, etc.*

¹⁷⁷ Lord Bridge in *Musisi* [1987] Imm AR 250 at 263

'An Inquisitorial Quality': are Country Guideline cases appropriate in an adversarial legal system?

*Amanda Shah**

'In a case like the present ... where conjoined appeals are heard together in order to produce a decision which is to be taken to be factually authoritative, the exercise upon which the IAT is engaged assumes something of an inquisitorial quality, although the adversarial structure of the appeal procedure of course remains.'

S and Others v SSHD [2002] INLR 416, paragraph 15

State parties to the UN Refugee Convention have chosen different ways to incorporate their international obligations into domestic processes for assessing asylum claims. In the UK the asylum appeals system is adversarial in nature: two parties advance their case and the judge decides between them. Other jurisdictions have adopted different legal models that utilise a more inquisitorial attitude. The importance of the legal model adopted at national level is heightened when those domestic agencies tasked with deciding asylum claims choose to issue cases setting precedents, as the Immigration Appeal Tribunal has chosen to do in Country Guideline determinations which are 'binding on the appellate authorities as to the factual state of affairs' in a given country.¹⁷⁸

This chapter examines the issues surrounding the adversarial background to the Tribunal's Country Guideline system and the arguments in favour of the Tribunal assuming a more inquisitorial role, with a corresponding procedural duty of care and fairness, where the quality, quantity or relevance of material put before it in guidance cases is not sufficient. These arguments are assessed in the context of the key Court of Appeal case on Country Guideline cases, *S and Others*, in which the Court suggested that if the Tribunal was to set factual

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¹⁷⁸ *S and Others v SSHD* [2002] INLR 416, paragraph 1

precedents, its work must assume 'something of an inquisitorial quality'¹⁷⁹ to ensure just and fair decisions are reached upon a comprehensive examination of 'substantial evidence going to each ... issue'.¹⁸⁰

The guidance of the Court of Appeal in *S and Others* has been inconsistently applied by the Tribunal when deciding Country Guideline cases and that this inconsistency has resulted in factual precedents on country conditions being based on insufficient, irrelevant or outdated information. These precedents are now being used across the country by the Legal Services Commission (LSC) as the basis for assessing merits tests, by Adjudicators in determining asylum claims, by the Tribunal in deciding permission to appeal and full appeals and by the courts in considering appeals and statutory review claims. The Tribunal has a clear duty, highlighted in *S and Others*, to ensure that if it is to continue to issue Country Guideline cases they are 'effectively comprehensive' and 'address all the issues in the case capable of having a real, as opposed to fanciful, bearing on the result' explaining 'what it makes of the substantial evidence going to each such issue'.¹⁸¹ This requires a fundamental shift by the Tribunal towards a more pro-active and inquisitorial approach, especially where the information required properly to hear a Country Guideline case is not supplied by the two parties.

Possible ways of seeking to achieve this shift are canvassed in this chapter: simply not designating the case as a Country Guideline one, the Tribunal adopting a more pro-active research role itself or the Tribunal appointing an independent 'assisting counsel' to contribute research and submissions to the case.¹⁸²

¹⁷⁹ *S and Others v SSHD* [2002] INLR 416 paragraph 15

¹⁸⁰ *S and Others v SSHD* [2002] INLR 416 paragraph 29

¹⁸¹ *S and Others v SSHD* [2002] INLR 416 paragraph 29

¹⁸² Another possibility could be the use of UNHCR as an intervener, as is permitted by the procedure rules. However, this may well go beyond the UNHCR remit and funding and UNHCR itself is subject to certain constraints.

3.1 Reliance on material brought by the two parties of the case

Unlike in Canada,¹⁸³ in the UK there is no documentation centre independent of the two parties in a case to ensure that Adjudicators or the Tribunal have independent and researched country information.¹⁸⁴ Instead the material analysed by the Tribunal in deciding a case is the material adduced by the two parties. If representatives fail to submit a bundle of material, the hearing can, and often does, continue on the basis of this inadequate information as the burden of proof is on the appellant to make out his or her case.¹⁸⁵

In choosing to issue guidance through the prism of a particular case, the Tribunal is hostage to the competence of the two representatives in a given case and their ability to produce comprehensive submissions and evidence. This is the logical outcome of basing a factual precedent upon a particular case within a strictly adversarial legal setting – the Tribunal is not comprehensively analysing all relevant material in accordance with the directions of the Court of Appeal,¹⁸⁶ merely the material that is presented before it on a particular occasion for a specific case by two particular representatives. For the claimant's representatives, the quality of material produced is often reliant not just on their competence and ability but the strict funding requirements of the LSC. That said, the LSC has stated that additional funding is available for Country Guideline cases where the representative is notified in advance that the case may be designated a Country Guideline one and where the representative notifies the LSC.¹⁸⁷ However, many Country Guideline cases are backdated and

¹⁸³ In Canada the Immigration and Refugee Board (IRB) has a research programme that "makes available current, public and reliable information to all parties in the refugee protection determination system." 'What it is and how it works' The Immigration and Refugee Board (undated). This approach is explored later in the section on 'grounds for an inquisitorial approach'. For further information see <http://www.irb-cisr.gc.ca/index.htm>

¹⁸⁴ CIPU is mistakenly treated by some as if it approximates to the Canadian documentation, as is discussed in the 'effectively comprehensive' chapter.

¹⁸⁵ *Sivakumaran* (18147) 20 August 1998

¹⁸⁶ See *S and Others v SSHD* [2002] INLR 416 paragraph 29

¹⁸⁷ IAA stakeholder meeting, Taylor House, 25th January 2005.

representatives have often been given little or no warning by the Tribunal that a case might be elevated to Country Guideline status.¹⁸⁸

If it is to set factual precedents the Tribunal has to take on its shoulders the additional responsibilities and procedural duties associated with issuing determinations which will impact on a significant number of other cases. These responsibilities mean that unlike in 'ordinary' cases, in Country Guideline cases the Tribunal cannot dismiss bad representation as the fault of the parties and continue to hear the case as a guidance case. Instead if it chooses to determine a case as giving guidance on country conditions, the shortcomings of the material presented by the two parties becomes the responsibility of the Tribunal to overcome, either itself or by appointing an independent investigator.

Worryingly there is ample evidence, as outlined in the following sections, that factual precedents have been created when the Tribunal has if anything cold-shouldered its responsibilities to overcome poor, incomplete, non-existent, irrelevant or out of date sources.

Absence of a party

It is increasingly common for at least one of the parties to an appeal to be unrepresented or totally absent, even in the Tribunal.¹⁸⁹ Decision makers are entitled to continue the hearing¹⁹⁰ and have done so even when the case is

¹⁸⁸ One practitioner even reported that despite assurances that a Turkish case would not be designated a Country Guideline case while grounds of appeal were pending to the Court of Appeal, the case was subsequently so designated after permission was refused.

¹⁸⁹ Increased LSC contracting restrictions have driven some established practitioners to leave the field, especially outside London, resulting in a diminished range of practitioners available to take on asylum cases. It remains to be seen what effect the LSC's accreditation scheme will have on the quality and quantity of publicly funded asylum practitioners, but assuming a proportion of current practitioners will not be accredited, the sources of legal representation open to asylum seekers will again be curtailed.

¹⁹⁰ See *BT (Former solicitors' alleged misconduct) Nepal* [2004] UKIAT 00311 which concerned a case where neither party attended the Adjudicator's hearing. The Tribunal found "in those circumstances, the position under the Rules is quite clear. He [the Adjudicator] is to consider, first of all, whether notice of the time and the place of the hearing has been properly served on the parties. He is then to consider whether there is any satisfactory explanation for the absence of the parties. **If there is no satisfactory explanation, he is obliged to proceed in the absence of the party in question. If there is a satisfactory explanation, he retains a discretion as to whether to proceed or not.**" [emphasis added].

creating a precedent. This was the case in *AR (Burundi – spoken language – Kirundi)* Burundi [2004] UKIAT 00225 where ‘the appellant [sic, should read respondent] was in attendance but had no legal representation’, she had only learnt English in the time since she had been in the UK (4 years) and had ‘a **fairly** good understanding of the English language, which she also spoke **fairly** well’ [emphasis added], but the Tribunal ‘found that she was not prejudiced in any way by lack of representation’.¹⁹¹ Lack of representation may not itself offend the principals of natural justice in an ‘ordinary’ case as the presumption is upon the appellant to prove his or her case. However, it is a completely unsatisfactory basis on which to underpin a Country Guideline case which, due to its near binding status¹⁹², will go on to affect a significant number of other cases.

Similar issues can arise if the parties are represented, but the representative is inexperienced or incompetent, had limited funding to research the case, or who, on instructions or for professional reasons, declines to address the Tribunal on issues considered irrelevant to the particular appeal. The Tribunal does not appear to allow for such representational deficits or constraints.

Poor factual matrix

In seeking to examine Country Guideline issues through the lens of a specific case, the Tribunal embarks on a novel exercise in our adversarial system. The Tribunal decides a particular case but its focus is on other cases in or presumed to be in the appeal system. Any material submitted and discussed at the hearing will be limited to the facts of the particular case, so a decision on a factual precedent cannot be reached independently of these. However, issues of relevance to the parties of the case are not necessarily the same as the issues the Tribunal wishes to produce guidance upon. It is inevitable that not all the issues upon which the Tribunal is seeking to give guidance will be relevant to the claimant whose appeal is being determined. For example it would be improper for a case whose specific facts pertain to the return of a Christian to

¹⁹¹ *AR (Burundi – spoken language – Kirundi)* Burundi [2004] UKIAT 00225 paragraph 6

¹⁹² See the chapter on certainty.

be used to set a factual precedent for the return of all other religious minorities within that country. Moreover such a practice is likely to exclude the possibility of the case being appealed further as the findings no longer directly relate to the claimant.

In correspondence with IAS regarding a complaint about the subsequent treatment of a case that had been listed to be a Country Guideline case, the President of the Tribunal, Mr Justice Ouseley, wrote as follows:

‘There are difficulties which the Tribunal has experienced on offering obiter guidance when it has, as here, a poor factual matrix to work with. It is also difficult for the Tribunal in setting up cases for guidance to be sure that the facts will permit such guidance to be given. It is a hazard I would prefer we did not face but it is at times inevitable and often unpredictable for any particular case. The Tribunal did not feel that it could usefully assess risk hypothetically here.’¹⁹³

These comments accurately identify one of the major problems facing the Tribunal in designating individual appeal determinations as factual precedents. Often this has not been the approach adopted by the Tribunal, however, which has gone on to elevate cases to Country Guideline status despite what is undoubtedly a ‘poor factual matrix’.

The problem is exaggerated in an adversarial system because of the nature of the interest of the different participants in an appeal. The two parties are interested only in advancing their own preferred version of the facts and law and the court or tribunal is interested only in deciding between the competing cases. The court or tribunal may make partial findings that favour one party in some respects but the other in other respects or may, more unusually, make independent findings based on a synthesis of the arguments presented, but this is not to be confused with a genuinely inquisitorial role where the court or tribunal acts on its own initiative (or appoints an independent person or body for this purpose) and commands the resources required to enable it to do so.

¹⁹³ Letter from Mr Justice Ouseley, President of the Immigration Appeal Tribunal to Immigration Advisory Service (10 January 2005).

A case in point is *NL (Mental Illness – Support for Family)* Pakistan CG [2002] UKIAT 04408 where the Tribunal was not ‘provided with any up to date medical evidence ... we consider it to be lamentable that we are hearing this appeal nearly ten months later and no more up to date evidence of the appellant’s mental state has been provided’.¹⁹⁴ With no current information about the appellant’s mental health the Tribunal could not assess the claimant’s mental health needs and therefore the availability or otherwise of treatment in Pakistan. There is reference to an apparent upturn in the claimant’s condition which is dated 29 October 2000 but this is nearly two years before the hearing date. The Tribunal concluded that despite ‘a significant lack of up to date medical evidence’ ‘there would be no breach of her Article 3 or Article 8 rights on return’.¹⁹⁵

The Tribunal has signalled very clearly that not only did it have no recent information about the appellant’s mental health but also no information at all about mental health facilities in her country of origin. What is more the Tribunal has been unequivocal in its displeasure – ‘we consider it to be lamentable’.¹⁹⁶ Nevertheless the case has been purposely backdated as a Country Guideline case. This is clearly not a satisfactory basis on which to pin a factual precedent which could go on to affect the outcome of human rights appeals for many other claimants.

The poor factual matrix is particularly problematic where the Tribunal use a case to extrapolate findings on other, wider issues not relevant to the particular claimant. This occurred in the case of *VD (Albania CG)* [2004] UKIAT 00115 (Trafficking), where the Tribunal decided to make findings about issues that were at best peripheral to the determination of the particular appeal and were certainly not raised in the grounds of appeal. Accordingly, neither evidence nor submissions would have been prepared by the representative on these issues – a claimant is not interested in wider issues, nor, therefore, is the claimant’s representative. Nevertheless, the Tribunal goes on to determine these

¹⁹⁴ *NL (Mental Illness - Support for Family)* Pakistan CG [2002] UKIAT 04408 paragraph 10

¹⁹⁵ *NL (Mental Illness - Support for Family)* Pakistan CG [2002] UKIAT 04408 paragraph 13

¹⁹⁶ *NL (Mental Illness - Support for Family)* Pakistan CG [2002] UKIAT 04408 paragraph 11

peripheral issues and to elevate the findings to Country Guideline status. As is discussed in the ‘effectively comprehensive’ chapter, the Tribunal’s conclusions in that case are seriously flawed.

In a determination that combines extrapolation with use of a poor range of sources, the Tribunal in *RM (Colombia CG)* [2002] UKIAT 05258 (Internal Relocation – FARC), concluded on the basis of the US Department of State report alone that the Colombian government is able to offer adequate protection against non-state agents in urban conurbations and therefore that there exists an internal flight alternative for persons in this position.¹⁹⁷ The individual in question feared persecution from FARC (Fuerzas Armadas Revolucionarias de Colombia), a powerful anti-government group. The Tribunal’s application of this general proposition concerning all victims of non-state agents to the individual claimant is extremely questionable, never mind its use in other future cases. That the case can be cited as binding in other cases involving potential victims of FARC or other terrorist organisations, potentially including paramilitary groups with links to government, is a matter of grave concern.

