European Asylum Support Office

Judicial analysis

Evidence and credibility assessment in the context of the Common European Asylum System

EASO Professional Development Series for members of courts and tribunals

Produced by IARLJ-Europe under contract to EASO

2018

SUPPORT IS OUR MISSION

EASO professional development materials have been created in cooperation with members of courts and tribunals on the following topics:

- introduction to the Common European Asylum System for courts and tribunals;
- qualification for international protection (Directive 2011/95/EU);
- asylum procedures and the principle of non-refoulement;
- evidence and credibility assessment in the context of the Common European Asylum System;
- Article 15(c) qualification directive (2011/95/EU);
- exclusion: Articles 12 and 17 qualification directive (2011/95/EU);
- ending international protection: Articles 11, 14, 16 and 19 qualification directive (2011/95/EU);
- country of origin information.

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European Asylum Support Office

The European Asylum Support Office (EASO) is an agency of the European Union that plays a key role in the concrete development of the Common European Asylum System. It was established with the aim of enhancing practical cooperation on asylum matters and helping Member States fulfil their European and international obligations to give protection to people in need.

Article 6 of the EASO founding regulation (*) specifies that the agency shall establish and develop training available to members of courts and tribunals in the Member States. For this purpose, EASO shall take advantage of the expertise of academic institutions and other relevant organisations, and take into account the Union's existing cooperation in the field with full respect to the independence of national courts and tribunals.

The International Association of Refugee Law Judges

The International Association of Refugee Law Judges (IARLJ) is a transnational, non-profit association that seeks to foster recognition that protection from persecution on account of race, religion, nationality, membership of a particular social group, or political opinion is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law. Since its foundation in 1997, the association has been heavily involved in the training of judges around the world dealing with asylum cases. The European Chapter of the IARLJ (IARLJ-Europe) is the regional representative body for judges within Europe. One of IARLJ-Europe's specific objectives under its constitution is 'to enhance knowledge and skills and to exchange views and experiences of judges on all matters concerning the application and functioning of the Common European Asylum System'.

(*) Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (OJ L 132/11, 29.5.2010, pp. 11-28).

Contributors

This judicial analysis has been developed by a process having two components: an editorial team (ET) of judges and tribunal members with overall responsibility for the final product and a drafting team of experts.

In order to ensure the integrity of the principle of judicial independence and that the EASO professional development series for members of courts and tribunals is developed and delivered under judicial guidance, an ET, composed of serving judges and tribunal members with extensive experience and expertise in the field of asylum law, was selected under the auspices of a joint monitoring group (JMG). The JMG is composed of representatives of the contracting parties, EASO and IARLJ-Europe. The ET reviewed drafts, gave detailed instructions to the drafting team, drafted amendments, and was the final decision-making body as to the scope, structure, content, and design of the work. The work of the ET was undertaken through a combination of face-to-face meetings in Oslo in May 2016, Valletta in January 2017, and Amsterdam in April 2017 as well as regular electronic/telephonic communication.

Editorial team of judges and tribunal members

The judges and tribunal members of the ET for this judicial analysis were: **Hugo Storey** (United Kingdom, chair), **Hilkka Becker** (Ireland), **Johan Berg** (Norway), **Jakub Camrda** (Czech Republic), **Bernard Dawson** (United Kingdom), **Katelijne Declerck** (Belgium), **Harald Dörig** (Germany), **Florence Malvasio** (France), **Liesbeth Steendijk** (Netherlands), and **Boštjan Zalar** (Slovenia). The ET was supported and assisted in its task by project coordination manager, **Clara Odofin.**

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Comments were also received from the following participants in the EASO network of court and tribunal members and members of the EASO Consultative Forum: Judge Dobroslav Rukov, Sofia City Administrative Court, Bulgaria; Judge Jacek Chlebny, Supreme Administrative Court, Poland; Anne Kneer, law clerk of the Asylum Department IV of the Swiss Federal Administrative Court; Binh Tschan, law clerk of the Asylum Department V of the Swiss Federal Administrative Court; Anders Bengtsson, senior lawyer (föredragande jurist), Administrative Court of Göteborg, Sweden; Maria Déhn judge (rådman), Administrative Court of Göteborg, Sweden; John Panofsky, senior lawyer (föredragande jurist), Administrative Court of Göteborg, Sweden; retired Judge John Barnes, United Kingdom; retired Judge Allan Mackey, New Zealand and United Kingdom; Debora Singer, Asylum Aid/Migrants Resource Centre, United Kingdom; Asylum Research Consultancy (ARC); Stinne Østergaard Poulsen, Legal Adviser, The Danish Refugee Council; Hana Lupačová, Public Defender of Human Rights, Czech Republic; Gábor Gyulai, Refugee Programme Director, Hungarian Helsinki Committee; International Rehabilitation Council for Torture Victims (IRCT); S. Chelvan, Barrister, No 5 Chambers, United Kingdom.

All these comments were taken into consideration by the ET in finalising the text for publication. The members of the ET and EASO are grateful to all those who have made comments which have been very helpful in finalising this analysis.

The methodology adopted for the production of this analysis is set out in Appendix C.

This judicial analysis will be updated, as necessary, by EASO in accordance with the methodology for the EASO professional development series for members of courts and tribunals.

Contents

List of abbreviations

APD	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
APD (recast)	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
COI	Country of origin information
CREDO project	CREDO — Improved Credibility Assessment in EU Asylum Procedures project, led by the Hungarian Helsinki Committee with project partners UNHCR, IARLJ and Asylum Aid (United Kingdom)
DSSH	Difference, stigma, shame, harm
Dublin III Regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
EASO	European Asylum Support Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
ECtHR	European Court of Human Rights
EDAL	European Database of Asylum Law
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
EWCA	Court of Appeal of England and Wales (United Kingdom)
Family reunification directive	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
IARLJ	International Association of Refugee Law Judges
IASFM	International Association for the Study of Forced Migration
IEHC	Irish High Court
IJRL	*International Journal of Refugee Law*
IP	Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment)
LGBTI	Lesbian, gay, bisexual, transgender and intersex
NGO	Non-governmental organisation

OFPRA	Office français de protection des réfugiés et apatrides (French Office for the protection of refugees and stateless persons)
PTSD	Post-traumatic stress disorder
QD	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
QD (recast)	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
RAIO	Refugee, Asylum and International Operations Directorate (United States)
RCD (recast)	Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)
Refugee Convention	Convention relating to the Status of Refugees (1951), as amended by its Protocol (1967) [referred to in EU asylum legislation as 'the Geneva Convention']
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UKIAT	United Kingdom Immigration and Asylum Tribunal
UKUT	United Kingdom Upper Tribunal
UNHCR	United Nations High Commissioner for Refugees

Preface

In close cooperation with courts and tribunals of the Member States as well as other key actors, the European Asylum Support Office (EASO) has begun the development of a professional development series aimed at providing courts and tribunals with a full overview of the Common European Asylum System on a step-by-step basis. Following consultations with the EASO network of court and tribunal members, including IARLJ-Europe, it became apparent that there was a pressing need to make available to courts and tribunals judicial training materials on certain core subjects dealt with in their day-to-day decision-making. It was recognised that the process for developing such core materials was one that had to facilitate the involvement of judicial and other experts in a manner fully respecting the principle of independence of the judiciary as well as accelerating the development of the overall professional development series.

This judicial analysis is the product of a project between IARLJ-Europe and EASO and it forms part of the EASO Professional development series for members of courts and tribunals.