Where decisions are made on guidance topics beyond the scope of the case being heard, the Tribunal is creating factual precedents without a factual basis and without the benefit of submissions and research on the issue from an interested party. The system of Country Guideline cases is therefore under a double bind, at the mercy of the competence or otherwise of representatives in a particular case submitting sufficiently comprehensive material and of the facts and issues of that case allowing a thorough examination of the topics selected to set guidance.

If the Tribunal aims to avoid or at least mitigate the ‘poor factual matrix’ problem, one option is to follow an approach it has already adopted in some cases. In *SSHD v S* (01/TH/00632) 1 May 2001, the Tribunal joined several cases in order to present a range of factual situations to enable it to look at as many of the relevant issues as possible. This is common in the Court of Appeal,

¹⁹⁷ *RM (Colombia CG)* [2002] UKIAT 05258 (Internal Relocation – FARC), paragraph 11.

where cases raising similar legal issues are combined. This approach is followed in very few of the designated Country Guideline cases, even though the need is arguably far greater with country conditions than with legal issues.¹⁹⁸

Poor range of sources

Some Country Guideline cases have been decided in cases where representatives have not submitted any country information at all or where both parties have relied on a single source, often the Home Office's Country Information Policy Unit (CIPU) report.

In *NL (Mental Illness – Support for Family)* Pakistan CG [2002] UKIAT 04408 the Tribunal was hampered in its examination of the issues because 'unfortunately, the appellant's representative did not see fit to provide us with a bundle of any kind.'¹⁹⁹ Of the two parties only one (the Home Office) produced any country evidence and they relied exclusively upon CIPU's 'Pakistan Country Assessment' (October 2001) and one other untraceable document.²⁰⁰ In *DM (Sufficiency of Protection – PSG – Women – Domestic Violence)* Albania CG [2004] UKIAT 00059 there is no indication that any report other than that submitted by the respondent (the Home Office who submitted CIPU's 'Albania Country Assessment' from October 2003) had been considered, which suggests that those acting on behalf of the claimant failed to supply any country information. When IAS contacted the representatives of the claimant cited in the determination, S Osman Solicitors (now Osmans Solicitors), we were informed that they had stopped Legal Aid work in January 2004 and were highly unlikely

¹⁹⁸ Notable exceptions include *AJH (Somalia CG)* [2003] UKIAT 00094 (Minority group-Swahili speakers), *VL (DRC CG)* [2004] UKIAT 00007 and *A et al (Turkey CG)* [2003] UKIAT 00034.

¹⁹⁹ *NL (Mental Illness - Support for Family)* Pakistan CG [2002] UKIAT 04408 paragraph 10

²⁰⁰ The second source is referred to in *NL (Mental Illness - Support for Family)* Pakistan CG [2002] UKIAT 04408 paragraph 4 as 'a document that had been put in concerning the National Commission on the Status of Women' and paragraph 9 'the document put in by Mr Pichamuthu concerning the National Commission on the status of women'. From this information it has not been possible to ascertain the title, source or date of this document or to find the document to discover the type of material it might contain other than on the National Commission on the Status of Women.

to have represented in this case which was heard on 15 March 2004.²⁰¹ Other examples include *MG (Desertion - Punishment)* Angola CG [2002] UKIAT 07360, where the only material before the Tribunal appears to have been the CIPU Assessments of Angola for April and October 2002, and *DG (Due Process - KAA)* Iraq CG [2002] UKIAT 06874 where only the CIPU report for April 2002 was assessed in a decision which found that prison conditions in Northern Iraq would not amount to a breach of Article 3.²⁰² In each of these cases the Tribunal has made findings of fact on the situation in a given country for a specific group which have gone on to be followed by Adjudicators and, perhaps even more crucially, by the LSC and yet these findings of fact have been based on scant information which is often, as we will see, out of date or not even relevant.

The problem of a poor range of material being put before the Tribunal in cases that go on to set a factual precedent is compounded by the fact that very often the source in question is CIPU. CIPU reports are far from independent, as is discussed in detail in the 'effectively comprehensive' chapter, and are simply the country evidence bundle for one side of an adversarial setting. In the last two years the quality of the CIPU reports has been strongly criticised both by IAS²⁰³ and the Advisory Panel for Country Information (APCI).²⁰⁴ Moreover CIPU itself inserts a disclaimer into the 'Scope of Document' section of each report which makes it clear that they are not a complete record of material on the issues:

'The Report aims to provide a brief summary of the source material identified, focusing on the main issues raised in asylum and human rights applications. ***It is not intended to be a detailed or***

²⁰¹ Osmans Solicitors further confirmed that if they had represented the claimant they would have submitted a bundle. According to the determination counsel instructed was Mrs C Charlton-Little. As Mrs Charlton-Little is not listed in the bar directory, IAS contacted the IAA for clarification of who acted in this case but was told that the IAA could not assist without the case reference number which IAS does not have. It has therefore not been possible to gain clarification as to the information presented in this case.

²⁰² See the 'effectively comprehensive' chapter for further discussion of these cases.

²⁰³ Carver, N (Ed), 'Home Office Country Reports: An Analysis' *IAS* (September 2004); Carver, N (Ed), 'Home Office Country Assessments: An Analysis', *IAS* (September 2003)

²⁰⁴ 'Report of Advisory Panel on Country Information consultation exercise on CIPU Country Reports October 2003' *Advisory Panel on Country Information* (March 2004)

comprehensive survey. For a more detailed account, the relevant source documents should be examined directly.' [emphasis added]

Furthermore, as the CIPU reports follow a rigid standard format regardless of the country being examined,²⁰⁵ there are occasions where the core issue in a Country Guideline case is not even addressed by the submitted report.²⁰⁶

The Home Office's universal reliance on a generic bundle of material (CIPU reports and relevant Country Guideline cases) at Adjudicator and Tribunal level in every single case is extremely unhelpful. Any attempt by the Home Office to submit generic bundles for a case that has been pre-designated as a possible Country Guideline case could and should be deemed unacceptable by the Tribunal. The specific issues in a guidance case can not be addressed by a generic bundle which merely skims the surface of all the main asylum claims generated from a particular country rather than carefully and comprehensively examining relevant material to the guidance issues at hand. The Tribunal's task would certainly be made considerably easier if the Home Office could be persuaded to conduct research in important cases – providing the Home Office also recalls and observes its duty to disclose material helpful to the claimant as well as unhelpful material.

Lack of relevant sources

The Tribunal frequently decides Country Guideline cases on the basis not just of a paucity of sources but also a startling lack of **relevant** sources. This flies in the face of the directions of the Court of Appeal in *S and Others*²⁰⁷ and it gives the determinations in question a degree of purported certainty they simply do not deserve or merit, the implications of which are discussed in the chapter on certainty and consistency.

²⁰⁵ See criticisms made of this approach in Carver, N (Ed), 'Home Office Country Reports: An Analysis' *IAS* (September 2004), pp. 10-11 and p.17

²⁰⁶ See the further analysis of irrelevant material examined in *NL (Mental Illness - Support for Family)* Pakistan CG [2002] UKIAT 04408 below.

²⁰⁷ *S and Others v SSHD* [2002] INLR 416 paragraph 29 exhorts that the Tribunal's reasoning must be 'effectively **comprehensive**' and 'address **all the issues** in the case capable of having a real, as opposed to fanciful bearing on the result' explaining what is made 'of the **substantial** evidence going to each such issue.' [emphasis added]

The Country Guideline case of *NL (Mental Illness – Support for Family)* Pakistan CG [2002] UKIAT 04408, as its title suggests, gives guidance on 'mental illness' and 'support for family'. The only vaguely relevant source before the Tribunal was CIPU's 'Pakistan Country Assessment' (October 2001), yet this report says nothing about mental health facilities. The only other source discussed in the determination reports related to the status of women and not either of the guidance topics. The paucity of both the breadth and the relevancy of information before the Tribunal are self evident. The determination states that the Adjudicator who previously heard the case 'had not been shown evidence of the medical treatment which the appellant required would not be available [sic]' and so he 'proceeded on the basis that the medical facilities which she [the claimant] required, were available.' Before the Tribunal it also 'remain[ed] the case that there is a lack of evidence in this regard.'²⁰⁸ The only guidance the case can give as to the extent of mental health facilities in Pakistan is that derived by the Adjudicator and approved by the Tribunal, which is, to paraphrase, 'I have no information on this matter but I think it will be alright'. It is unfathomable why *NL* (heard before the Country Guideline system was introduced) was designated a guidance case or what value it adds to practitioners' understanding of mental health treatment in Pakistan.²⁰⁹

NL exemplifies the problems associated with backdated Country Guideline cases, heard before the start of the Country Guideline system and designated as guidance cases posthumously. These cases were heard with no understanding that they would subsequently be used to set factual precedents and were simply heard as 'ordinary' cases engaging none of the additional

²⁰⁸ *NL (Mental Illness - Support for Family)* Pakistan CG [2002] UKIAT 04408 paragraph 11 reads in full 'We have been provided with no evidence as to the extent to which the appellant could be treated on return to Pakistan for her ailments. The Adjudicator, at paragraph 41, made it clear that he had not been shown evidence of the medical treatment which the appellant required would not be available for her in Pakistan and that therefore, he proceeded on the basis that the medical facilities which she required, were available to patients in her condition. It remains the case that there is a lack of evidence in this regard.'

²⁰⁹ This is in contrast to the approach of the Tribunal in *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007 which exhibits a more robust approach to the guidance it gives. Paragraph 1 clearly sets out the guidance issue covered - 'this case is a country guideline (CG) case on the issue of whether failed asylum seekers per se face a real risk of serious harm upon return to the Democratic Republic of Congo (DRC)' – and then goes on to examine it.

responsibilities this report proposes are appropriate to the hearing of guidance cases. As such, backdated guidance cases include cases which draw on a desperately poor range of sources. If *NL* passed the quality threshold to be designated a guidance case, that threshold is worryingly low.

Even guidance cases heard since the Country Guideline system was instituted have suffered from a similar dearth of relevant information, even when it has been specifically requested by the Tribunal. *SN & HM (Divorced women – Risk on return)* Pakistan CG [2004] UKIAT 00283 saw the Tribunal request specific information when granting leave to appeal to one of two conjoined appeals:

‘When granting leave, the Tribunal stated in terms: “Evidence will have to be given as to what sort of influence or political importance this family has. Also evidence will have to be given as to the actual availability of a place to go for women who have been treated in the way this claimant has.”²¹⁰

The requested evidence was not supplied. The case proceeded and, despite the failure of the representative to submit the evidence the Tribunal considered necessary to determine the case and the broader issues (for which there could be many explanations), it was classified as a guidance case:

‘No effort was made to tender any new evidence for the hearing on either of these points. The Tribunal has therefore dealt with the matter on the basis of the bundle before the Adjudicator and the single copy of the Tribunal bundle filed for us. We are however concerned that experienced immigration solicitors should fail to deal with such an obvious direction, and fail to file the required three copies of the documents upon which they seek to rely at the hearing.’²¹¹

In designating *SN & HM* a Country Guideline case the Tribunal is clearly breaching the safeguards set out in *S and Others* regarding the necessity for a comprehensive examination of all material issues in setting factual precedents.

²¹⁰ *SN & HM (Divorced women - risk on return)* Pakistan CG [2004] UKIAT 00283 para 5

²¹¹ *SN & HM (Divorced women - risk on return)* Pakistan CG [2004] UKIAT 00283 para 6. The Tribunal makes a further three references to the representative's failure to file new evidence to deal with the concerns addressed in the grant of permission to appeal, paragraph 22, 28 and 44.

In *FD (Kosovo – Roma)* Serbia and Montenegro CG [2004] UKIAT 00214 both representatives were approached following the hearing to provide new information on the position in Kosovo for Roma following a fresh round of inter-ethnic violence in March 2004:

‘The above [determination] was written before the recent outbreak of inter-ethnic violence in Kosovo ... We invited submissions from both parties and, following the publication of a UNHCR position paper of 30th March 2004 on international protection needs in Kosovo as a result of those inter-ethnic confrontations, we invited further submissions explicitly addressing that paper.

Neither party made any submissions.’²¹²

Despite the fact that neither party submitted any further material, the case proceeded as a guidance case with insufficient information as to the current country conditions. The Tribunal justified this approach by referring to comments made by UNHCR in its March 2004 paper which ‘urged that up-to-date information be taken into account’ and concluding ‘this we have done.’²¹³ Considering the Tribunal only read one 4-page report on the March 2004 violence and received no submissions from either party upon it, it is impossible to see how it could reasonably have considered itself well appraised of the situation for minorities in Kosovo in the light of the March violence.

Outdated material

The issue of changing country situations and fixed factual precedents was discussed in the certainty, consistency and justice chapter but it is important to note here that this problem is exaggerated by the Tribunal's passivity in proceedings. In an adversarial system where the Tribunal is entirely dependent on the material placed before it by the two parties, and therefore on the competence, funding and approach to the case of the two parties, it is inevitable that the Tribunal will find itself limited to outdated material on occasion. Again, this may be unfortunate and inevitable in some ‘ordinary’ cases, but it is very

²¹² *FD (Kosovo – Roma)* Serbia and Montenegro CG [2004] UKIAT 00214 paragraphs 57-58

²¹³ *FD (Kosovo – Roma)* Serbia and Montenegro CG [2004] UKIAT 00214 paragraph 63

clear that elevating any such findings to Country Guideline status is detrimental to justice and damaging to future claimants. The Tribunal must either adopt a more inquisitorial role or accept that a case in which potentially obsolete material has been presented is not suitable as a factual precedent.

3.2 Grounds for an inquisitorial approach

Whilst the legal model adopted in the UK to hear asylum appeals is adversarial in approach, some state parties to the 1951 UN Convention Relating to the Status of Refugees have adopted much more inquisitorial methods of obtaining the information required to determine asylum claims.²¹⁴ A variety of different models have been established, probably the best known of which is that used in Canada. Here full hearings of the Canadian Immigration and Refugee Board (IRB) are 'usually non-adversarial' although 'it becomes adversarial when a representative of the CIC [Citizenship and Immigration Canada, the equivalent of the UK Immigration and Nationality Directorate] participates in the case to argue against the claim'.²¹⁵ As the procedures for the hearings are relatively informal, 'evidence presented and accepted is not restricted by technical or legal rules of evidence'²¹⁶ and IRB decision makers are assisted in obtaining relevant evidence by a refugee protection officer employed by the IRB who is "neutral"; i.e., they have no interest in the outcome of the case and their role is not to oppose, or to support, the refugee protection claim.²¹⁷ The Spanish authorities have adopted a different approach. Spain's UNHCR representative has to be informed and given the opportunity to express an opinion on cases before the authorities make a decision as to the admissibility of a case.²¹⁸ Whilst UNHCR's position is not binding, the Asylum and Refugee Office (*Oficina de Asilo y Refugio* or OAR) 'normally follows it when applications are lodged at the

²¹⁴ For information on how country information is produced in other jurisdictions see 'The Structure and Functioning of Country of Origin Information Systems Comparative Overview of Six Countries Commissioned by the Advisory Panel on Country Information' International Centre for Migration Policy Development (August 2004)

²¹⁵ 'What it is and how it works' The Immigration and Refugee Board (available in hard copy from the IRB) (undated), p.6.