The analysis is primarily intended for use by members of courts and tribunals of EU Member States concerned with hearing appeals or conducting reviews of decisions on applications for international protection. The objective is to scrutinise how, in the context of the CEAS, members of courts and tribunals should either review the evidence and credibility assessment undertaken by the determining authority (or court or tribunal of lower instance) or carry out evidence and credibility assessment themselves. It aims to provide a judicial analysis which is of use both to those without (or with limited) prior experience of adjudication in the field of the CEAS as well as to those who are experienced or specialist judges in the field. As such, it aims to be a useful point of reference for all members of courts and tribunals concerned in the hearing of cases or actions to which the CEAS applies. The structure, format, content and design have, therefore, been developed with this broad audience in mind. It provides:

— a general introduction to evidence and credibility assessment in the asylum context, including the structure and scope of this analysis and the use of terminology (Part 1);

— an overview of the relevant EU legal framework (Part 2);

— an overview of the judicial context, defining the varying tasks of members of courts and tribunals and outlining relevant challenges (Part 3);

— an analysis of the specific principles and standards on evidence and credibility assessment in light of EU law and relevant jurisprudence (Part 4);

— an analysis of specific aspects of evidence and credibility assessment (Part 5);

— an outline of the multidisciplinary factors that need to be taken into account in assessing evidence and credibility (Part 6).

The analysis is supported by several appendices including a number of checklists which reflect the content of its chapters and aim to assist members of courts and tribunals to achieve a structured approach to evidence and credibility assessment (Appendix A) ([1]). It is further complemented by a list of primary sources, listing not only relevant EU primary and secondary legislation and essential case-law of the Court of Justice of the European Union (CJEU) and the courts and tribunals of EU Member States, but also the European Court of Human Rights (ECtHR) and relevant international treaties of universal and regional scope (Appendix B). To ensure that the relevant legislation and case-law is easily and quickly accessible to readers, hyperlinks have been utilised. Appendix C outlines the methodology used, while Appendix D also contains a selected list of relevant official documents and publications, in particular the relevant publications of IARLJ and UNHCR ([2]). Finally, a compilation of jurisprudence is provided as a separate document, listing extracts from key judgments and decisions on evidence and credibility assessment in the context of the CEAS.

The aim is to set out clearly and in a user-friendly format the current state of the law. This publication analyses the law of the CEAS as it stood at 30 July 2017. It is worth emphasising that, together with other judicial analyses in the professional development series, this analysis will be updated periodically as necessary. However, it will be for readers to check whether there have been any changes in the law. The analysis contains a number of references to sources that will help the reader to do that.

Other analyses, which have been or are being developed as part of the professional development series, explore other specific areas of the CEAS, in addition to a general introduction to the CEAS ([3]).

([1]) In general terms, EU law parallels and has much consistency with international norms, as well as standards and guidance provided by the IARLJ and UNHCR in their international operations. See IARLJ, *A structured approach to the decision making process in refugee and other international protection claims Including: A flowchart using established judicial criteria and guidance, The IARLJ international judicial guidance for the assessment of credibility, The IARLJ, judicial checklist for COI*, June 2016.

([2]) See Sections 2.2 and 2.3 of Appendix D respectively for publications by the United Nations High Commissioner for Refugees (UNHCR) and the International Association of Refugee Law Judges (IARLJ). This analysis builds on the IARLJ's body of work on this topic, and in consideration of UNHCR guidance and other studies. With regard to credibility assessment, we have been assisted by the useful research and findings of the 'CREDO project', led by the Hungarian Helsinki Committee. Project partners were UNHCR, IARLJ and Asylum Aid (United Kingdom). The project was co-funded by the European Commission. The publications from this project may be found in Appendix D.

([3]) See: EASO, The Implementation of Article 15(c) QD in EU Member States, July 2015; EASO, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) — A judicial analysis*, January 2016; EASO, *Ending International Protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) — A judicial analysis*, December 2016; EASO, *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, August 2016; EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis,* December 2016; and EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018.

Key questions

This judicial analysis strives to answer the following main questions:

1. What does evidence and credibility assessment mean in the asylum context (Part 1)?

2. Which principles and norms of EU primary and secondary law govern evidence and credibility assessment (Part 2)?

3. What are the tasks of courts and tribunals with regard to evidence and credibility assessment (Sections 3.1, and 3.2), what challenges are they likely to face (Section 3.3), and which principles, standards and factors have to be taken into account when conducting judicial proceedings (Section 3.4)?

4. What are the specific principles and standards applicable to evidence and credibility assessment (Part 4)?

5. What does the assessment of facts and circumstances entail under Article 4 QD (recast) (Section 4.1) and how has an application for international protection to be substantiated under Article 4(1) and (2) QD (recast) (Section 4.2)?

6. What are the general principles and standards for the assessment of evidence (Section 4.3)?

7. What are the methods for assessing the credibility of the applicant's statements and documentary or other evidence (Section 4.4) and what are the credibility indicators (Section 4.5)?

8. What are the specific standards for assessing: documentary evidence (Section 4.6); expert evidence (Section 4.7); and country of origin information (Section 4.8)?

9. How should evidence as to past and future risk of persecution or serious harm be evaluated under Article 4(4) QD (recast) (Section 4.9)?

10. How do evidence and credibility have to be assessed in the more specific contexts of:
    - the determination of the applicant's nationality (Section 5.1);
    - cases involving minors (Section 5.2);
    - the application of the concept of internal protection (Section 5.3);
    - the determination of family relationships (Section 5.4);
    - exclusion from international protection (Section 5.5);
    - withdrawal of protection (Section 5.6);
    - subsequent applications (Section 5.7);
    - determination of the Member State responsible for examining an application for international protection under the Dublin III Regulation (Section 5.8); and
    - the application of the safe country concepts (Section 5.9)?

11. Which multidisciplinary factors may need to be taken into account in assessing evidence and credibility (Part 6)?

Part 1: Introduction to evidence and credibility assessment in the asylum context

1.1 Structure and scope

This judicial analysis concerns the assessment of evidence and credibility under the instruments of the Common European Asylum System, in particular the qualification directive (recast) ([4]) (QD (recast)) and the asylum procedures directive (recast) ([5]) (APD (recast)) ([6]). The emphasis is on the assessment of facts and circumstances relating to applications for international protection — meaning refugee status and subsidiary protection status (Article 2(a) QD (recast)). The definition of 'refugee' requires 'a well-founded fear' of persecution for a Convention reason (Article 2(d) QD (recast)). Whereas eligibility for 'subsidiary protection' requires that in respect of an applicant — who does not qualify as a refugee — 'substantial grounds have been shown for believing' that if returned to the country of origin, he/she 'would face a real risk of suffering serious harm' (Article 2(f) QD (recast)).

The European Council has stated with regard to the CEAS:

> [I]t is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome ([7]).

As such the QD (recast) seeks to achieve a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards, and the purpose of the APD (recast) is to establish common procedures for granting and withdrawing international protection pursuant to the QD (recast) ([8]).

One of the main objectives of the QD (recast) is to ensure that Member States apply common criteria for the identification of applicants eligible for international protection. It follows that this includes the establishment of the facts relevant for determining qualification for international protection. Only when the relevant facts have been established, can an informed decision be made whether the criteria for refugee status or subsidiary protection status are met. Evidence and credibility assessment, therefore, plays a crucial role in international protection cases.

([4]) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9.

([5]) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

([6]) For further information on the CEAS see EASO, *An introduction to the CEAS for courts and tribunals — A judicial analysis*, op. cit., fn. 3.

([7]) European Council, *The Stockholm Programme: An open and secure Europe serving and protecting the citizens*, 2 December 2009, [2010] OJ C 115/1, Section 6.2. This is also highlighted in recitals (12) and (13) QD (recast) which clarify that the main objective of this directive is, inter alia, '[…] to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection […]. The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movement of applicants for international protection between Member States, where such movement is purely caused by differences in legal frameworks'.

([8]) See recitals (8), (10) and (12) of the QD (recast), and recitals (6) and (7) as well as Art. 1 APD (recast).

Whilst the primary focus is on the determination of whether an applicant qualifies for refugee status or subsidiary protection status, consideration is also given to evidence assessment in other CEAS contexts. Therefore, this judicial analysis also addresses evidence assessment in cases concerning the Dublin III Regulation ([9]) (Section 5.8).

This judicial analysis will only cover procedural provisions in so far as they impact on evidence and credibility assessment. For more extensive elaboration upon some of these provisions, readers are referred to EASO, *Asylum procedures and the princip*le of non-refoulement - *Judicial analysis,* 2018 ([10]).

This judicial analysis has six parts in which different elements relevant to the evidence and credibility assessment are addressed (see Table 1 below).

Table 1: Structure of this judicial analysis

Part 1	Introduction to evidence and credibility assessment in the asylum context	pp. 16-20
Part 2	The EU legal framework for evidence assessment	pp. 21-22
Part 3	Defining the tasks of members of courts or tribunals	pp. 23-38
Part 4	Specific principles and standards applicable to evidence and credibility assessment	pp. 39-119
Part 5	Selected specific aspects relating to evidence and credibility assessment	pp. 120-167
Part 6	Multidisciplinary approach to the assessment of evidence and credibility	pp. 168-181

1.2 Use of terminology

This section seeks to explain the meaning of words and phrases as used in this judicial analysis. The explanations below are not intended as legal definitions, unless otherwise specified, but endeavour to convey the particular meaning given to the terms in this judicial analysis.

1.2.1 Who is the decision-maker?

Depending on the context, the decision-maker will either be the determining authority — 'the administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases' (Article 2(f) APD (recast)) — or a court or tribunal.

1.2.2 What is evidence?

In European Union (EU) law, there is no general definition of 'evidence', and specifically no definition of 'evidence' in the QD (recast) or the APD (recast) ([11]). Article 4 QD (recast) refers to the '[a]ssessment of facts and circumstances' and speaks of the 'elements' needed to

([9]) Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III Regulation) [2013] OJL 180/31.

([10]) EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, op. cit., fn. 3., 2018.

([11]) Art. 22(3) Dublin III Regulation, op. cit., fn. 9, defines 'proof' and 'circumstantial evidence' for the purpose of that regulation. See Section 5.8.1.2.

substantiate an application for international protection. According to Article 4(2) QD (recast), these consist of the 'applicant's statements and all documentation at the applicant's disposal'. However, it can be deduced both from other provisions of the QD (recast) and judgments of the Court of Justice of the European Union (CJEU) that 'evidence' may comprise more than the applicant's statements and documentation. Article 4(5) QD (recast) addresses the situation 'where aspects of the applicant's statements are not supported by documentary **or other evidence**' ([12]). The CJEU in *A, B and C*, referred to 'assessing statements and documentary or **other evidence**' ([13]). Consequently, it is safe to conclude that 'evidence' is a broad term and comprises 'anything that asserts, confirms, supports, refutes or otherwise bears on the relevant facts in issue' ([14]). Therefore, for the purposes of this judicial analysis, 'evidence' may comprise any material (including the applicant's statements, documentation or other exhibits), which supports, verifies, or refutes a relevant fact.

1.2.3 What are 'elements'?

In accordance with Article 4(2) QD (recast), the elements needed to substantiate an application for international protection consist of 'the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.' The term 'elements', therefore, encompasses both facts and evidence.

1.2.4 What are material facts?

Material facts are the facts by which an applicant substantiates the application and that are linked to one or more of the requisites of the definition of a refugee or person eligible for subsidiary protection. Material facts are those facts and circumstances which are legally relevant for a determination of qualification for international protection. The assessment of the applicant's statements must be based on facts material to the core of the claim.

1.2.5 What are country of origin information and country information?

Country of origin information (COI) is not specifically defined in the CEAS instruments, although Article 4(3)(a) QD (recast), which refers to '[a]ll relevant facts as they relate to the country of origin', would appear to serve as a definition. It would be very difficult to give a more precise definition, in light of the variety of material that can be referred to as COI. The requirement that these facts include 'laws and regulations of the country of origin and the manner in which they are applied' appears to indicate that, in the context of the assessment of international protection needs, the analysis of the situation in the country of origin must take due account, inter alia, of the existing legal framework as it is applied by the authorities of the country of origin at the time of the assessment of the application ([15]). The term 'country information' has a broader meaning and refers to information on any country including, for example, countries

([12]) Emphasis added.
([13]) CJEU, judgment of 2 December 2014, Grand Chamber, joined cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, EU:C:2014:2406, para. 54, emphasis added.
([14]) UNHCR, *Beyond proof: Credibility assessment in EU asylum systems*, May 2013, p. 28. See Section 4.2.4 below on types of evidence.
([15]) See also Section 4.8 Standards for assessing country of origin information.

of transit ([16]), countries designated as responsible for examining an application under the Dublin III Regulation, safe 'first countries of asylum', and 'safe third countries'.

1.2.6 What is the obtaining of evidence?

In this judicial analysis, the process of acquiring evidence will be referred to as the 'obtaining of evidence' ([17]). Most evidence will be obtained by the applicant in support of the application and by the determining authority before adopting its decision. However, evidence may also be obtained in the course of the judicial procedure (Article 46(3) APD (recast)). See Section 4.2 for further information on the obtaining of evidence.

1.2.7 What is evidence assessment?

This concerns the examination of the value, the legitimacy and the relevance to the material facts of all evidence that is obtained relating to the application. Only when the factual circumstances are established, can it be decided whether the conditions for granting international protection are met. Evidence assessment cannot be approached in a mechanistic manner. It is for the determining authority to 'modify their methods of assessing statements and documentary or other evidence having regard to the specific features of each category of application for asylum, in observance of the rights guaranteed by the Charter [of Fundamental Rights]' ([18]). The assessment must also take the individual situation and personal circumstances of the applicant into consideration (Article 4(3) QD (recast)). For more specific information on evidence assessment, see Part 4 below.

1.2.8 What is credibility assessment?

The term 'credibility' is not defined in any of the CEAS instruments. Its use in Article 4(5)(e) QD (recast) refers to the general credibility of an **applicant,** but that is in the context of a specific rule governing non-confirmation of aspects of the applicant's statements. In the context of evidence assessment more generally, we are concerned with the credibility of an applicant's **statements and other evidence** (sometimes referred to as the applicant's 'account' or 'story'). Hence, credibility assessment conducted by the determining authority or members of a court or tribunal concerns the process of inquiry into whether all or part of the statements of the applicant or other evidence submitted by him/her relating to the material facts ([19]) can be accepted in order to determine his/her qualification for international protection. As set out in Section 4.5 on credibility indicators, this assessment may include verifying whether the applicant's statements are consistent, sufficiently detailed, plausible, and compatible with, inter alia, his/her documents, COI and any other evidence obtained. It is important to note that assessing credibility does not mean that in all cases the decision-maker will attain certainty about the truthfulness of the statements of the applicant. UNHCR has defined credibility as follows: 'Credibility is established where the applicant has presented a claim which is coherent

([16]) See Art. 10(3)(b) APD (recast).
([17]) The term 'obtaining' of evidence is not found in the QD (recast). However the APD (recast) does use the terms 'obtained' and 'obtain' in Arts. 10(3)(b), 45(2)(a) and recital (39) regarding country information.
([18]) CJEU, *A, B and C*, op. cit., fn. 13, para. 54. See also Charter of Fundamental Rights of the European Union of 18 December 2000, as adopted in 2007, [2012] OJ C 326/391 (entry into force: 1 December 2009).
([19]) See Table 2 below and Section 1.2.4 for further information on material facts.

and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed' ([20]).