²¹⁶ 'What it is and how it works' The Immigration and Refugee Board (undated), p.3.

²¹⁷ 'What it is and how it works' The Immigration and Refugee Board (undated), p.6 and p.21.

²¹⁸ Since the 1994 Asylum Act there has been no automatic right of entry for asylum seekers in Spain. 'Legal and Social Conditions for Asylum Seekers and Refugees in Europe: Spain' ECRE/Danish Refugee Council, (2003), p.4

border'.²¹⁹ In this way UNHCR has an integral role within the decision-making system to the supply of information upon which a determination is based. In France, the appeal system is explicitly inquisitorial in nature. A *rapporteur* investigates the case and makes a recommendation to the appeal tribunal. An increasing number of claimants are legally represented but there is no party present to argue against the grant of asylum.²²⁰

UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status (January 1992) strongly suggests that an inquisitorial approach is actually required of those deciding asylum claims. It states, in paragraph 196, that:

'It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.'

This imparts a shared duty upon the Tribunal to assist in the production of evidence necessary to hear an asylum case, something which has been described by Symes and Jorro as 'the need to take an active part in the information gathering process'.²²¹ If this shared duty applies in individual cases, it must surely apply all the more strongly in a Country Guideline case where tens, hundreds or even thousands of claims could be affected by the outcome.

²¹⁹ On the other hand it appears that the OAR does not necessarily follow the UNCHR's recommendation in in-country cases. 'Legal and Social Conditions for Asylum Seekers and Refugees in Europe: Spain' ECRE/Danish Refugee Council, (2003), p.6

²²⁰ These examples are intended purely to be illustrative of the different approaches in different countries and are not intended to be exemplary. It is important to note that there are major concerns about the refugee status determination and appeal procedures in both Spain and France and that Canadian practitioners have expressed similar concerns about the system there. It is commonly felt that **too** inquisitorial a system forces the deciding authority to become prosecutor as well as judge. An appointed 'assisting counsel' system in Country Guideline cases could avoid this problem.

²²¹ Symes, M and Jorro, P, Asylum Law and Practice, (London, 2003), s.14.46

By comparison, asylum decision-makers in the UK are extremely reluctant to adopt an inquisitorial role, even where the quality of information before them is deficient. Typically the courts have stepped back and reviewed information put before them rather than proactively seeking information which they feel would aid them in their decision-making and which has not been provided by the two parties of a case. However this does not have to be so and when setting factual precedents, as with Country Guideline cases, there are compelling reasons why this is inadequate and inappropriate.

It has long been accepted that where an erroneous decision may result in the claimant's torture or death, a more proactive approach by the decision maker may need to be adopted in order to give the case the 'most anxious scrutiny' it deserves.²²² This enhanced duty applies in cases where the claimant is badly represented, where the decision maker must avoid reaching adverse findings as a result of poor representation.²²³ It must also apply where the claimant is not represented at all. As the Tribunal made clear in the *Surendran* (19197) 25 June 1999 guidelines, Adjudicators should take an active role in assisting unrepresented appellants as 'it is the duty of the Special Adjudicator to give every assistance, which he can give, to the appellant.'²²⁴

Although the current Practice Direction on country evidence and trial bundles (CA1 of 2003) revoked the earlier Practice Direction which indicated that Adjudicators would take judicial notice of certain country reports, the Tribunal clearly considers itself and Adjudicators to have some expertise with regards to country information. For example, in *SK (Return - Ethnic Serb) Croatia CG* [2002] UKIAT 05613 it was noted that 'the tribunal builds up its own expertise in relation to the limited number of countries from which asylum seekers come.'²²⁵ Again in *Balachandran* (20262) 17 December 1999 the Tribunal commented

²²² Lord Bridge in *Musisi* [1987] Imm AR 250 at 263

²²³ See Symes, M and Jorro, P, *Asylum Law and Practice*, (London, 2003), pp. 689-690 s.14.48

²²⁴ The *Surendran* Guidelines are also reproduced in the starred determination of *MNM v SSHD* (00/TH/02423) 1 November 2000.

²²⁵ *SK (Return - Ethnic Serb) Croatia CG* [2002] UKIAT 05613 paragraph 5

that it has 'its own expertise in the sense that it is familiar with the situation in many countries from which asylum seekers regularly come'. Consequently:

'...the Tribunal has in mind, because it has referred to it in other cases, the up-to-date material and is conscious that if there is anything which should be taken into account in favour of an appellant, even though, through incompetence, that appellant has not put the matter before the Tribunal, it will have regard to that matter.'

In other words whilst the asylum appeals system remains adversarial in nature, because of the experience built up by the appellate authorities through hearing numerous cases with similar facts, claimants who are badly represented could still benefit from the acquired knowledge of the Tribunal on prevailing country situations. However, a line must be drawn between decision-makers adopting a more proactive approach to introducing material within a proper procedural framework and them acting as experts based on their own knowledge.²²⁶ As Newman J cautioned in the Administrative Court in *R v The Immigration Appellate Authority, ex p Mohammed* (CO/918/00), the latter approach involves the introduction of information which 'is, in essence, personally stored' and is therefore difficult to challenge by the parties. The Tribunal's use of its own knowledge of country information also raises the question of how complete a picture the Tribunal really does hold in its mind of a country situation and how wedded the Tribunal might become to its own view on country conditions. If the Tribunal is to undertake research, it will need a research staff or an 'assisting counsel' or other investigator.

In *Ravichandran* the House of Lords held that the Immigration Appellate Authority is part of the asylum decision making process, rather than simply an appeals mechanism for decisions already made. The Tribunal as an agency for administrative decision making has an obligation to consider the most recent material available on the issues under consideration in asylum cases. To interpret this obligation as merely consideration of the most recent material put before the Tribunal by the two parties (which should be a given in itself) is an unnecessarily narrow interpretation of the *Ravichandran* principle, which obliges

²²⁶ The importance of this distinction is discussed further in the chapter on expert evidence.

decision makers to consider country situations as of the date of hearing. There is no caveat within *Ravichandran* that allows only the material produced by the parties to be considered even if that material is a year or two years out of date, and the same can be said of the statutes which have incorporated *Ravichandran* into black letter law.²²⁷ As Sedley LJ stated in *Karanakaran*, the Tribunal is 'required to take everything material into account'.²²⁸ Not to do so also wilfully ignores paragraph 196 of the UNHCR Handbook. In considering material not presented before them, the Tribunal would not be acting outside the statutory scheme or the case law, nor would it be exhibiting signs of 'mandate creep', it would be fulfilling its legal obligations.

The logic of the Tribunal making these interventions, within what is still an adversarial process, is reinforced in Country Guideline cases where the outcome of the case will go on to affect a significant number of other cases at multiple levels of the asylum system. The Tribunal has been given a very strong steer by the Court of Appeal that it is not sufficient merely to review the information presented by the representatives of the two parties where the case will go on to be determinative in the outcome of future cases. In *S and Others*, the Court of Appeal gave guidance to the Tribunal on the 'safeguards' it must employ when deciding Country Guideline cases and a more proactive 'inquisitorial quality' to the Tribunal's work within the framework of the adversarial system was endorsed:

'In a case like the present ... where conjoined appeals are heard together in order to produce a decision which is to be taken to be factually authoritative, **the exercise upon which the IAT is engaged assumes something of an inquisitorial quality**, although the adversarial structure of the appeal procedure of course remains.'²²⁹ [emphasis added]

The Court of Appeal has since re-iterated its views on the centrality of the Tribunal's inquisitorial role in *Shirazi* [2003] EWCA Civ 1562 which was remitted

²²⁷ Currently s.85(4) of the Nationality, Immigration and Asylum Act 2002.

²²⁸ *Karanakaran* [2000] Imm AR 271 paragraph 137

²²⁹ *S and Others v SSHD* [2002] INLR 416 paragraph 15

to the Tribunal as 'the issues canvassed ... have not been adequately addressed'²³⁰. Sedley LJ stated:

'...In **a system which is as much inquisitorial as it is adversarial**, inconsistency on such questions [as the Tribunal's reading of the situation in a country] works against legal certainty ... It means that in any one period a judicial policy (with the flexibility that the word implies) needs to be adopted on the effect of in-country data in recurrent classes of cases.'²³¹ [emphasis added]

Shirazi categorically endorses an inquisitorial approach by the Tribunal and even describes the asylum process in the UK as 'as much inquisitorial as it is adversarial' in nature.

Notably there is evidence that some Tribunal panels have paid heed to the Court of Appeal's advice. Just as we have seen examples of where the Court of Appeal's guidance has been blatantly ignored, there are also examples of a more inquisitorial approach being adopted by the Tribunal. The Tribunal panel in *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007 accepts the advice of the Court of Appeal in *S and Others* and *Shirazi* and clearly demonstrates how it believes the Court of Appeal's guidance should be implemented. In the first paragraph of its determination, the Tribunal makes its position clear:

'Having been tasked with reaching an authoritative decision on this issue, we saw it as essential to ensure we took cognisance of **all materials having a bearing on the issue**.'²³² [emphasis added]

The Tribunal goes on to demonstrate its commitment to this approach by reconvening the hearing 'in order to hear further submissions from the parties on material which had come to hand since the original hearing.'²³³ These materials included reports that were introduced by the Tribunal itself rather than either of the two parties. In particular these were materials brought together by

²³⁰ *Shirazi* [2003] EWCA Civ 1562 paragraph 33

²³¹ *Shirazi* [2003] EWCA Civ 1562 paragraph 29

²³² *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007 paragraph 1

²³³ *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007 paragraph 1

Bail for Immigration Detainees which 'became known to other Tribunal panels in cases heard since the original hearing'²³⁴ and an expert report by Dr Erik Kennes which 'the Tribunal became aware of ... in the course of dealing with another case which had to be remitted' and which it 'considered it right to refer to'²³⁵.

The Tribunal acknowledges that its steps are 'unusual' but believes they are 'fully justified in our view by the task we were set of reaching a decision to be treated as a country guideline case.'²³⁶ In other words, as guidance cases set precedents that will impact on significant numbers of subsequent cases at all stages of the asylum process, the Tribunal is required to assume a more proactive attitude than it might otherwise do in an 'ordinary' case, to ensure it considers all relevant material. The Tribunal panel in *VL* reiterates this thinking, stating:

'Once, therefore, the Tribunal embarks upon the task of making a country guideline decision, in the sense identified by the Court of Appeal in *S and Others*, it is not only valid but also in everyone's interest that it does all in its power to ensure it has before it all known materials having a material bearing on the relevant issues. It would defeat the object of the exercise if the Tribunal were to confine itself to the body of evidence adduced by the parties even when it is aware that that body of evidence omits potentially material evidence.'²³⁷

Clearly, for the Tribunal to consider in a Country Guideline case only the material before it, when it is obvious that other relevant materials have not been provided by the two parties, makes a mockery of the entire system.

A more inquisitorial approach is also evident in some other cases, including *AL (Article 3 – Kabul)* Afghanistan CG [2003] UKIAT 00076. Here, unhappy that the claimant's representative had failed to provide satisfactory evidence to

²³⁴ *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007 paragraph 7

²³⁵ *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007 paragraph 6

²³⁶ *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007 paragraph 8

²³⁷ *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007 paragraph 10

show the proximity of the claimant's home to Kabul, the Tribunal determined 'this is most unsatisfactory and after the hearing, in fairness to the Appellant, we consulted the very substantial Times World Atlas'.²³⁸ Also, in *MS & Others (Risk on Return – Deplete Uranium)* Kosovo CG [2003] UKIAT 00031 the Tribunal identified and supplied to both parties a report which had been mentioned by the SSHD and by an expert but which 'had not been provided to us by the parties'.²³⁹ Similarly, the Tribunal in *AF ('Warlords/commanders' – Evidence expected)* Afghanistan CG [2004] UKIAT 00284, which is of importance as it gives guidance on 'evidence expected', criticises the determination of an Adjudicator for failing to back up a contention with any confirmatory evidence. Acknowledging the adversarial nature of the UK's asylum system the Tribunal reinforces the obligation of 'fact-finders in the asylum system' to obtain and check all available evidence:

'Adjudicators, like other fact-finders in the asylum system, are subject to the double obligation expressed in 203-4 of the UNHCR handbook: by 203, they must be prepared to give the claimant the benefit of the doubt (and particularly on his individual history) where no evidence is available after a genuine effort to obtain it; but by 204, they should only do so, not only when satisfied of his general credibility, **but after obtaining and checking all available evidence.** [emphasis added]

The responsibility for obtaining evidence under our adversarial system is of course that of the parties; but that in our view does not absolve the adjudicator from considering what evidence might reasonably be required in a given set of circumstances to confirm a given fact or situation'.²⁴⁰

Whilst the adversarial nature of the system is not in doubt, decision makers are not absolved from a responsibility to consider all materials that might reasonably be expected to be obtained. This duty must surely be reinforced when the material considered in a case and the conclusions reached by the Tribunal set precedents that will impact on future cases.

²³⁸ *AL (Article 3 – Kabul)* Afghanistan CG [2003] UKIAT00076 paragraph 21

²³⁹ *MS & Others (Risk on Return – Deplete Uranium)* Kosovo CG [2003] UKIAT 00031 paragraph 5

²⁴⁰ *AF ('Warlords/commanders' – evidence expected)* Afghanistan CG [2004] UKIAT 00284 paragraphs 5-6

3.3 Procedural care in introducing own research

As we have seen, the introduction of material by the Tribunal in Country Guideline cases is a practice endorsed by the Court of Appeal, the UNHCR Handbook and certain Tribunal panels. However the adoption of a more inquisitorial approach to decision-making brings with it certain challenges, not least the importance of decision-makers ensuring materials they introduce are handled with sufficient procedural care. Naturally this responsibility is incumbent upon decision makers as part of the principal of natural justice in an 'ordinary' case. This duty must be heightened where the outcome of the case will affect a significant number of others. The effect of any dereliction of procedural duty on the part of the Tribunal could go on to have a profound effect on subsequent cases with similar facts. For this reason, if a Tribunal panel is to rely on information adduced from their own research, it is imperative that it allows both parties the opportunity to comment on this new material either pre- or post-hearing.