Credibility assessment is only part of evidence assessment. Even when (aspects of) the statements of an applicant relating to material facts are not credible, it is possible for his/her application for international protection nonetheless to succeed. An applicant may qualify for refugee or subsidiary protection status, for example, on the basis of a medical report notwithstanding a lack of credibility in some or all aspects of the applicant's statements. Applicants may also be eligible for international protection solely by virtue of the fact that it is established that they are, for instance, nationals of a particular country experiencing exceptionally high levels of armed conflict or in which all members of a particular ethnic group or clan face persecution or serious harm. Such facts can also be supported by other evidence. Credibility assessment is thus not a goal or end in itself, but a tool for determining eligibility for refugee status or subsidiary protection status.

Table 2: Words and phrases explained in summary

Evidence	Any material (including the applicant's statements, documentation and other exhibits) which supports, verifies, or refutes a relevant fact.
Elements	The applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.
Material facts	Facts by which an applicant substantiates the application and that are linked to one or more of the requisites of the definition of a refugee or person eligible for subsidiary protection and which are relevant for a determination of international protection.
Country of origin information	All relevant facts as they relate to the country of origin.
Obtaining of evidence	Process of acquiring evidence.
Evidence assessment	Examination of the value, the legitimacy and the relevance to the material facts of all evidence that is obtained relating to the application.
Credibility assessment	Credibility assessment is the process of inquiring into whether all or part of the statements and other evidence presented by the applicant relating to the material facts can be accepted in order to determine qualification for international protection.

([20]) See UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, para. 11, cited by the European Court of Human Rights (ECtHR) in its Grand Chamber judgment of 23 August 2016, *JK and Others v Sweden*, application no 59166/12, para. 53.

Part 2: The EU legal framework for evidence assessment

The EU legal framework governing evidence and credibility assessment is limited. EU primary law contains certain principles and rights of general application which impact on evidence and credibility assessment ([21]). EU secondary law provides some more specific norms with regard to assessment of evidence and credibility ([22]). The CJEU has developed some further principles but these too are relatively few. Since the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Refugee Convention) ([23]) also lack provisions regarding the subject of evidence and credibility assessment in international protection cases, other sources of guidance, interpretation and inspiration have relevance. In this regard, in a number of Member States, there is a rich jurisprudence dealing with this subject area. In addition, the jurisprudence of the ECtHR constitutes an important source of such guidance ([24]). Also, Article 52(3) of the Charter of Fundamental Rights of the European Union (EU Charter) ([25]) prevents the institutions and bodies of the EU and the Member States from developing a different human rights jurisprudence where the provisions of the EU Charter and the European Convention on Human Rights (ECHR) ([26]) correspond, although this must 'not prevent EU law providing more extensive protection'. Materials such as the International Association of Refugee Law Judges (IARLJ) publication on the assessment of credibility as part of the CREDO Project ([27]), the United Nations High Commissioner's (UNHCR) handbook and subsequent guidelines on international protection ([28]) and other publications may also provide valuable guidance to national courts and tribunals on evidence and credibility assessment, although they are not binding ([29]).

The various provisions of EU primary and secondary law relating to the CEAS are addressed in detail in *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis* ([30]). Those that may have particular importance to evidence and credibility assessment are set out below in Table 3 ([31]).

([21]) See EASO, *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, August 2016, op. cit., fn. 3, Part 2.

([22]) The legal basis for the creation of secondary legislation is derived from Art. 78 Treaty on the Functioning of the European Union (TFEU; consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009): in [2012] OJ C 326/47). For further information on Art. 78 TFEU, see EASO, *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, August 2016, op. cit., fn. 3, Sections 1.4 and 2.1.1.

([23]) Convention Relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954) (Refugee Convention); and Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entry into force: 4 October 1967).

([24]) See EASO, *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, August 2016, op. cit., fn. 3, Section 3.4.1.

([25]) EU Charter of Fundamental Rights, op. cit., fn. 18.

([26]) Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, ETS No 005, 4 November 1950 (entry into force: 3 September 1953) (ECHR). See Art. 53.

([27]) IARLJ, Assessment of credibility in refugee and subsidiary protection claims under the EU Qualification Directive, Judicial criteria and standards, CREDO Project, 2013 (IARLJ, Assessment of Credibility, CREDO project), p. 35. For further information on the CREDO Project see fn. 2 above. Other publications of the project were: UNHCR, *Beyond proof*, op. cit., fn. 14; Hungarian Helsinki Committee, Credibility Assessment in Asylum Procedure, A Multidisciplinary Training Manual, Vol. 1, 2013 (Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 1); and Hungarian Helsinki Committee, Credibility Assessment in Asylum Procedure, A Multidisciplinary Training Manual, Vol. 2, 2015 (Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 2).

([28]) UNHCR, *Handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 protocol relating to the status of refugees, 1979*, reissued December 2011 (UNHCR Handbook). For a list of UNHCR publications relevant to evidence and credibility assessment, see Section 2.2 of Appendix D below.

([29]) The position of UNHCR is discussed in EASO, *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, August 2016, op. cit., fn. 3, Section 1.3.

([30]) Ibid.

([31]) It should be noted that at the time of writing, proposals for the amendment of secondary legislation were under consideration.

Table 3: General principles and EU primary and secondary law relevant for evidence and credibility assessment

General principles	Right to good administration Right of defence Right to be heard
Treaty on European Union	Article 19(1): Effective legal protection
Charter of Fundamental Rights of the European Union	Article 1: Human dignity Article 7: Respect for private and family life Article 20: Equality before the law Article 21: Non-discrimination Article 24: The rights of the child Article 41: Right to good administration (including the right to be heard) Article 47: Right to an effective remedy and fair trial Article 48: Right of defence
Qualification Directive (recast)	Article 4: Assessment of facts and circumstances
Asylum procedures directive (recast)	Article 10: Requirements for the examination of applications Article 11: Requirements for a decision by the determining authority Article 14: Personal interview Article 15: Requirements for a personal interview Article 16: Content of a personal interview Article 17: Report and recording of personal interview Article 46: The right to an effective remedy
Dublin III Regulation	Article 22: Replying to a take charge request Article 27: Remedies
2003 family reunification directive ([32])	Article 5: Submission and examination of the application Article 11: Other evidence

([32]) Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12, 3 October 2003 (family reunification directive).

Part 3: Defining the tasks of members of courts or tribunals

It is the task of courts and tribunals to examine the legal correctness of the decisions of the competent administrative authorities, or decisions of lower courts upholding (or in some jurisdictions, reversing) decisions of competent authorities. In undertaking this task, they will approach evidence and credibility assessment in different ways depending on the type of procedure and their place in the national judicial hierarchy. Thus, the court or tribunal may be required to assess the evidence itself and make its own findings of fact. Alternatively, the court or tribunal may only be concerned with reviewing the assessment of evidence by the administrative determining authority or a lower court or tribunal for legal error.

Some sections of this analysis will refer to procedural provisions in order to help understanding of the varying roles of the members of courts or tribunals in this respect. A more extensive elaboration of such provisions will be given in *Asylum procedures and the principle of* non-refoulement — *Judicial analysis* ([33]).

3.1 Examination of facts and points of law by a court or tribunal

3.1.1 Right to an effective remedy

Article 47 of the EU Charter guarantees the right to an effective remedy before a court or tribunal. The APD (recast) contains a specific guarantee of the right to an effective remedy in the context of appeals procedures. Article 46(1) APD (recast) (titled 'Appeals Procedures') first of all identifies the types of decision against which this right lies.

Article 46(1) APD (recast)

Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;

(ii) considering an application to be inadmissible pursuant to Article 33(2);

(iii) taken at the border or in the transit zones of a Member State as described in Article 43(1);

(iv) not to conduct an examination pursuant to Article 39;

([33]) EASO, *Asylum procedures and the principle of* non-refoulement — *Judicial analysis*, 2018, op. cit., fn. 3, Part 6.

(b) a refusal to reopen the examination of an application after its discontinuation pursuant to Articles 27 and 28;

(c) a decision to withdraw international protection pursuant to Article 45.

From the above it can be seen that this right applies not just to decisions on the substance of an application for international protection but also certain decisions made within identified procedures under which Member States may not be required to assess the substance.

Article 46(3) APD (recast) stipulates:

Article 46(3) APD (recast)

In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.

This provision clearly entails that in appeals procedures before a court or tribunal of first instance such a remedy can only be effective if it provides for an examination of both facts and law. Thus a system in which the determining authority is completely in charge of establishing the facts and where judicial review by courts or tribunals of first instance is limited to points of law appears to be contrary to Article 46(3) APD (recast). In *Samba Diouf*, the CJEU decided on the preliminary question whether the right to an effective remedy must be interpreted as meaning that it precludes rules pursuant to which no separate judicial remedy exists as regards the decision of the determining authority to examine an application under an accelerated procedure. The CJEU considered that:

> In order for that right to be exercised effectively, the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrefutable presumption as to the legality of those reasons. It is also within the framework of that remedy that the national court hearing the case must establish whether the decision to examine an application for asylum under an accelerated procedure was taken in compliance with the procedures and basic guarantees laid down in Chapter II of Directive 2005/85, as provided for in Article 23(4) of the directive ([34]).

Article 46(3) does not prevent Member States from having appeal procedures that allow for courts of tribunals in addition to those of first instance to also conduct a full and *ex nunc* examination of both facts and points of law.

It is clear from the above that members of some courts and tribunals, depending on their place within the judicial hierarchy of a Member State, may have to perform not just the function of examining points of law, but a fact-finding function. Even if a court or tribunal is only examining points of law, it may need to analyse whether the evidence and credibility assessment made by the determining authority or lower judicial instance was lawful. However, there is no requirement for a Member State to ensure that more than the first instance of courts

([34]) CJEU, judgment of 28 July 2011, case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, para. 61.

or tribunals needs to do so. In the case of *Samba Diouf*, the CJEU stated that 'the principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction' ([35]).

3.1.2 Fact finding by courts and tribunals

In relation to appeals to a court or tribunal of at least first instance against decisions on the **substance** of an application for international protection, the right of applicants to a remedy on the facts entails that they must be able to challenge the findings of fact made by the determining authority and their underlying evidential basis.

The exact meaning of a 'full and *ex nunc* examination of both facts and points of law' has not yet been clarified by the CJEU ([36]). However, it is apparent that the remedy must encompass a full and up-to-date assessment of evidence and credibility. The right to a 'full' examination necessitates that the court or tribunal must take into account all the evidence put forward by the parties up to that point and may, depending on national procedures, extend to the right on the part of an applicant to give oral testimony and/or call witnesses before the court or tribunal. While *ex nunc* means 'from now on', the origin of this requirement of Article 46(3) APD (recast) appears to derive most directly from the well-established case-law of the ECtHR on Article 3 ECHR (see Section 3.1.2.1). The right to an *ex nunc* examination means that the court or tribunal cannot confine itself to the state of the evidence at the time of the decision made by the determining authority, but must ensure it has before it any relevant evidence relating to how matters stand at the date of the hearing of the appeal.

A court or tribunal tasked with assessing the evidence in order to make findings of fact must ensure that, where applicable, it applies the same legal criteria laid down in CEAS instruments, including Article 4 QD (recast), as decision-makers within the determining authority.

([35]) Ibid. para. 69.

([36]) In *Samba Diouf*, ibid., para. 57, the CJEU indicated, however, that the review of the legality of this decision should concern 'both the facts and the law' in application of the APD. See Council of State (Netherlands), decision of 13 April 2016, 201506502/1/V2 (see unofficial English summary).

The APD (recast) sets out a range of procedural guarantees to be enjoyed by applicants during the appeal procedure, as set out in Table 4 below.

Table 4: Guarantees for applicants under the APD (recast)

Article 12(2) APD (recast)	'With respect to the procedures provided for in Chapter V [appeals procedures], Member States shall ensure that all applicants enjoy guarantees equivalent to the ones referred to in [Article 12] paragraph 1(b) to (e).'
Article 12(1)(b) to (e) APD (recast)	'With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees: […] b) they shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to provide those services at least when the applicant is to be interviewed as referred to in Articles 14 to 17 and 34 and appropriate communication cannot be ensured without such services. In that case and in other cases where the competent authorities call upon the applicant, those services shall be paid for out of public funds; c) they shall not be denied the opportunity to communicate with UNHCR or with any other organisation providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned; d) they and, if applicable, their legal advisers or other counsellors in accordance with Article 23(1), shall have access to the information referred to in Article 10(3)(b) and to the information provided by the experts referred to in Article 10(3)(d), where the determining authority has taken that information into consideration for the purpose of taking a decision on their application; e) they shall be given notice in reasonable time of the decision by the determining authority on their application. If a legal adviser or other counsellor is legally representing the applicant, Member States may choose to give notice of the decision to him or her instead of to the applicant;'
Article 10(4) APD (recast)	'[t]he authorities referred to in Chapter V [courts and tribunals] shall, through the determining authority or the applicant or otherwise, have access to the general information referred to in paragraph 3(b), necessary for the fulfilment of their task' ([37]).

In addition, Articles 20 and 21 APD (recast) provide for free legal assistance at least before courts and tribunals of first instance.

It can be inferred from Article 47 of the EU Charter and Article 46 APD (recast) that the court or tribunal must also ensure that 'applications are examined and decisions taken individually, objectively and impartially' ([38]). To do otherwise would prevent the remedy from being effective and would also be contrary to general legal norms governing judicial proceedings, including the right to a fair trial under Article 47 of the EU Charter. Accordingly, in order to ensure objective and impartial examination, a court or tribunal cannot automatically endorse findings of fact made by the determining authority. Conversely, it cannot automatically accept an applicant's evidence. If the evidence in the case is disputed, a court or tribunal must ensure

([37]) The latter requires courts and tribunals to have access to precise and up-to-date information obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions.

([38]) It would appear that recital (17), which states that: 'In order to ensure that applications for international protection are examined and decisions thereon are taken objectively and impartially, it is necessary that professionals acting in the framework of the procedures provided for in this directive perform their activities with due respect for the applicable deontological principles', also applies to members of courts and tribunals.

that the applicant has a proper opportunity to clarify, amend or add to his/her evidence and that both parties are able to address the underlying issues.

In the same way, it can be inferred that courts or tribunals making decisions relating to international protection must also give their own reasons for their decision. It would not be consistent with the right to an effective remedy for a court or tribunal to simply say, without explanation, in its decision that it agrees with the reasons given by the determining authority.

Where courts or tribunals deal with appeals against any of the **non-substantive** decisions specified in Article 46(1)(a) APD (recast), it is important to note that examination of these **also** requires a full and *ex nunc* examination of both facts and points of law.

In respect of a decision by the competent authority to examine an application for international protection under an accelerated procedure, in its *Samba Diouf* judgment, the CJEU made clear that 'the legality of the final decision adopted in an accelerated procedure — and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded' must be the subject of a 'thorough review' by national courts or tribunals and indicated that the review of the legality of this decision should encapsulate 'both the facts and the law' ([39]). The Court stressed that what is important is that the reasons justifying the use of an accelerated procedure can be effectively challenged before the national court and reviewed by it within the framework of the action against the final decision ([40]).

3.1.2.1 Evidence available to court and tribunal members and the power to obtain evidence *proprio motu*

Members of courts or tribunals tasked with fact finding may meet the requirement of Article 46(3) APD (recast) to provide for a full and *ex nunc* examination of both facts and point of law by obtaining evidence through the parties and/or by obtaining evidence themselves ([41]).