The correct approach was taken, as has been discussed, in *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007. Here, when the Tribunal proposed to introduce two new sources not included by either of the parties to the case, the hearing was reconvened and both parties given the opportunity to make submissions as to the relevance of the new materials to the core issues of the case.²⁴¹ Importantly, the representatives do seem to have specifically addressed and made submissions on that evidence. However, *VL* is far from the norm. For example, in *FG (Risk – Single Female – Clan Members – Article 3)* Somalia CG [2003] UKIAT 00175 the Tribunal criticised the Adjudicator for exercising an inquisitorial approach incorrectly and not disclosing material to the two parties as she had 'referred to website information examined by her – and not identified in the determination'.²⁴² The outcome of the Tribunal's determination was that the Adjudicator 'did not make

²⁴¹ *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007 paragraphs 6-7

²⁴² *FG (Risk – Single Female – Clan Members – Article 3)* Somalia CG [2003] UKIAT 00175 paragraph 4

it clear to what objective material she was referring and she also referred to web based material which was not made available to the parties. This should never be done.²⁴³ In *AM (Risk – Warlord – Perceived Taliban)* [2004] UKIAT 00004, the Tribunal further cautions against Adjudicators' use of case law which is not well-known without warning both parties as 'the position with an unfamiliar case is akin to that in relation to a piece of evidence that has not been adduced at the hearing but relied on by an Adjudicator nonetheless as a result of his research afterwards'.²⁴⁴ The Tribunal found that the use of the case in question was inappropriate:

'We do not consider that the 2002 case of *No. 14* fell into the category of a well-known case ... We are fortified in that view by the fact that **the Adjudicator relied on this case not for any proposition of law but as a source of general country guidance**. While the Court of Appeal in *S* has properly identified a role for country guideline cases which are to be followed as far as possible, it remains that recourse to such pre-PD10 [Practice Direction 10] cases, especially ones (like *No. 14*) which were not set down as country guideline cases, without warning the parties, is quite close to using evidence not adduced at the hearing.²⁴⁵ [emphasis added]

If parties are not given the opportunity to make submissions upon **all** material considered in the determination of a Country Guideline case, recourse to justice could be limited not just for the claimant in question but also for all those whose cases subsequently fall into the remit of the guidance case.

The Tribunal is far from innocent, however, and itself fails to observe the proper enhanced procedural duties that should apply in a Country Guideline case. In *FD (Kosovo – Roma)* Serbia and Montenegro CG [2004] UKIAT 00214 the Tribunal attempted to deal with important country situation developments arising after the hearing. It stated that 'the UNHCR ... thought it likely that detailed reports would be published in April 2004, though none had been published by mid-late May 2004'.²⁴⁶ The comment regarding the lack of reports as of mid-late May 2004 is from the Tribunal, not the UNHCR source quoted, which has a

²⁴³ *FG (Risk – Single Female – Clan Members – Article 3)* Somalia CG [2003] UKIAT 00175 paragraph 23

²⁴⁴ *AM (Risk – Warlord – Perceived Taliban)* [2004] UKIAT 00004 paragraph 24

²⁴⁵ *AM (Risk – Warlord – Perceived Taliban)* [2004] UKIAT 00004 paragraph 26

²⁴⁶ *FD (Kosovo – Roma)* Serbia and Montenegro CG [2004] UKIAT 00214 paragraph 63

publication date of March 2004. However reports that analysed the inter-ethnic violence in March 2004 were published between March 2004 and May 2004, not least a report from the UN Secretary General published on 30 April 2004 that found:

'The violence in March has completely reversed the returns process. Minority areas were targeted, sending a message that minorities and returnees were not welcome in Kosovo. In less than 48 hours, 4,100 minority community members were newly displaced, more than the total of 3,664 that had returned throughout 2003. The majority of those who fled were in the Pristina and southern Mitrovica regions (42% and 40%, respectively), but displacement affected all regions of Kosovo. Of the displaced, 82 per cent are Kosovo Serbs and the remaining 18 per cent include Roma and Ashkali displaced. It is estimated that 350 Kosovo Albanians were displaced from the northern section of Mitrovica.²⁴⁷ [emphasis added]

In paragraph 63 of its determination, the Tribunal makes it clear that it had canvassed reports written up until May 2004 and found them not to be of relevance. While the Tribunal may have attempted to do so, it clearly failed to do a very thorough job, never mind an 'effectively comprehensive' one. The careless methodology contributed to the SSHD's successful appeal against the decision of an Adjudicator to allow the claimant's asylum and human rights appeals. Fundamentally, as this case is a Country Guideline case, any future claimant whose case is based on the return of Roma to Kosovo will be left battling to overcome the hurdle of this decision which, regardless of the merit or otherwise of the facts of this particular case, is based on seriously flawed research.

In *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007 the SSHD was granted leave to appeal partly on the basis of the Adjudicator announcing shortly prior to the hearing that he would be relying on *Mozu* [2002] UKIAT 05328 and not allowing submissions post-hearing. The Tribunal found not only that this was unfortunate but that the case relied upon as the result of the Adjudicator's own research was not representative of the Tribunal's position on the issue:

²⁴⁷ 'Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo' UN Security Council (30 April 2004)

'However, given that the Adjudicator e [sic] himself invoked *Mozu* as authority, it is most unfortunate he did not allow the parties a short time after completion of the hearing to submit any more recent cases. The fact of the matter was that at the date he heard this case (10.3.03) there were several reported Tribunal decisions postdating *Mozu* and, since it was his own research which had located *Mozu*, that same research should have taken care to check whether *Mozu* was representative of the current position of the Tribunal on this issue. In this regard we would emphasise that since the issue was plainly one which potentially affected a significant number of cases, the procedural duty of care on the Adjudicator was even greater.'²⁴⁸

In criticising the Adjudicator for the introduction of outdated case law, the Tribunal flags up another procedural duty incumbent upon decision makers when adopting a more investigative approach. Material introduced by decision makers, whether case law or objective evidence, must be current. This is a matter of common sense as well as legal obligation for all those involved in the hearing of an asylum case. The use of outdated material is particularly dangerous when an Adjudicator or Tribunal relies upon their own research without allowing the parties an opportunity to comment upon it or to expose the inadequacy of the new materials. If the outcome of a Country Guideline case is derived in part or in whole from an outdated document researched by the Tribunal without employing sufficient procedural care, the impact of this injustice would be felt by significant numbers of people. The same principle applies to reliance on the personal experience or expertise of the decision-maker. The use of such information must be properly disclosed and both parties must be allowed the opportunity to respond or object.²⁴⁹ However, the Tribunal should also recognise that if representatives in an adversarial system themselves fail to disclose up-to-date and relevant information, this failure does not absolve the

²⁴⁸ *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007 paragraph 16

²⁴⁹ As examples of reliance on personally acquired knowledge see *Balachandran* (20262) 17 December 1999: 'the Tribunal has its own expertise in the sense that it is familiar with the situation in many countries from which asylum seekers regularly come.'; *KK (evidence – late filing – proper notice)* Afghanistan [2004] UKIAT 00258 'Reported': 'However we saw this claimant present in court, and have no doubt (from many years' joint experience of hearing both Afghan and Punjabi cases) that, without the veil, she could be identified as either a Sikh or Hindu, and not an indigenous Muslim lady.'; *BA (Perceived bias – Israel – Gaza)* Israel [2004] UKIAT 00118 'Reported' considers whether an Adjudicator 'wrongfully failed to recuse himself given his recent personal contact with the Israeli army and Israeli government officials and historians' and finds in this instance that he did not.

Tribunal (or the Adjudicator) from its responsibility to rely on current information. If the Tribunal is forced to rely on its own knowledge or information that it is already aware of, it is doubtful that the determination concerned should be elevated to Country Guideline status, however. The danger of imposing artificial and incorrect certainty on subsequent cases is too great.

3.4 Conclusion

Despite the pioneering efforts of some Tribunal panels to implement the advice of the Court of Appeal in *S and Others*, there is ample evidence that too many Country Guideline cases are still being decided on poor, irrelevant or no country information. The Tribunal is declining to adopt a more inquisitorial approach to bridging the information gap and where it does introduce material of its own volition, it sometimes fails to observe necessary safeguards and persists in elevating the ensuing determinations to Country Guideline status. According to *S and Others*, the *raison d'être* behind the setting of factual precedents is to ensure a measure of consistency to decisions emanating from the Tribunal on similar factual situations by bringing together all relevant evidence:

'There have been a very large number of appeals relating to ethnic Serbs and many have been adjourned by the Tribunal pending the outcome of these appeals, which have been described as test cases ... While the results have varied, the approach has been consistent, but the Tribunal **has had to rely on whatever material has been put before it**. This has meant there has been a degree of apparent inconsistency and so it was thought desirable that there should be an authoritative decision as to what the current situation is to enable consistent results to be achieved because **this Tribunal has been able to consider all relevant evidence**.'²⁵⁰ [emphasis added]

'All relevant evidence' is not limited to 'all relevant evidence placed before the Tribunal by the parties to the appeal in question'. If **all** the relevant material pertinent to the issues of a guidance case is not canvassed, then inconsistent decision making will continue or, worse, consistently **bad** decision making ensues, as many practitioners legitimately fear is currently the case. The purpose of factual precedents is to eradicate the anomalies of decision making

²⁵⁰ *S and Others v SSHD* [2002] INLR 416 paragraph 3. See also *Shirazi*.

on similar situations of fact, yet the Tribunal's efforts have suffered from precisely this failing.

The burden rests with the appellant to prove his or her case, not the court nor the respondent. If the claimant's representative is badly prepared or not at court, the Tribunal is justified in continuing with the hearing, disastrous as that might be for the individual concerned. However, this course of action should be contingent on two considerations. Firstly, the Tribunal should in all cases consider the shared fact-finding duty suggested by the UNHCR Handbook and the duty to consider up-to-date evidence imposed by *Ravichandran* and subsequent statutory provisions. Secondly, the Tribunal, in light of this and the additional, enhanced duties that accompany the setting of a factual precedent affecting other claimants, has to recognise that it cannot designate a case as a Country Guideline case unless it is satisfied that all the relevant material has been considered. This will be all but impossible where the representative fails in some way.

So, what action is required? The Tribunal should remove Country Guideline designation from cases where it has been critical of the quality of evidence presented to it.²⁵¹ Clearly there is a very strong possibility that a different Tribunal panel or an Adjudicator would reach a different conclusion on a case if presented with no bundle by the claimant's representative as opposed to a full and comprehensive bundle on the relevant issues. It is in nobody's interests to run a Country Guideline case with insufficient material upon which to weigh the guidance issues²⁵² and if the Tribunal judge it inappropriate to adjourn the hearing, the case should be run as an 'ordinary' case and not used to set a factual precedent. In several Country Guideline cases the Tribunal has as much as admitted that it has insufficient evidence on the issues at hand and invited

²⁵¹ In *KK (evidence – late filing- proper notice) Afghanistan* [2004] UKIAT 00258 'the appeal was given on the basis that the Tribunal needed to give general guidance on the situation facing Sikhs in Afghanistan but the decision 'is not a 'country guidance' case' (paragraph one) because key evidence had not 'been authoritatively confirmed or disproved from some official source' and 'it would be wrong to give our decision ... the status of a 'country guidance' case' (paragraph 36).

²⁵² *VL (Risk – Failed Asylum Seekers) Democratic Republic of Congo CG* [2004] UKIAT 00007 paragraph 10

further submissions from the representatives, either when granting leave to appeal, pre- or post- hearing. However, where representatives have failed to comply with these directions, the Tribunal has carried on regardless.²⁵³ If the Tribunal continues to be ineffective in securing compliance with directions and is incapable of bridging the information gap itself with good quality, up-to-date and independent research, as at present, it has to be accepted that it is inappropriate to designate affected cases as Country Guideline cases. A further option is to adopt a more inquisitorial approach and try to bridge the gap. If the Tribunal or the new AIT does decide to follow this path, care has to be taken to observe procedural safeguards on the use of new material, as has been exhibited in cases such as *VL (Risk – Failed Asylum Seekers)* Democratic Republic of Congo CG [2004] UKIAT 00007.

The Court of Appeal in *S and Others* accepts that the notion of factual precedents is 'foreign to common law'²⁵⁴ and 'exotic'²⁵⁵ but concludes it to be 'benign and practical'²⁵⁶ subject to a set of caveats. Too often *S and Others* has been misinterpreted as conferring an unrestricted legitimacy to the system of Country Guideline cases because of Laws LJ's phrase, 'benign and practical'. The Court's actual position, and arguably the *ratio decidendi*, is that 'if the conception of a factual precedent has utility [i.e. is benign and practical] in the context of the IAT's duty, **there must be safeguards**' [emphasis added], these being 'the application of the duty to give reasons with particular rigour', to 'take special care to see that its decision is effectively comprehensive' and to 'address all the issues in the case capable of having a real, as opposed to fanciful bearing on the result' explaining what is made 'of the substantial evidence going to each such issue.'²⁵⁷ Without these caveats being observed, Country Guideline cases cease to be a 'benign and practical' aid for decision-makers and degenerate into obstructions to justice in individual cases. A more active and inquisitorial role is required, and whilst this might appear at odds with the traditional judicial approach, if the Tribunal wishes to expand its remit into

²⁵³ See *FD (Kosovo – Roma)* Serbia and Montenegro CG [2004] UKIAT 00214 and *SN & HM (Divorced women - risk on return)* Pakistan CG [2004] UKIAT 00283

²⁵⁴ *S and Others v SSHD* [2002] INLR 416 paragraph 26

²⁵⁵ *S and Others v SSHD* [2002] INLR 416 paragraph 28

²⁵⁶ *S and Others v SSHD* [2002] INLR 416 paragraph 28

²⁵⁷ *S and Others v SSHD* [2002] INLR 416 paragraph 29

areas previously seen as 'foreign' or 'exotic' to common law, it stands to reason that a corresponding shift in responsibilities is required.