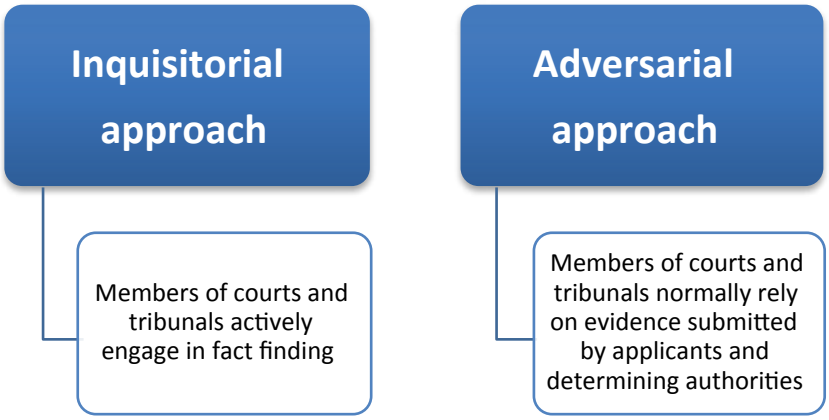
([39]) CJEU, *Samba Diouf*, op. cit., fn. 34, paras. 56 and 57.

([40]) Ibid., para. 58. See also EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018, op. cit., fn. 3, Subsections 5.1.2 and 6.1.3.1.

([41]) As stated before, the CJEU has not yet explained how this provision should be interpreted. It should be noted that the ECtHR can in certain limited circumstances obtain materials *propio motu* and has stated that a full and *ex nunc* assessment is called for in cases concerning the principle of *non-refoulement*. See e.g. ECtHR, judgment of 11 January 2007, *Salah Sheekh v the Netherlands*, application no 1948/04, para. 136: 'In determining whether it has been shown that the applicant runs a real risk, if expelled, of suffering treatment proscribed by Article 3, the Court will assess the issue in the light of all the material placed before it, or, if necessary, material obtained *proprio motu*, in particular where the applicant — or a third party within the meaning of Article 36 of the Convention — provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent government. […] [I]n assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time. Since the nature of the contracting states' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the contracting state at the time of the expulsion […]. In the present case, given that the applicant has not yet been expelled, the material point in time is that of the Court's consideration of the case. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities […].'

The courts and tribunals of Member States differ as to whether they adopt an inquisitorial approach, adversarial approach or a mixture of the two (see Figure 1 below).

Figure 1: inquisitorial and/or adversarial approach



The courts or tribunals of Member States which adopt an adversarial approach are more dependent on the evidence submitted by applicants and determining authorities than those which adopt an inquisitorial approach.

Although only concerned with applying the ECHR, the ECtHR in *FG* v *Sweden* seeks to identify working rules for the national authorities and courts in this regard. The ECtHR suggests that even if an applicant chooses not to rely on or disclose a specific individual ground for asylum by deliberately refraining from mentioning it, if the contracting state is made aware of facts relating to a specific individual which could expose him or her to a real risk of ill-treatment, the authorities must carry out an assessment of that risk of their own motion. According to the ECtHR, '[t]his applies in particular to situations where the national authorities have been made aware of the fact that the asylum seeker may, plausibly, be a member of a group systematically exposed to a practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned' ([42]).

In order to fulfil its duty to ensure a full and *ex nunc* examination, the court or tribunal must not only have access to all relevant information concerning the individual position and personal circumstances of the applicant (see Article 4(3)(c) QD (recast)), but also be informed of the content of evidence used by the decision-maker. It must also have access to precise and up-to-date information from various sources as to the general situation prevailing in the countries of origin and transit at the time of making its determination (see Article 10(4) APD (recast)).

In some national procedures, the court or tribunal may have power to direct or request one or both parties to adduce further evidence, including information about the general situation ([43]). In others, members of courts of tribunals may have the power to obtain the evidence

([42]) ECtHR, judgment of 23 March 2016, *FG v Sweden*, Grand Chamber, application no 43611/11, paras. 126-127 and 150-157. See also, Request for a preliminary ruling from the Administrativen sad Sofia-grad (Bulgaria) lodged on 18 November 2016, Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite, case C-585/16 (2017/C 046/17).

([43]) In Italy the judge cannot investigate facts not offered by the parties (see Arts. 63 and 64 of the Italian Code of the Administrative Proceedings). In the United Kingdom, procedure rules envisage that all evidence is submitted by the parties (see e.g. Tribunal Procedure Rules 2014, rules 4 and 14).

themselves, *proprio motu* ([44]). In such a case, the principle of equality of arms dictates that the court or tribunal should inform the parties it has done so, and afford them an opportunity to comment ([45]). In this connection, some courts may even have access to information resources themselves ([46]). In addition, members of courts or tribunals may be able to obtain or direct production of reports from experts, insofar as fairness is ensured. For further details, refer to Section 4.2.3 on obtaining of evidence by Member States, including members of courts or tribunals.

3.2 Examination of points of law only

Whilst applicants are afforded a full and *ex nunc* examination of both facts and points of law by at least a court or tribunal of first instance, other (generally higher) national courts or tribunals may only have an examining function that is limited to points of law. However, where courts and tribunals in this position are not engaged in fact finding, this does not mean that they are unconcerned with issues of evidence and credibility assessment. On the contrary, appeals or applications for judicial review brought at that level quite often involve a challenge to the legality of such assessment, requiring these courts and tribunals to decide whether the evidence and credibility assessment made by the determining authority (or lower court or tribunal tasked with fact finding) is flawed by legal error.

By way of example, an appeal against a decision of the determining authority which was based on a personal interview during which the applicant was not given an opportunity to explain alleged inconsistencies in his/her account (contrary to Article 16 APD (recast)) may lead the court or tribunal concerned to conclude that that decision is a nullity and should be set aside. An appeal or action brought against the decision of a lower court or tribunal, if the latter has heard evidence from a minor but approached it in the same way as evidence given by an adult, may likewise result in a decision to set aside that decision. Accordingly, other parts and sections of this judicial analysis may be just as pertinent for courts and tribunals conducting a reviewing function only as they are for those engaged in both fact finding and examining points of law.

The function of examining points of law may also involve a review of other aspects of the procedure conducted by the determining authority and/or lower court or tribunal. As regards the procedure conducted by the determining authority, Articles 6 to 30 of Chapter II of the APD (recast) contain basic principles and guarantees governing the procedure (see Section 4.3). The examination procedure at the level of the determining authority must be in accordance with these principles and guarantees (Article 1(1) APD (recast)). However, whether a court or tribunal considers that breaches in procedure justify a decision to annul or set aside a decision by a determining authority or by a lower court or tribunal or to itself remake it will usually

([44]) See e.g. Art. 86 of the German Code of Administrative Court Procedure (Verwaltungsgerichtsordnung) and Bundesverwaltungsgericht (Federal Administrative Court) (Germany), judgment of 10 May 1994, BVerwG 9 C 434.93, in *Neue Zeitschrift für Verwaltungsrecht* 1994, p. 1123; for further details see below, Section 4.2.3. By way of further example, the Belgian Council for Aliens Law Litigation has full judicial review but no investigative competence. It can confirm, reform or annul the decision if it considers essential information is lacking to be able to decide on the appeal and if further investigation is needed. The Council for Aliens Law Litigation can also adjourn the case and request both parties to further submit evidence or up-to-date COI (Arts. 39/2, § 1 and 39/62 of the Act of 15 December 1980 on access to territory, stay, establishment and departure of foreigners).

([45]) The French Council of State requires that the parties be afforded the opportunity to comment on information obtained by the judge: Council of State (France), judgment of 22 October 2012, *M. C.*, no 328265. The 2015 reform of the law in France enshrined this requirement in the French code (Art. R. 733-16 of the Code on the entry and stay of foreigners and asylum law).

([46]) UNHCR, Improving Asylum Procedures: Comparative analysis and Recommendations for Law and Practice — Detailed Research on Key Asylum Procedures Directive Provisions, March 2010, pp. 464-466.

require that they be shown to have a material effect on the outcome of the decision. See EASO*, Asylum procedures and the princi*ple of non-refoulement - *Judicial analysis,* 2018 ([47]).

These same rules are relevant to members of courts and tribunals in so far as they relate to the procedural lawfulness of the decision of the determining authority. In order to ensure it provides an effective remedy, a court or tribunal must be satisfied that the procedures at the level of the determining authority do not breach the procedural guarantees laid down in the APD (recast). Violation of the procedural guarantees with respect to personal interviews may, for instance, impede a particular applicant who satisfies the criteria for refugee status or subsidiary protection from fully presenting the grounds for his/her application. If determining authorities disregard their obligation to state reasons for rejecting the application, the right to an effective remedy may not be exercised effectively. Other factors, such as the lack of information on the procedure to be followed (Article 12(1)(a) APD (recast)) and lack of access to the services of an interpreter (Article 12(1)(b)) might also prevent applicants from successfully making out a case for international protection, irrespective of whether their case factually satisfies the required criteria. Therefore, the review as regards points of law must also include whether the examination procedure by the determining authorities observed the procedural principles and guarantees with due diligence.

Depending on national procedures, some courts or tribunals may have competence, if they decide (in exercise of their examination of points of law) that the decision of the determining authority or the lower court or tribunal is wrong in law, to not only set it aside but proceed to conduct a full and *ex nunc* examination of both facts and points of law itself, in the same way as arises in a first instance court or tribunal ([48]).

3.3 Challenges

3.3.1 Difference from typical criminal and civil law settings

In international protection cases, as opposed to typical criminal and civil cases, the main objective of the evidence and credibility assessment is not so much establishing past events as establishing future risk. Although past events that took place in the country of origin are relevant for evidence and credibility assessment, the objective in international protection cases is to determine the existence and extent of a possible future risk ([49]).

Whereas in criminal and civil law the general rule of 'no proof means no case' applies, in international protection cases, members of courts or tribunals often have to base their decision on minimal evidence to determine such matters as the applicant's nationality or lack of it, and whether an applicant has a well-founded fear of persecution or would face a real risk of serious harm if returned to his/her country of origin. In addition, international protection cases must be handled with particular caution and diligence, bearing in mind that mistakes can have

([47]) EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018, op. cit., fn. 3.
([48]) See Supreme Court (Tribunal Supremo, Spain), Cassation Appeal, judgment of 23 February 2015, appeal no 2944/2014.
([49]) See EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, op. cit., fn. 3. It should be noted that in civil cases issues of future risk can also arise, e.g. in a tort case involving risks that might materialise in the future. See also High Court (Ireland), judgment of 17 January 2017, ON v Refugee Appeals Tribunal & ors [2017] IEHC 13, para. 63.

grave implications, such as when an applicant is wrongfully returned to his/her country of origin and, as a consequence, exposed to persecution or serious harm ([50]).

Asylum cases can also diverge from criminal and civil cases with respect to common evidentiary problems, such as the absence of documentary evidence. Applicants for international protection are responsible for presenting their reasons for applying for international protection and submitting all supporting evidence at their disposal. However, in asylum cases evidence, especially documentary evidence, may be lacking or incomplete. This may be for a variety of reasons. For example, the documents may have been left behind, lost, falsified or destroyed, or cannot be obtained from the authorities of the country of origin, particularly where the latter are the alleged actor of persecution and/or serious harm, because of the risk of disclosing information regarding the applicant's whereabouts and the fact that the applicant has made an application for international protection. Also, documentary evidence may simply not exist.

3.3.2 Translation and interpretation

When conducting a personal interview, the APD (recast) requires the authority concerned to ascertain that applicants are able to present the reasons for their application in a comprehensive manner. It is therefore mandatory to select an interpreter capable of ensuring 'appropriate communication between the applicant and the person who conducts the interview' (Article 15(3)(c) APD (recast)). The interview also needs to 'take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly' (Article 15(3)(c) APD (recast)). In some situations, however, an interpreter might have a negative influence on the ability of applicants to make their statements. For example, applicants may not trust interpreters from their country of origin because of, for instance, the interpreter's gender, ethnicity, religion, and/or political opinion and may, therefore, not be able to speak freely about the events leading to their application for international protection. An interpreter of the same sex should be provided in cases in which an applicant might otherwise have difficulties presenting the reasons for his/her application in a comprehensive manner (Article 15(3)(c) APD (recast)) ([51]). In addition, there may be a shortage of interpreters in particular languages or a lack of qualified and competent interpreters. In some Member States, especially if there are no interpreters who speak both the language of the applicant and that of the procedure, double-interpretation ([52]) may be relied upon. Although this may be unavoidable in certain cases, it may cause an additional loss of information that unfortunately is inherent in all instances of translation and interpretation.

Therefore, decision-makers and members of courts or tribunals must always keep in mind the possibility that seemingly inconsistent statements by applicants or inconsistencies in translated documents may be caused by inaccurate interpretation or translation. An additional challenge in this context is that decision-makers and members of courts or tribunals may have difficulties appraising the quality of interpretation. It is, therefore, important for the competence of the interpreter to have been professionally assessed. It can also sometimes occur that interpreters may seek to go beyond their professional competence by offering their own

([50]) ECtHR, judgment of 21 January 2011, application no 30696/09, para. 293, where the Court underlined the importance of Art. 3 ECHR and 'the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises'.
([51]) Supreme Administrative Court (Czech Republic), judgment of 30 June 2010, *AN v Ministry of Interior*, 9 Azs 17/2010-182.
([52]) In this context, the term 'double-interpretation' aims to describe the situation in which an intermediate interpreter is called upon because no interpreter is available to directly interpret the language of the applicant into the language of the procedure for examining the application for international protection.

opinion or evidence. Equally, members of courts and tribunals should be aware of the possibility of an unjustified challenge regarding the standard of interpretation.

3.3.3 Cultural differences and geographic distance

Apart from linguistic problems, care needs to be taken as regards the extent to which cultural differences and geographic distance between the applicant's country of origin and the country examining the application for international protection may have an adverse impact on evidence and credibility assessment. For example, decision-makers may not fully understand or properly interpret an applicant's behaviour resulting from his/her cultural background and/or religion. Additionally, the social norms in the particular country of origin may not correspond to European social norms familiar to decision-makers. The determining authority and members of courts or tribunals must also be vigilant to avoid expecting certain behaviours of applicants based on stereotypes about their presumed particular cultural or ethnic background, tradition, religion or gender ([53]). If an applicant has not acted in conformity with a particular tradition or, for instance, has a relationship with someone from a different tribe or a different religion, his/her statements should not automatically be considered non-credible. A court or tribunal 'making an adverse finding on credibility must only do so on reasonably drawn inferences and not simply on conjecture or speculation' ([54]).

See Section 6.4 below for more on the impact of applicants' cultural background on evidence and credibility assessment.

It is likewise important to keep in mind that some cultures do not consider time and dates (e.g. birthdays) to be as significant as in Western society. This may mean applicants are unable to identify the exact time and/or date an event took place. Moreover, certain cultures may disapprove of direct eye contact with strangers.

Geographic distance may mean that decision-makers are considerably handicapped in carrying out fact finding as regards conditions in the applicant's country of origin. Since decision-makers usually cannot easily verify the applicant's statements, the examination of the credibility of these statements becomes very important, as does the evidence provided by the applicant and by COI from various sources.