At present, claimants are subject to a lottery as to whether the facts of their case fall under the authority of a guidance case which has been decided on the basis of a comprehensive analysis addressing all the issues having a real bearing on the result and explaining the substantial evidence going to each issue. This lottery is further loaded against the claimant if the guidance case is one which has been backdated, and where the standard of material canvassed is even more questionable. The obvious danger is that unless the directions of the Court of Appeal are applied uniformly by different panels of the Tribunal, some factual precedents will continue to be set on the basis of insufficient material and will go on to affect a significant number of claimants either at court or in seeking to pass the merits test to gain LSC funding. The only way to ensure Country Guideline cases are truly 'benign and practical' is for every Tribunal panel to assume 'something of an inquisitorial quality' in **every** Country Guideline case.²⁵⁸ Not to do so, as we have seen, is to risk breaching the UK's international legal obligations by denying due process to significant numbers of claimants.

²⁵⁸ *S and Others v SSHD* [2002] INLR 416 paragraph 15

The treatment of expert evidence

Jonathan Ensor*

4.1 Introduction

The body of law that circumscribes the function of experts does so for the main part by defining the difference between lay and expert evidence.²⁵⁹ Hodgkinson suggests that whilst lay witnesses may only give evidence of fact, experts are privileged in being able to assist the court through a broader range of evidence including opinion; explanation of technical meaning; and evidence of facts, the observation, comprehension or description of which require expertise.²⁶⁰ In the asylum context, expert evidence is most commonly offered on matters of medical or country knowledge. Medical evidence more normally relates directly to the physical or mental health of the asylum seeker. Frequently, this will be by establishing past ill-treatment, explaining reticence or difficulties in recounting events, or by explaining the physical or mental impact that would result from removal. Country experts, who form the focus of this study, provide evidence relating to credibility and future risk, based on their specialised understanding of country conditions. This evidence may extend to, *inter alia*, political, social, cultural, economic, linguistic or geographic knowledge; informing on issues such state and non-state risk, protection and obstacles to resettlement; and establishing the plausibility of claimed political, social or ethnic status and associated persecution. The nature of asylum claims are such that these categories cover a range of expertise, delineated not only by territory or region,

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²⁵⁹ In the Immigration Appellate Authority any evidence that is relevant may be considered, even if it would be inadmissible evidence in a court of law (r.48(1) of Immigration and Asylum Appeals (Procedure) Rules 2003). Several references are made in this chapter to academic works addressing questions of admissibility, which within the context of the IAA can be translated into questions of how much weight should be attributed to evidence and the proper role of an expert.

²⁶⁰ Hodgkinson T *Expert Evidence Law and Practice* (London 1990) p9. Note that the lay witness may also give opinion evidence as a mechanism for relaying fact or where opinion is itself at issue in the case.

but also by the particular circumstances of the case. Moreover, it may fall to the expert to guide the tribunal or court through cultural nuances that are alien to western thinking and may inhibit an accurate understanding of the claimant's motives or vulnerability.

In the analysis that forms the main body of this paper, the treatment of the specialist institutional knowledge of UNHCR will be considered alongside that of individual experts. The evidence on country conditions provided by UNHCR has repeatedly been acknowledged to be of significant importance in asylum claims. As 'the main body dealing with refugees throughout the world',²⁶¹ reports from UNHCR 'will be given significant weight'²⁶² and 'deserve the highest respect'.²⁶³ The determination in *Kurmarlingham* (14685; 1997) underscores the 'undoubted impartiality' of UNHCR whilst *Ragavan* (15350; 1997) emphasises the significance of UNHCR reliance on in-country observers. Moreover, in *FD (Kosovo – Roma) Serbia and Montenegro CG* [2004] UKIAT 00214 the Tribunal note that UNHCR sources 'must be well placed to provide sound information' and that their papers go 'through a process of consideration through UNHCR hierarchy' and therefore should be regarded as 'responsible, well researched and considered analysis'.²⁶⁴ Thus, as with many of the country experts who appear before the Tribunal, the contribution of UNHCR is important due to their close association with the complex issues on which asylum claims turn. Indeed, Henderson has noted the nature of asylum claims is such that the issues before the Tribunal are frequently beyond the ordinary experience of those charged with fact finding.²⁶⁵ Accordingly, it would be expected that the recourse to experts should in many cases be a matter of good practice. This understanding was confirmed in the Court of Appeal in the case of *Es Eldin*.²⁶⁶

'It must be extremely difficult for special adjudicators to form their view of credibility in relation to somebody who comes from a culture different from theirs and from a political background different from theirs. In those

²⁶¹ *Pasupathipillai* (14057; 4 November 1996)

²⁶² Symes M and Jorro P *Asylum Law and Practice* (London 2003) p724

²⁶³ *Pasupathipillai* (14057; 4 November 1996)

²⁶⁴ *FD (Kosovo – Roma) Serbia and Montenegro CG* [2004] UKIAT 00214 paragraph 43.

²⁶⁵ Henderson M *Best Practice Guide to Asylum and Human Rights Appeals* (Immigration Law Practitioners' Group in association with the Refugee Legal Group London 2003) p192.

²⁶⁶ *Es Eldin v Tribunal* (C/2000/2681) 29 November 2000

circumstances a special adjudicator always needs all the help that can be given by those who know more about such matters than he or she necessarily does.’

The broad recommendation of ‘all the help that can be given’ is reflected by the use of experts in the provision of not only country facts, but also in the interpretation of country conditions and the offering of opinion. The importance of this function in asylum cases – and in Country Guideline cases in particular – has been affirmed in the Court of Appeal in *S and Others* [2002] EWCA Civ 539.²⁶⁷

‘In this field opinion evidence will often or usually be very important, since assessment of risk of persecutory treatment in the milieu of a perhaps unstable political situation may be a complex and difficult task in which the fact-finding Tribunal is bound to place heavy reliance on the view of experts and specialists.’

However, this view is not uncontested. In *SK Croatia CG* [2002] UKIAT 05613, in which the Tribunal considered the remitted case of *S and Others*, the understanding of the role of expertise expressed in the Court of Appeal was directly challenged:

‘We note but respectfully are unable to accept the view of the court [of appeal] of the importance of opinion evidence ... the Tribunal builds up its own expertise in relation to the limited number of countries from which asylum seekers come. Naturally, an expert’s report can assist, but we do not accept that heavy reliance is or should be placed upon such reports. All will depend on the nature of the report and the particular expert.’²⁶⁸

The professed reason for the scepticism expressed by the Tribunal in *SK* and other cases examined in this chapter is the Tribunal’s opinion that the expert evidence placed before it is often or even routinely deficient in some way.²⁶⁹ The number of expert reports that are deficient because of a lack of ‘expertise’ or knowledge on the part of the expert is in fact very small – the problem is more likely to lie in the way in which the expert was instructed (failure to explain

²⁶⁷ *S and Others* [2002] EWCA Civ 539, paragraph 29

²⁶⁸ *SK Croatia CG* [2002] UKIAT 05613, paragraph 5

²⁶⁹ This is clear from many if not all of the Tribunal determinations referred to in this chapter and is also a view expressed by John Barnes in ‘Expert Evidence – The Judicial Perception in Asylum and Human Rights Appeals’ (2004) *IJRL* vol. 4, no. 3, 349 at paragraph 15.

the nature of the legal context in which the report would ultimately be used or the issues that the expert should address) or in other communication issues, such as the use of language. This paper recognises that some ‘expert’ reports do not properly deserve that descriptor. However, there are in fact other, deeper causes influencing the Tribunal’s approach, at the root of which is the Tribunal’s unnecessary anxiety that it retain ultimate discretion over the outcome of a given appeal or, more specifically, discretion to reject a case even though compelling expert evidence has been presented. The anxiety is unnecessary because it will always be the function of the court or tribunal to make the final legal judgment – the Tribunal at times appears to be suffering from a type of institutional inferiority complex. As will be seen, this sometimes leads the Tribunal to adopt conflicting positions of convenience, for example in one case expressing the view that experts should confine themselves strictly to opinions on the factual situation but in another rejecting evidence not couched in the ‘correct’ legal terminology.

The contrasting approaches to the treatment of expert evidence in the Court of Appeal and the Tribunal form the context within which the analysis in the main body of this paper is situated. More specifically, the disputed ‘importance’ of expert evidence is examined through the lens of three key themes that determine the impact of expert evidence in the Tribunal. Deconstructing the Tribunal’s approach in this way not only provides a framework for analysis, but also plays a productive role by offering insight into how and where the Tribunal’s approach may be adapted to ensure decision making is founded on the securest possible footing.

The first theme, at what may be considered the lowest level of the analysis, considers how the interpretation of language constrains the role that experts are able to play within the Tribunal. Interpretation is a challenging phenomenon in all disciplines and the legal lexicon is no different to that of any other profession in imbuing common language with a highly developed meaning. Interpretation of particular words or phrases across the boundary of different professions is critical to ascertaining the meaning – and importance – of expert evidence. Simultaneously, the understanding that the Tribunal adopts from evidence that

is uncertain or cautious in tone or silent on a particular issue is fundamental, offering a choice that may be determinative in the decision making process.

The second theme examines how the reliability of experts is determined. Whilst ensuring that an expert is not an advocate rightly has recognised importance,²⁷⁰ the mechanism that is adopted for such an assessment defines the criteria for independence and thus establishes which experts will have weight in the eyes of the Tribunal. Ultimately, this mechanism defines the role of expert evidence, and is therefore subject to considerable scrutiny below. Finally, the third theme considers the use of the Tribunal's own expertise. Related to both interpretation and the assessment of independence, the assumption of the Tribunal's knowledge of country conditions is frequently an important element in determining the understanding of and weight applied to expert opinion. The review of Country Guideline cases in the third section below highlights the trend for the Tribunal to rely on its own expertise to the point of displacing alternative evidence. The conclusion draws out how this theme in particular is instrumental in defining and ultimately undermining the Tribunal's view of the importance of experts and, moreover, demonstrates how the Tribunal has adopted a procedure and mindset that allows questionable findings and then elevates them to Country Guideline status.

4.2 Role of the expert and the use of language

The problems associated with the meaning of language are addressed directly in *GH (Former KAZ – Country Conditions – Effect) Iraq CG* [2004] UKIAT 00248 in relation to 'risk'. Here, the Tribunal states the weight applied to evidence will be 'substantially diminished if not altogether eroded'²⁷¹ when 'opinions expressed as to whether risk to an applicant engages either Convention **unless** the evidence makes it clear that the witness understands and is applying the concepts as to what is required to amount to persecution'²⁷² (emphasis added).

²⁷⁰ *Ikarian Reefer (National Justice Compania Naviera S. A. v Prudential Assurance Co. Ltd)* [1993] 2 Lloyd's Rep 68

²⁷¹ *GH (Former KAZ – Country Conditions – Effect) Iraq CG* [2004] UKIAT 00248 para 48

²⁷² *GH (Former KAZ – Country Conditions – Effect) Iraq CG* [2004] UKIAT 00248 para 49

The Tribunal therefore believe, first, that the expert should express risk in terms that address the legal concept understood by the courts; and, second, that the weight to be attributed to the expert evidence is dependant on adherence to this understanding. The analysis of the Tribunal then moves forward on this basis, assessing in the next two paragraphs the contribution of each of the experts:

'51. Whilst in his principal report dealing with the situation of the appellant, Dr Rashidian concluded that in the KAZ '*There is a serious risk that [the appellant] would be targeted and his life can be in danger*', this reference to 'serious risk' must be read in the context of his earlier statement as to sufficiency of protection on the basis that his safety 'cannot be guaranteed by the KDP or the PUK' and that 'Neither the KDP nor the PUK can provide full protection to any suspect who has been targeted by Ansar-al Islam'. This misplaced approach was reinforced in his letter of 10 May 2004 where, on being asked about internal flight, he concluded that as a result of animosity between Iraqi Arabs and the Kurds 'the life of no Kurd in the Iraqi Arabs regime can be guaranteed if the life of he or she is not safe in the Iraqi Kurdish regions.'

Here, the Tribunal seek to develop an understanding of Dr Rashidian's meaning as to 'serious risk' through an analysis of earlier documents relating to sufficiency of protection. The fact that Dr Rashidian states that safety 'cannot be guaranteed'; that 'full protection' is not available; and that a Kurd life 'cannot be guaranteed' in the Iraqi Arabs regime, is taken by the Tribunal as a 'misplaced approach'. At no point does Dr Rashidian claim that legal sufficiency of protection does or does not exist; he instead quite properly offers his expert opinion on the level of available protection. Doubtless it would be misplaced for an Adjudicator to rule insufficiency of protection on the basis of this evidence alone, but it is hard to understand why this language cannot be taken at face value rather than being used to reject the Dr Rashidian's entire evidence out of hand for not addressing a specific legal concept.

A similar approach is adopted towards the evidence of Mr Joffe:

'52. In Mr Joffe's case, in his summary at the end of his first report, he said 'It seems that, generally, conditions in Iraq are not such that individual security and safety can be assured'. A similar approach appears at paragraph 13 of the third report where he says 'It is difficult to argue that, even in apparently secure areas, there is a situation that approximates to genuine stability and security'. In re-examination when

he was asked about security levels in the part of Iraq administered by the PUK, he was asked whether the PUK operated a security system generally to guard against attacks and replied: 'They do with mixed success - probably not blanket control to allow guarantee of security.'

In his development of a more nuanced understanding of the security situation, Mr Joffe appears to have been penalised for attempting to give a fuller picture than Dr Rashidian. However, by not addressing the issue of whether there is sufficiency of protection both experts suffer the same fate, as explained in the Tribunal's summary of paragraphs 51 and 52:

'53. In our judgment, therefore, neither witness can be regarded as expressing opinions as to risk based on the concept of real risk which it is the duty of Adjudicators and this Tribunal to apply and to that extent such expressed views must be approached with considerable caution as to the evidential weight to be given to them.'

It is important to reiterate where both experts have erred in the view of the Tribunal: neither offered an opinion on whether the legal test has been passed. This point is made clear at paragraph 50: 'although both expressed views as to potential risk, neither witness demonstrated such an understanding of the legal concepts to be applied in evaluating risk.' Because of this, 'considerable caution' must be adopted when attributing evidential weight. Rather than seeking to assimilate the information offered by experts and then deploy it in an assessment of whether the legal test is met, the Tribunal uses alleged shortcomings in the language and conceptual legal understanding of the experts – language and understanding the experts cannot reasonably be expected to possess – to reject that information and prefer other, indirect sources that do not directly speak to the issue in question.

In the view of *S and Others*, the experience and knowledge of the expert should be brought to bear in assisting the Tribunal with understanding the 'risk of persecutory treatment'.²⁷³ Through *Sivakumaran* and subsequent decisions, the Tribunal has developed a refined understanding of 'real risk' and it is their function as a decision making body to establish whether this standard is met. However, such a decision requires first that the Tribunal is cognisant of the

²⁷³ *S and Others* [2002] EWCA Civ 539, paragraph 29

environment within which the asylum seeker has claimed to be at risk. It is at this level at which the expert is invited to speak. Whilst it may be within the natural language of the expert to refer to risk within such a context, it remains for the Tribunal in the second stage of analysis to address whether such comments amount to 'real risk' in the legal sense. As Henderson points out, 'the modern view, as appears from *Stockwell*, is that so long as the court remembers that final decision is for it, 'the expert is called to give his opinion and should be allowed to do so.'²⁷⁴ Similarly, John Barnes writes that:

'...it will almost always be wrong in principle for expert witnesses to seek to pronounce on the effect in United Kingdom law of the expert conclusions or opinions which they seek to draw either from the information within their expertise or that specifically provided to them for the purposes of their evidence in a given case.'²⁷⁵

Views within the Tribunal appear to be divided but the *Stockwell* point appears to have been abandoned in the reasoning in *GH Iraq* insomuch as the Tribunal has failed to remember that it is for the court to make the final decision and that the expert should be allowed to give his or her opinion. Worse, there appears to have been an inversion, with the Tribunal in fact **expecting** the expert to consider the legal test. The effect of this is that the fact-finding Tribunal is unable to place the 'heavy reliance on the view of experts and specialists' recommended in *S and Others*, as reduced weight prevents the evidence from ever reaching the decision making process.

The unreasonable expectations of the Tribunal also extend to the treatment of UNHCR country information. Whilst UNHCR may justifiably be assumed to be familiar with legal terminology, the information that it provides is framed in the language of its mandated area of expertise: the 1951 Refugee Convention. However, in *K (Risk - Sikh - Women) Afghanistan CG* [2003] UKIAT 00057, the Tribunal states at 14.14:

²⁷⁴ Henderson M *Best Practice Guide to Asylum and Human Rights Appeals* (Immigration Law Practitioners' Group in association with the Refugee Legal Group London 2003) p220 quoting *Stockwell (1993) 97 Cr App R 260*.

²⁷⁵ Barnes J, 'Expert Evidence – The Judicial Perception in Asylum and Human Rights Appeals' (2004) IJRL vol. 4, no. 3, 349 at paragraph 7.

'In any event, the UNHCR's advice falls short of saying that women who fall within either or both of these categories are at real risk of treatment which amounts to persecution. It is inconceivable that if they are at such risk, the UNHCR would not say so. We therefore conclude that the mere fact that a woman would be returning to Kabul without a male and/or community support does not, of itself, mean [sic] that she faces a real risk of treatment amounting to persecution.'

In fact, UNHCR is quoted at 14.13 as stating that women in the categories outlined above would be 'at risk and exposed to possible persecution, if they return to Afghanistan'. In finding it 'inconceivable' that the UNHCR would not refer to 'real risk' if it felt that a Convention reason were engaged, it would appear that the Tribunal is unaware, or needs to remind itself, that the UNHCR's specific remit is to deal with issues in relation to the 1951 Refugee Convention and that UNHCR is an international agency providing the same wording of its positions to courts around the world. Moreover, as with other experts, UNHCR is not obliged to follow the preferred terminology of the Tribunal.²⁷⁶ As UNHCR comment, 'it is in fact entirely conceivable that we would provide a comment on risk on return that is intended to signify that such categories fall within Article 1A(2) of the 1951 Convention without expressly stating this in a vocabulary specific to UK jurisprudence.'²⁷⁷

The absence of reference to 'real risk' in the example above leads to an understanding by the Tribunal that is damaging to the case of the asylum seeker. This preference for developing a 'negative inference' (negative from the perspective of the asylum seeker) or 'restrictive inference' (by assuming the narrowest possible meaning) from the use of the language, phrases or indeed silence of UNHCR is by no means unique. In *AZ (Risk on return) Ivory Coast CG* [2004] UKIAT 00170 the Tribunal goes so far as to elicit the conclusion that:

²⁷⁶ Indeed, 'real risk' is itself terminology particular to the Tribunal and not that expressed by the House of Lords in *Sivakumaran* [1988] AC 958. However, the Tribunal maintains the assertion that UNHCR comments can be interpreted through the particular lens of their own conceptual framework. In reality the majority of UNHCR country information is not even directed at the UK, much less at the Tribunal, but at an international audience. Even if the Tribunal believes that the higher courts do or should adopt the concept of 'real risk', the international aspect of UNHCR's reach should be sufficient in itself for the Tribunal to understand that the concept has not been adopted by UNHCR.

²⁷⁷ Letter from UNHCR London to Immigration Advisory Service, 3 December 2004.

'In the present case, if UNHCR considered that anyone who is internally displaced in Abidjan faces such a real risk of treatment that would violate Article 3 of the ECHR or any similar international instrument, they can be expected to say so. They have not.'²⁷⁸

This apparent statement is in fact an assumption based on the silence of UNHCR on this matter. Not only does the Tribunal suggest once again that 'real risk' would be the accepted formulation, it also infers that the UNHCR has and should be expected to provide a position worded specifically in relation to potential Article 3 violations – a position which is entirely imagined. Further, the Tribunal has once again ignored or failed to understand the remit of UNHCR, and the fact that the agency primarily focuses on the Refugee Convention.²⁷⁹ Although advice provided by UNHCR may be relevant to other human rights instruments,²⁸⁰ the Tribunal have not taken into account that UNHCR's practice has consistently been to provide comments limited in their wording to the implementation of the Refugee Convention and has not usually sought explicitly to provide guidance on or interpretation on behalf of other, more general, human rights instruments including the European Convention on Human Rights.²⁸¹ Whilst there may be an overlap in circumstances that give rise to a likelihood of engaging both conventions, it is totally wrong of the Tribunal to expect the UNHCR to frame any of its comments in the language or Articles of any instrument other than the Refugee Convention.

The preference for 'negative inference' is further evidenced in *VK (Risk – Release – Escapes – LTTE) Sri Lanka CG* [2003] UKIAT 00096, in which the

²⁷⁸ *AZ (risk on return) Ivory Coast CG* [2004] UKIAT 00170 paragraph 63

²⁷⁹ UNHCR is specifically mandated by the United Nations General Assembly under its statute to: 'provide international protection ... to refugees' (Article 1); and 'promote the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto' (Article 8). In addition, under Article 35 of the Refugee Convention, State Parties (including the United Kingdom) are under an obligation to: '... co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.'

²⁸⁰ UNHCR's refugee protection mandate will inevitably involve issues that fall within the scope of other international instruments and indeed UNHCR encourages the scrupulous use by States of all human rights instruments that contribute to the protection of refugees to complement the use of the Refugee Convention. In fact in certain instances it may even be that country information provided by UNHCR – for example of humanitarian conditions for the return of failed asylum-seekers – is more relevant to an ECHR issue than to the Refugee Convention.

²⁸¹ The Court of Appeal reminds the Tribunal of this fact in *Djebari v SSHD* [2002] ECWA Civ 813

similarity of language between two UNHCR letters produced nine months apart is inferred to mean that 'there is nothing to show that UNHCR have taken any account of the developments which have occurred in the meantime.'²⁸² The possibility that, backed up by a process of in-country assessment and head office review of all published statements, UNHCR in fact consider the circumstances not to have changed appears to have been totally ignored by the decision maker. In *VL Democratic Republic of Congo CG* [2004] UKIAT 00007 the Tribunal again uses an alleged failing or omission to undermine the evidence:

[UNHCR] does not state that persons falling into this category are necessarily at risk, only that they were "**likely to be at risk and therefore deserved to receive particular and careful consideration**" [emphasis in original]²⁸³

Rather than highlighting a similarity between 'necessarily at risk' and 'likely to be at risk', the Tribunal is able to emphasise a distinction – and one which is not favourable to the asylum seeker. Moreover, the Tribunal create a new test of 'necessarily at risk' when faced with this evidence, setting aside its own preferred 'real risk' test and enabling the language employed by UNHCR to be clearly distinguished. This approach is not unique. Faced with the same evidence in *CI-B (Link to Mobutu) Democratic Republic of Congo CG* [2004] UKIAT 00072, the Tribunal again employ the novel 'necessarily at risk' category, enabling a negative inference to be drawn:

[n]or did the UNHCR letter state that persons in that category were necessarily at risk but rather that they were likely to be at risk and therefore deserved particular and careful attention.²⁸⁴

In *AN (Risk – Failed asylum seekers) Democratic Republic of Congo CG* [2003] UKIAT 00050 UNHCR is quoted as being 'aware of instances' of interrogation and subsequent detention and serious ill-treatment of failed asylum seekers at Kinshasa airport. In response the Tribunal note that guarantees against persecution cannot be given and state:

²⁸² *VK (Risk – Release – Escapes – LTTE) Sri Lanka CG* [2003] UKIAT 00096 para 14

²⁸³ *VK (Risk – Release – Escapes – LTTE) Sri Lanka CG* [2003] UKIAT 00096 para 100

²⁸⁴ *CI-B (Link to Mobutu) Democratic Republic of Congo CG* [2004] UKIAT 00072 para 24

'The fact that there are "instances" where interrogation at the airport has been followed by arbitrary detention and serious ill-treatment simply is not sufficient to discharge the low standard of proof.'²⁸⁵

Whilst on the face of it a reasonable conclusion, the Tribunal has once again failed to consider the role of UNHCR. Indeed, by focussing on 'instances' and thus the use of language that can be contrasted against real risk, the Tribunal has failed to take cognisance of the fact that UNHCR has no remit to and generally does not monitor failed asylum seekers, and therefore their awareness of these 'instances' is of itself significant. A decision to a focus instead on UNHCR being 'aware' of such treatment could lead to an alternative conclusion: the interrogation and serious ill-treatment must reasonably be assumed to be more frequently occurring than can be directly inferred from the number of 'instances' that come to the attention of UNHCR staff. Whilst this may or may not on its own be sufficient to alter the conclusion of the Tribunal, it is an extremely dubious foundation on which to base a Country Guidelines case that purports to be authoritative on the issue of returns. Moreover, this reasoning highlights how the anxiety of the Tribunal to differentiate between the language used and the preferred formulation (which itself sometimes appears to have been developed to specifically contrast with the evidence that the Tribunal wishes to reject) distracts the focus of the decision-maker away from a proper consideration of the overall country circumstances upon which UNHCR have provided comment.

UNHCR employs nuanced language. This is a reflection of its detailed understanding of the circumstances on which it comments. However, the Tribunal, rather than reading this language as appropriate to describe complex situations that are not amenable to establishment as 'fact', instead uses the nuances as an opportunity to demonstrate or infer a lack of 'real risk'. In so doing the Tribunal ignores its obligation to not artificially narrow the concept of risk,²⁸⁶ reduces the likelihood of those in danger of persecution gaining

²⁸⁵ *AN (Risk – Failed asylum seekers) Democratic Republic of Congo CG* [2003] UKIAT 00050 paragraph 10.6

²⁸⁶ *Asuming* (11530; 11 November 1994): 'It makes little sense to base the establishment of future risk on the existence if a serious possibility that an event may occur but exclude from

protection, and considers the statements of UNHCR for their particular choice of language rather than their overall meaning.²⁸⁷

4.3 'Expert evidence' or 'independent and reliable evidence'?

AZ (risk on return) Ivory Coast CG [2004] UKIAT 00170 is concerned about the perceived tendency of claimants' representatives to confuse 'expert evidence' with 'independent and reliable evidence'.²⁸⁸ The Tribunal outlines its approach for dealing with this issue:

'In order to test the independence of the person put forward as an expert, the Tribunal will generally compare the opinion with information contained in other reports.'

Whilst this is doubtless an essential element in a process of balancing evidence, the comparative technique for establishing independence (and therefore weight) is inherently problematic due to the definitional necessity of expert opinion being in some sense different from the general understanding.²⁸⁹ Moreover, a focus on difference rather than similarity serves to provide reasons that highlight the presumed shortcoming of the expert and offers the opportunity for any evidence, save only those reports that are identically similar, to be found partial. The difficulty that the Tribunal has created for itself is in requiring expert opinion to in some sense be proved correct before being allowed, for fear that the Tribunal may place reliance on 'inferences drawn by someone with a certain perspective' rather than 'inferences drawn by someone who is objective'.²⁹⁰

consideration of that issue all events save those more likely than not to have occurred, and, that, it seems to the Tribunal, artificially narrows the concept of risk lying at the heart of the asylum claim (see *Kaja*); Symes M and Jorro P Asylum Law and Practice (London 2003) p64: 'given the nature of the issues, the low standard of proof and the evidential difficulties face be a genuine refugee applicant, there is a requirement that the decision-maker engage in a certain degree of rational speculation in favour of the asylum seeker.'

²⁸⁷ See also the paper on 'effectively comprehensive analysis' in this volume regarding the over attention of the Tribunal to particular forms of language.

²⁸⁸ *AZ (risk on return) Ivory Coast CG* [2004] UKIAT 00170 paragraph 49

²⁸⁹ Hodgkinson T Expert Evidence Law and Practice (London 1990) p14: 'The expert is not present in order to decide the matter in issue, but to assist the Tribunal in so deciding. The evidence is not admissible, certainly in so far as it consists of expert evidence of opinion, unless it treats of matters that are beyond the knowledge and experience of the Tribunal'

²⁹⁰ *AZ (Risk on return) Ivory Coast CG* [2004] UKIAT 00170 para 49

GH (Former KAZ – Country Conditions – Effect) Iraq CG [2004] UKIAT 00248, similarly, is concerned with impartiality and objectivity of the experts, and adopts a similar approach to *AZ* in attempting to verify the expert evidence through comparison. Moreover, the criteria for attaching weight to such evidence is also set down:

'If the witness is partial, or shows a lack of objectivity in his approach to the body of evidence on which he draws to form his opinions, then the weight to be given to his opinion as an expert will be substantially diminished if not altogether eroded.'²⁹¹

Following an impressive dissection of the experts' evidence, their academic credentials are set down and the Tribunal assesses their suitability as witnesses. Apparently ignoring their professional qualifications and experience in Iraqi affairs, both are found to be partial due to their evidence being selective, lacking in objectivity, and 'seeking to promulgate opinions on matters which neither reflect a proper appreciation of the stated and accepted evidence of the applicant, nor the full range of objective evidence, nor the legal nature of the issues for decision'.²⁹² Taking the last three quoted points, it is hard to see how any are relevant to the business of the expert: it would be quite wrong to expect the expert to pre-empt credibility findings or usurp the risk-finding role of the Tribunal itself; an acknowledged expert should not be required to agree with alternative objective evidence; and, as already discussed, the expert should be free to offer opinions without having to make a legal judgement. However, on this basis their evidence is 'substantially diminished if not altogether eroded'.

As with all evidence, the Tribunal in *GH Iraq* rightly assesses the weight to be attached to that offered by an expert. However, the fact that fundamental rights are at issue in asylum claims lowers the threshold before which evidence should be excluded from consideration. Brooke LJ expands on this necessarily cautious approach in *Karanakaran*:

'...it would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision-maker believes, on

²⁹¹ *GH (Former KAZ – Country Conditions – Effect) Iraq CG* [2004] UKIAT 00248 para 48

²⁹² *GH (Former KAZ – Country Conditions – Effect) Iraq CG* [2004] UKIAT 00248 para 75

what may sometimes be somewhat fragile evidence, that they probably did not occur.²⁹³

Thus, 'everything capable of having a bearing on the case has to be given the weight, great or little, due to it.'²⁹⁴ Significant implications flow from an approach predicated in this manner, manifested as a web of circumstances within which evidence should not be discounted. The Tribunal, for example, has stated that 'we do not see our task as excluding evidence which taken of itself would well be credible simply because it conflicts with other evidence',²⁹⁵ whilst the Court of Appeal has noted that when an acknowledged expert offers uncontradicted evidence it would be 'completely wrong' to dismiss it from consideration²⁹⁶ and moreover, that such evidence may, as in *Gupreet Singh*, be 'sufficient in an asylum claim to establish the facts'.²⁹⁷ Rather than assuming bias and seeking to discount contradictory evidence, which appears to be the starting point of the modern Tribunal, this body of opinion suggests that Symes and Jorro's conclusion regarding human rights reports should be extended to all expert evidence:

'[t]here is a respectable argument to be made that the task of a decision-maker faced with conflicting reports from reliable sources is not to identify preferred documents and to exclude others from consideration altogether, but rather to approach the material collectively, taking into account the possibility that each is deserving of some weight.'²⁹⁸

However, the sceptical approach to experts is common to many cases. In *BK (Blood Feud) Serbian and Montenegro CG* [2004] UKIAT 00156 the expert is a Fellow of the Royal Institution and of the Royal Anthropological Institute, a tutor at Durham University, and chairman of the board at the Centre for Research into Post Communist Economies: by any measure an outstandingly eminent academic and considered by the Tribunal as one 'whose opinions must be assessed seriously'.²⁹⁹ This apparently benign phraseology is in fact very revealing of the underlying mindset. Firstly, the Tribunal finds itself capable of

²⁹³ *Karanakaran v Secretary of State for the Home Department* [2000] Imm AR 271

²⁹⁴ *Karanakaran v Secretary of State for the Home Department* [2000] Imm AR 271

²⁹⁵ *Hassan* (15558; 3 October 1997)

²⁹⁶ *Karanakaran v Secretary of State for the Home Department* [2000] Imm AR 271

²⁹⁷ *Gupreet Singh v SSHD* [2001] EWCA Civ 516

²⁹⁸ Symes M and Jorro P *Asylum Law and Practice* (London 2003) p727.

²⁹⁹ *BK (Blood Feud) Serbian and Montenegro CG* [2004] UKIAT 00156 paragraph 7

'seriously' assessing the opinion of an expert who has been acknowledged to the point of being raised to high standing by his peers. Second, the phrase 'assessed seriously' is straightforwardly different from 'taken seriously', where the latter accepts the important contribution that is offered by an individual's extensive experience and knowledge, whilst the former commences from an assumption that an expert's opinion should be, of itself, open for assessment. In *IK (Returnees – Records – IFA) Turkey CG* [2004] UKIAT 00312 evidence is received from nine different individuals, all of whom have experience in Turkish and/or Kurdish issues. In considering this variety of sources, the Tribunal states at paragraph 27 (names of experts have been replaced with '(')):

'...we have only heard oral evidence from () but have taken the written evidence from all these people into account along with the other material documentary evidence before us. In so doing we have recognised that they all (() apart) are human rights activists. This is not intended in any derogatory sense, as Mr Grieves at one point suggested it might, but it does reflect potentially on their objectivity and the difference between an expert and an independent expert. In that light we have carefully assessed the merits of the opinions they have offered.'

The last two sentences of paragraph 27 are an outstanding admission of prejudice by the Tribunal. A distinction is explicitly drawn between 'human rights activists' and others. The category 'human rights activist' covers, from amongst the nine people listed at paragraph 26, a Turkish human rights lawyer who is on the Turkish Board of Amnesty International; a Turkish human right lawyer of 13 years standing and a board member of the Human Rights Association in Turkey; and a Turkish academic, specialising in political science and international politics, who has written a number of books and received a variety of awards for human rights activities. By suggesting the activities of this group 'does reflect potentially on their objectivity and the difference between an expert and an independent expert' the Tribunal is in effect stating that if you have evidence pertinent to human rights and persecution and keep it to yourself, then you are suitable as an expert witness; however if you act on that evidence by campaigning to prevent persecution and abuse, then you have distinguished yourself as partial and lacking in independence. The insertion of 'potentially' as a caveat is unimpressive and in no way mitigates the view stated, as the view itself would otherwise be superfluous. The suggestion that the distinguishing of

this group in this way is not 'derogatory' is simple nonsense: the clear suggestion is that these individuals lack the professionalism and/or intellectual and/or moral rigour to observe their duty to the Tribunal. By stating that in light of this 'we have carefully assessed the merits of the opinions they have offered' the Tribunal is not only endorsing its own ability to assess the opinion of experts but also effectively reserving the right to disregard those elements of expert testimony which do not accord to the view that it wishes to endorse.

In each of above examples a major concern is the assumption by the Tribunal that it is able to assess the quality of an expert through a comparative examination of their evidence. However, in *IK Turkey* it is critical to note that the Tribunal's scepticism about the group of experts is not borne out of an assessment of the academic or professional record of each individual, but out of a supposition that 'human rights activists' as such have 'particular axes to grind'.³⁰⁰ This notion is akin to suggesting that doctors have their own 'axe to grind' when expert medical evidence is required, inasmuch as doctors work tirelessly to cure and prevent disease, disablement or trauma rather than merely filing notes of clinical observations in the hope that they may one day be required by the Tribunal. The difference with medical experts, however, is that their expertise is taken to be established by their experience and knowledge.³⁰¹

³⁰⁰ *SK Croatia* [2002] UKIAT 05613 para 5: 'We were fortunate in S to have had called before us two experts who were truly knowledgeable and who had no particular axes to grind.'

³⁰¹ Parallels can also be drawn with the point discussed above in the 'effectively comprehensive' chapter in relation to the treatment of primary source evidence.

4.4 The Tribunal as expert

The previous section illustrates a tendency for the Tribunal to imbue itself with a significant degree of expertise, enabling it to make an informed, comparative judgement on the independence of expert witnesses on the basis of their evidence. Indeed, this approach is explicitly stated in *SK Croatia* [2002] UKIAT 05613: 'the Tribunal builds up its own expertise in relation to the limited number of countries from which asylum seekers come.'³⁰² From this understanding it is a short step for the Tribunal to displace expert opinion on the basis of its own expertise, and these two steps are regularly combined in Country Guidance cases.

In *AZ (Risk on return) Ivory Coast CG* [2004] UKIAT 00170, the expert's view is found to be in disagreement with existing country information. This conflict is resolved by recourse to the Tribunal's own expertise:

'53. We also noted Miss Griffiths' response to our question as to whether the authorities in the Ivory Coast would infer that the Appellant had simply been trying to make a better life for himself abroad. She said that this would be the rationale of a country at ease with itself, whereas, in the case of the Ivorian authorities, the situation was one of paranoia. Miss Griffiths' perception that it is only in the case of a country at ease with itself that security officials would think that a failed asylum seeker's motive for leaving his country was economic betterment was not one that accords with the Tribunal's general experience of hearing and determining appeals involving a very wide range of countries. To take one example, we know from CIPU Reports that the Turkish authorities are aware that many of their citizens who leave Turkey do so in order to make a better life for themselves abroad and not because they genuinely fear persecution.'

For this reason, the Tribunal is 'unable to accept Miss Griffiths's views as evidence that compels the conclusion that returning RDR members are at real risk of persecution'.³⁰³ There are difficulties with this reasoning on a number of levels: the reliability of CIPU is assumed and not subject to scrutiny, whilst the similarity of the conditions in Turkey and post-coup Cote d'Ivoire in terms of how 'at ease' the authorities are is not addressed in the brief comparison. Most

³⁰² *SK Croatia* [2002] UKIAT 05613 paragraph 5.

³⁰³ *AZ (Risk on return) Ivory Coast CG* [2004] UKIAT 00170 paragraph 54

pertinently for the purposes of the present discussion, however, is the invocation of the Tribunal's own expertise: the 'general experience' of the Tribunal is used to refute the specific knowledge of the expert that the Ivorian authorities are in state of 'paranoia'. Indeed, this is the entire basis for discounting – not attaching less weight, even, but outright discounting – the expert's evidence on this point, evidence that is in fact uncontradicted as the alternative country information, quoted at paragraph 52, is in fact silent on the issue.³⁰⁴ This should be compared with the approach adopted in *MN (Town Tunis regarded as Bravanese) Somalia CG* [2004] UKIAT 00224, in which the Tribunal 'do not find it in the slightest bit significant that the other background material does not comment' on the issue in question, or with the Court of Appeal's assessment that it would be 'completely wrong' to dismiss uncontradicted expert evidence from consideration which moreover may be 'sufficient in an asylum claim to establish the facts'.³⁰⁵

In *BK (Blood Feud) Serbia and Montenegro CG* [2004] UKIAT 00156 the Tribunal also engages in a critical assessment of the expert's evidence. Mr Standish, an expert of some standing, states:

'[quoting from the US State Department] "UNMIK arrested three of the alleged assailants; however, because the case involves a family feud, no charges were filed against the assailants because the case was settled out of court through traditional Albanian feud mediation methods."

In my view this statement raises legitimate questions about the extent which UNMIK and its police effectively collude in such informal out-of-court settlements in order to avoid provoking tension between the ethnic Albanian majority population and UNMIK police, an increasingly large number of whom are ethnic Albanian recruits. Intervention in blood feuds by other ethnic Albanians – even police officers – tends to be avoided owing to the potential risk to the individuals and their own families.³⁰⁶

The analysis in the second paragraph is an illustration of the role and purpose of an expert. The opinion explains the meaning of the raw facts provided by the US Department of State by reference to the wider socio-political environment in

³⁰⁴ The Tribunal in fact infer a contrary position from the silence of UNHCR on the issue. The significant problems with this approach dealt with in the second section of this paper.

³⁰⁵ *Gupreet Singh v SSHD* [2001] EWCA Civ 516

³⁰⁶ *BK (Blood Feud) Serbia and Montenegro CG* [2004] UKIAT 00156 paragraph 10

which they are situated. It is an interpretation that is not available to the lay person as it relies on the application of specialised knowledge about a particular region. However, the Tribunal 'do not consider that this quoted report bears the interpretation he places on it'.³⁰⁷ Rather than accepting the expert interpretation, the Tribunal reiterate the facts and conclude 'the parties in the dispute resolved it between themselves and did not want to pursue it any further and did not file charges. No prosecution can succeed in the absence of evidence'.³⁰⁸ This may be a conclusion that is open to be drawn on the basis of the facts alone; however, the role and purpose of the expert is to bring additional knowledge to the Tribunal in order to assist it in coming to the correct understanding of the facts that would otherwise be outside of its capability. The only explanation of the Tribunal's actions is an assumption of an equal or better ability to interpret the facts, and thus an implicit refusal to accept the need for country experts or an assumption that the expert is neither impartial nor independent. The level of misunderstanding of the purpose of the expert is reinforced in the straight-faced conclusion of the Tribunal that the Adjudicator had 'an unexplained preference for Mr Standish's report' which is 'unsustainable on the evidence'.³⁰⁹

A similar situation arises in *OM (Cuba returning dissident) Cuba CG* [2004] UKIAT 00120 in which the straightforward evidence of the expert is rejected outright by the Tribunal. At paragraph 26, the determination notes:

'It was suggested in a letter written by a Cuban law expert Mr Wilfred Allen, who is a practicing Attorney based in Miami and who assists Cuban exiles, that the fact that the claimant has stayed in Britain without permission would lead the government of Cuba to assume that he claimed asylum and punish him accordingly.'

This is a to-the-point judgement made by an individual who has established experience of dealing with Cuba. The Tribunal, however:

'...cannot see why the authorities in Cuba should assume otherwise than that the claimant was abroad, perhaps seeking work and failing to find it or that he simply overstayed, taking the opportunity to travel which otherwise he might not have. His return to Cuba would have all the

³⁰⁷ *BK (Blood Feud) Serbia and Montenegro CG* [2004] UKIAT 00156 paragraph 11

³⁰⁸ *BK (Blood Feud) Serbia and Montenegro CG* [2004] UKIAT 00156 paragraph 11

³⁰⁹ *BK (Blood Feud) Serbia and Montenegro CG* [2004] UKIAT 00156 paragraph 18

appearance of being voluntary and it is implausible, to put it no higher, that he would volunteer the information that in fact he was an unsuccessful asylum seeker. We do not follow the reasoning behind Mr Allen's suggestion.³¹⁰

In other words, the Tribunal prefers its own version of the reality in Cuba, rejecting the expert opinion and even going as far as to suggest how the Cuban authorities would interpret the return of an overstayer. Once again, the Tribunal's alternative explanation is not necessarily unreasonable; however, this is the direct insertion of the Tribunal's opinion in place of that of an expert, the explanation for which is that the Tribunal 'do not follow the reasoning' of the witness. The 'reasoning' in this instance is based on experience of dealing with Cuban exiles and knowledge of Cuban law. Indeed, 'reasoning' is not even called for as the expert's view is presented as a statement of fact. However, in the absence of alternative expert evidence on this issue, the Tribunal's distaste for either the expert or his opinion forces it to assume a greater knowledge of Cuba than it can possibly be equipped with.

4.5 Conclusion: misplaced expertise?

Hodgkinson points out that there is an inherent dilemma within expert evidence. Given that experts deal with 'matters that are beyond the knowledge and experience of the Tribunal' the 'contradiction within expert evidence'³¹¹ arises when differing opinions are placed before the decision making body. In this case, the necessity to reach a judgement requires that, in effect, greater weight is placed on the opinion of the Tribunal than on the expert whose evidence is rejected. Clearly, this problem becomes particularly acute when the conflict is between the opinion of the expert and the Tribunal, as is the case when the Tribunal relies on its own expertise in assessing the independence of or actually displacing expert evidence. In the former the problem is indirect, arising when the Tribunal finds itself able seriously to assess the evidence and therefore assuming competency in the field to which the expert is talking. When displacing expert evidence, the problem is much more immediate, with a clear

³¹⁰ *OM (Cuba returning dissident) Cuba CG* [2004] UKIAT 00120 paragraph 27

³¹¹ Hodgkinson T *Expert Evidence Law and Practice* (London 1990) p14.

preference shown for the Tribunal's opinion over that of the expert. Thus, particularly in the latter case, it effectively falls for the Tribunal to prove itself correct in order to resolve Hodgkinson's contradiction between its own knowledge and that of the expert. Whilst not denying that the Tribunal may over time gain experience in many matters common to asylum claims, a serious problem results.³¹² Compounded by the desire to compare existing country information with expert evidence to demonstrate objectivity, the process of assessment of experts and evidence is effectively immune to any corrective mechanism or external input, as a closed system is formed that is resistant to penetration by new information at each stage. The reliance on the existence of supporting country information or Tribunal experience reduces the chances of alternative informed opinion being given weight. Critical here is the notion of Tribunal *experience* rather than *expertise*: in the absence of its own research skills and resources, the Tribunal is only able to build experience based on the reports it sees before it, with the same sources appearing repeatedly and the Home Office's CIPU country reports making a disproportionate contribution as they are relied on in almost every case that is heard.³¹³ Most worryingly, expert witnesses will by definition from time to time present evidence that is exceptional or represents a near unique insight into practices that are otherwise successfully concealed by abusive governments. It is these insights that the Tribunal should be most seeking but instead, under the reasoning found in Country Guidelines cases, to which it is most immune. Thus, the Tribunal's predisposition towards attributing weight on a comparative basis rather than on an assessment of the experience and professional competence of the witness has severely undermined asylum seekers' access to justice. The procedure adopted by the Tribunal systemically undermines the contribution of experts on

³¹² The Tribunal does itself no favours in this regard by failing to appreciate the mandate of UNHCR, as illustrated in the second section of this chapter, or demanding recourse to the most recent CIPU reports (see the Introductory paper in this volume). Attention is also drawn to the advice of *R v IAA ex parte Mohammed* (CO/818/00) "Reliance on such personally acquired information gives rise to significant risk to the about fairness to an Appellant who will be in no position to test the reliability of the matters being held against him. It [personally stored knowledge] should invariably, in my judgement, be avoided." Hodgkinson, on this issue, notes: "[the court] ought to draw the attention of the witness the experience which seems to them to suggest that the evidence given is wrong, and ought not to prefer their own knowledge or experience without giving the witness an opportunity to deal with it." Hodgkinson T *Expert Evidence Law and Practice* (London 1990) p 27.

³¹³ See the critique of the treatment of CIPU reports in the 'effectively comprehensive' chapter.

the basis of 'fragile evidence', ignoring the approach laid down in *Karanakaran*.³¹⁴ The failings that result subsequently escalate in significance due to the authority afforded to Country Guideline cases, with the conclusions drawn from this dysfunctional approach to experts and the questionable rejection of relevant evidence then applied in other similar cases.

The Tribunal's approach appears to be directly influenced by the thinking in the determination of *SK Croatia CG* [2002] UKIAT 05613. Despite being a case remitted to the Tribunal by a superior court whose judgments are binding on the Tribunal on the basis of country reports that vindicated the opinions of two experts who, in original Tribunal hearing, considered the evidence preferred by the Tribunal to be 'too optimistic',³¹⁵ *SK Croatia* reflects a deep scepticism towards expert opinion. The understanding promulgated in *SK Croatia* is that 'many [experts] have their own points of view which their reports seek to justify', a rejection that 'heavy reliance should be placed upon [expert] reports' and, finally, that the court in *S* is 'fortunate' in having experts 'who had no particular axe to grind'.³¹⁶ Moreover, 'the Tribunal builds up its own expertise in relation to the limited number of countries from which asylum seekers come'.³¹⁷ This mindset has recently been reaffirmed in *IK Turkey CG* [2004] UKIAT 00312 in which 'the weight to be given to the evidence of each of the experts [is] in line with the approach described in *SK Croatia CG* [2002] UKIAT 05613 and *GH Iraq CG* [2004] UKIAT 00248', thus combining *SK Croatia*'s negative attitude to expert opinion and confidence in the Tribunal's own expertise, with *GH Iraq*'s 'important distinction' between 'an "expert" and an "independent expert"', in which the weight accorded to evidence 'depends upon demonstrable impartiality and objectivity'.³¹⁸ The unspoken message in this approach to country experts appears summarised by Heydon and Ockelton, who describe 'a general feeling

³¹⁴ *Karanakaran v Secretary of State for the Home Department* [2000] Imm AR 271: "it would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision-maker believes, on what may sometimes be somewhat fragile evidence, that they probably did not occur."

³¹⁵ *S and Others v SSHD* [2002] EWCA Civ 539 paragraph 9, quoting the Tribunal's original judgment at paragraph 32.

³¹⁶ *SK Croatia* [2002] UKIAT 05613 paragraph 5

³¹⁷ *SK Croatia* [2002] UKIAT 05613 paragraph 5

³¹⁸ *IK Turkey CG* [2004] UKIAT 00312 paragraphs 21-23, and, almost incidentally, preferring the Tribunal's approach over that of the higher courts.

that ... expert witnesses are selected to prove a case and are often close to professional liars'.³¹⁹ Viewed from this perspective, the overtly negative treatment of expert evidence described in this paper acquires a foundation. The supposition of the need to 'assess' the evidence of acknowledged experts and the derogatory view of human rights professionals can both be directly understood from the mindset established in *SK Croatia*. It takes a further step, however, to explain the persistently restrictive inferences drawn from the analysis of UNHCR evidence and the finding of partiality of the experts in *GH Iraq* on the basis of their failure to address the required legal test. The consistently negative approach across these decisions leaves the Tribunal open to an accusation of having allowed a general scepticism to develop into a tendency to negate the impact of experts via restrictive interpretation. This accusation is sharpened by understanding that in each of these cases the Tribunal had a real choice: the evidence in each case was capable of attracting a spectrum of interpretation, but in each case the most negative was selected.

The foregoing demonstrates that the legacy of *SK Croatia*'s refusal to acknowledge the importance of expert evidence is a procedure that is resistant to acknowledging expert opinion and a Tribunal mindset that matches. Specifically, the analysis in this paper has documented the displacement of expert opinion, a tendency to undermine the credentials of experts through findings of partiality, and the adoption of a restrictive approach to the interpretation of expert statements. The decisions in the Country Guideline cases analysed in this paper suggest that the result is a reduced quality of decision making that has moved a long way from the presumption in favour of the asylum seeker that is outlined in decisions such as *Kaja*, *Asuming*, *Karanakaran* and *Sivakumaran*³²⁰ and in the UNHCR Handbook.³²¹

³¹⁹ Heydon J D and Ockelton M *Evidence: Cases and Materials* (London 1996) p384.

³²⁰ *Asuming* (11530; 11 November 1994): "It makes little sense to base the establishment of future risk on the existence if a serious possibility that an event may occur but exclude from consideration of that issue all events save those more likely than not to have occurred, and, that, it seems to the Tribunal, artificially narrows the concept of risk lying at the heart of the asylum claim (see *Kaja*)"; *Karanakaran v Secretary of State for the Home Department* [2000] Imm AR 271: "when the decision maker is uncertain as to whether an alleged event occurred, or finds that although the probabilities are against it, the event may have occurred, it may be necessary to take into account the possibility that the event took place in deciding the ultimate

In seeking an alternative mechanism for addressing expert evidence, it is important to acknowledge that elements of the Tribunal's approach exist out of necessity. The need to test expertise is paramount in this regard, as is the necessity for the expert to remain obliged by his or her duty to the court and therefore to explain, reference and justify the opinions given and not to act as an advocate. Moreover, the Tribunal's work to this end is not assisted by the absence of experts appearing for the Home Office. If the Tribunal's role were restricted to deciding between expert evidence their difficulties would be restricted at worst to the original formulation of Hodgkinson's contradiction and at best would yield reinforcing images of country conditions. However, for the present the Tribunal's approach remains predicated on a sceptical view of the function and independence of experts that is bound to yield the institutionalised tendency to discount or degrade evidence demonstrated in the previous three sections. Alternative views on the value and professionalism of experts are abundant and a consistent call for a more positive approach are found in a number of Court of Appeal judgments. *S and Others* [2002] EWCA Civ 539, presented in the introduction, contrasts sharply with the reasoning of the Country Guidance cases analysed here, as well as with the comments in *SK Croatia* considered above:

'...opinion evidence will often or usually be very important, since assessment of risk of persecutory treatment in the milieu of a perhaps unstable political situation may be a complex and difficult task in which the fact-finding Tribunal is bound to place heavy reliance on the view of experts and specialists.'³²²

Es Eldin, also already quoted, reinforces this view, whilst a number of cases before the Court of Appeal have expressed concern over the treatment of experts in the Tribunal. In *Nirmalanathan v SSHD* [2004] EWCA Civ 1380, for

question." *Sivankumaran*, moreover, reinforces the view of *Kaja* that decision makers should award a positive role to uncertainty in establishing facts.

³²¹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva 1992) paragraph 196: "Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."

³²² *S and Others v SSHD* [2002] EWCA Civ 539, paragraph 29

example, the court examines a case in which the Tribunal had overturned a decision on the basis that the Adjudicator had 'misled herself by concentrating her attention entirely upon the report of Dr Good [the expert]'.³²³ The Court of Appeal, however, finds the Tribunal's reasons 'unconvincing' and states that the Tribunal appear to have 'water[ed] down the factual basis of the appellant's case accepted by the Adjudicator in order to justify their conclusion that she was wrong'.³²⁴ Similarly, in *Koci v SSHD* [2003] EWCA Civ 1507 the enthusiasm of the Tribunal to overturn the view of an expert is exposed to have forced the Tribunal to take a narrow view of the facts of the case, to find a nonexistent inconsistency between the evidence of the expert and the CIPU country report, and to sideline the evidence of both Amnesty International and the US State Department.³²⁵ In *Djebari v SSHD* [2002] EWCA Civ 813, the Court of Appeal finds that the Tribunal offered a restrictive view of the evidence of the expert.³²⁶

These examples are cited to highlight how the different mindset of the Court of Appeal, demonstrated in the quote from *S and Others*, above, leads to a quite different treatment of expertise. By accepting 'all the help that can be given by those who know more about such matters'³²⁷ and acknowledging that it may be necessary to 'place heavy reliance on the view of experts',³²⁸ the Court of Appeal has freed itself to examine all the available evidence without the prior encumbrance of demonstrating that the expert has a 'particular axe to grind'.³²⁹ The lesson for the Tribunal is clear: expert evidence can and should play a valuable role in assisting the Tribunal to reach the legal judgments necessary to determine a case if the Tribunal will recognise that experts are versed in different and non-legal academic disciplines, cannot be expected to usurp the role of the decision-maker by making legal judgments and that the proper approach is to seek to assimilate expert evidence into an overall assessment, not discard it with the disingenuous language of 'weight'.

³²³ *Nirmalanathan v SSHD* [2004] EWCA Civ 1380 paragraph 13

³²⁴ *Nirmalanathan v SSHD* [2004] EWCA Civ 1380 paragraph 21

³²⁵ *Koci v SSHD* [2003] EWCA Civ 1507 paragraph 29-31

³²⁶ *Djebari v SSHD* [2002] EWCA Civ 813 paragraph 27

³²⁷ *Es Eldin v Tribunal* (C/2000/2681) paragraph 18

³²⁸ *S and Others* [2002] EWCA Civ 539 paragraph 29

³²⁹ *SK Croatia* [2002] UKIAT 05613 paragraph 5

Recommendations

- (i) There should be greater transparency and consultation over the criteria for designating, or not designating, Country Guideline cases and over major issues such as the country groups re-organisation of the Tribunal. Stakeholder groups exist but are not utilised by the Tribunal.
- (ii) The Tribunal must observe the requirements for an effectively comprehensive analysis set out by the Court of Appeal in *S and Others*.
- (iii) Country Guideline cases must be fully and properly referenced so that the evidence considered in a guidance case can be identified and challenged.
- (iv) Additional research resources are required if an effectively comprehensive analysis is to be achieved. The deficiencies in many of the cases examined indicate that Country Guideline cases cannot be left to the vagaries of the adversarial system. An 'assisting counsel' system would be beneficial.
- (v) Greater efforts should be made to link related cases to afford a better opportunity for a genuinely comprehensive analysis of all the relevant issues, based on a firmer factual foundation.
- (vi) Greater caution should be exercised in designating Country Guideline cases. The Tribunal must show greater willingness **not** to designate a case as a Country Guideline one and to 'de-designate' when appropriate. All backdated Country Guideline cases should be removed and all cases over one year old should also be removed.
- (vii) The Tribunal must be explicit and specific about the issues that are designated as guideline issues to avoid case-specific findings being elevated to guideline status.

- (viii) The Tribunal should review and consider its approach and attitude to expert evidence and seek to assimilate expert evidence rather than distinguish, isolate and reject it as at present.
- (ix) The Tribunal should recognise that it may possess experience of country information but it does not possess research skills and cannot, for example, make judgments about what types of evidence may or may not be available.