([53]) See e.g. Supreme Administrative Court (Czech Republic), judgment of 28 July 2009, *LO v Ministry of Interior*, 5 Azs 40/2009-74 (see EDAL Czech summary and EDAL English summary), where the court underlined that the applicant's cultural and educational background should be considered when assessing the extent of the applicant's knowledge concerning his country of origin. In this case the appellant was from Senegal, was illiterate, had never attended school and before leaving the country had never left his home village. According to the court, the questions he was asked were on such level that they could have been used rather with a person who studied at high school and was from a developed country. The ministry also failed to take into account the cultural difference between the industrialised world and an African country, and difference as regards the common knowledge of an ordinary citizen in different cultural contexts (Art. 13(3)(a) of APD was referred to). Some inconsistencies also followed from translation (e.g. reference to the national currency 'sefa' was in fact a phonetic version of French 'CFA'; 'Džamakuta' in fact meant 'Ndiamacuta').

([54]) Court of Session (Scotland, United Kingdom), Outer House, judgment of 8 June 2005, *Joyce Wani, Anna Awala en Kefa Awala v Secretary of State for the Home Department* [2005] CSOH 73, para. 24.

3.3.4 Factors affecting the applicant and the court or tribunal member

3.3.4.1 Factors affecting the applicant

There are many factors that may influence the ability of applicants to substantiate their application with supporting evidence. This is acknowledged by recital (29) APD (recast) which states:

Recital (29) APD (recast)

Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedurals guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.

Additionally, in this regard, where simultaneous applications for international protection by a large number of third-country nationals or stateless persons leads a Member State to provide that the personnel of another authority be temporarily involved in conducting personal interviews, this Member State is charged with ensuring that the '[p]ersons conducting personal interviews of applicants […] shall also have acquired general knowledge of problems which could adversely affect an applicant's ability to be interviewed, such as indications that the applicant may have been tortured in the past' (Article 14(1) APD (recast)). For example, it is important to be mindful of a potential fear of authorities which may originate from an applicant's negative experiences with the authorities in his/her country of origin. Such a fear of authority figures may extend to the persons conducting personal interviews ([55]) (see Section 6.3).

Furthermore, it must be taken into account that some questions asked by the person conducting the personal interview may be of a sensitive nature and may evoke different or even unsatisfactory responses from an applicant, if for example they give vague, evasive or unconvincing answers. Similarly, interviewers' (or decision-makers') questions may evoke highly distressing traumatic memories, in extremis causing dissociation (see Section 6.2). Questions of a sensitive nature include those relating to gender-based violence such as rape, sexual violence ([56]), domestic violence, forced marriage, female genital mutilation, honour crimes and violence on account of sexual orientation or gender identity. In *A, B and C,* the CJEU considered that 'having regard to the sensitive nature of questions relating to a person's identity and, in particular, his sexuality, it cannot be concluded that the declared sexual orientation lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset' ([57]). Therefore, according to the CJEU, persons conducting personal interviews must take into account 'the personal and general circumstances surrounding the application including the applicant's cultural origin, gender, sexual

([55]) UNHCR Handbook, op. cit., fn. 28, para. 198.
([56]) Supreme Administrative Court (Czech Republic), *AN v Ministry of Interior*, 9 Azs 17/2010-182. op. cit., fn. 51.
([57]) CJEU, *A, B and C*, op. cit., fn. 13, para. 69. See also Council for Aliens Law Litigation, decision of 12 January 2017, no 180657.

orientation, gender identity or vulnerability' (Article 15(3)(a) APD (recast)) ([58]). The CJEU also underlines that the competent authorities are required to 'carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant' (Article 4(3)(c) QD (recast)) ([59]).

Such considerations may be pertinent for members of courts and tribunals when they are assessing the written and/or oral evidence of applicants.

Such considerations do not necessarily mean that inconsistent and discrepant statements have no implications for evidence and credibility assessment, only that particular care needs to be taken as to the weight to be attached to them. For further information on psychological factors influencing the behaviour of the applicant, see Part 6 below.

3.3.4.2 Factors affecting the court or tribunal member

Court and tribunal members need to be aware that they may be affected by factors not directly related to the judicial process. For instance, the cultural or religious experiences and background of court or tribunal members charged with reviewing the application may, even if only subconsciously, give rise to certain assumptions regarding the cultural or religious background of an applicant. Although reliance on stereotypes occurs in all human societies, it is imperative that court and tribunal members remain particularly vigilant and aware of their own human susceptibility to stereotypical profiling and strive always for absolute impartiality and objectivity to ensure a fair assessment ([60]). Caution should also be exercised to ensure that basic personal factors such as the personal impression or likeability of the applicant are not given undue importance in the review process. Importantly, where members of courts and tribunals have a high workload, the resulting stress and sometimes heavy emotional burden may strain their ability to decide on an appeal or review due to a phenomenon called 'compassion fatigue' ([61]). In this context, 'compassion fatigue' does not necessarily mean a lack of compassion for the applicant but is meant to describe a subconscious condition that may negatively influence the assessment (see further Section 3.4.4).

3.4 Relevance of principles and standards for the conduct of hearings before courts or tribunals

Whether or not applicants are entitled to international protection, decisions made on their appeals or actions taken against adverse decisions made by determining authorities are likely to be a momentous event with significant implications for their life. It is the duty of every member of a court or tribunal to respect the human dignity of the applicant, and indeed everyone involved in the litigation, whether it takes written or oral form. In this regard, Article 1 of

([58]) See the following illustrative examples of cases in which the decision-maker did not take into account the personal circumstances of an applicant, such as young age, medical conditions and traumatic experiences: Metropolitan Court (Hungary), judgment of 4 February 2011, *SMR v Office of Immigration and Nationality*, 17.K.30.302/2010/18-II (see EDAL English summary); Supreme Court (Slovenia), judgment of 18 October 2012, I UP 471/2012, paras. 10-16 (see EDAL English summary); and Verwaltungsgerichtshof (Administrative Court) (Austria), judgment of 17 April 2007, VwGH 2006/19/0675 (see Edal English summary).

([59]) CJEU, *A, B and C*, op. cit., fn. 13, para. 70.

([60]) See e.g. the report on judicial ethics by the European Network of Councils for the Judiciary, Judicial Ethics Report 2009-2010, and the Bangalore Principles of Judicial Conduct 2002.

([61]) Compassion fatigue can be described as the impact of exposure to traumatic stories when working with people suffering from the consequences of a traumatic event. See Figley, C. R. (ed.) (1995), *Compassion fatigue: Coping with secondary traumatic stress disorder in those who treat the traumatized* (New York: Brunner/Mazel).

the EU Charter underlines the requirement to respect and protect the human dignity of each individual.

3.4.1 Hearings and the attitude/manner of the decision-maker

Whether members of courts or tribunals of Member States conduct written or oral hearings, it is important to be aware that their own approach to their task may influence their credibility and evidence assessment. As in all judicial proceedings, principles of judicial conduct must be followed. Beyond national codes of conduct, these are reiterated in a number of international and European documents, such as the 2002 Bangalore Principles of Judicial Conduct ([62]). These Principles recall six main values on which judicial conduct should be based (see Table 5 below).

Table 5: Values and principles upheld in the 2002 Bangalore Principles of Judicial Conduct

#	Values	Principles
1	**Independence**	'Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.'
2	**Impartiality**	'Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.'
3	**Integrity**	'Integrity is essential to the proper discharge of the judicial office.'
4	**Propriety**	'Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.'
5	**Equality**	'Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.'
6	**Competence and diligence**	'Competence and diligence are prerequisites to the due performance of judicial office.'

Very similar values and principles are articulated in opinions of the Consultative Council of European Judges (Council of Europe) ([63]). For instance, Opinion No 1 is devoted, inter alia, to the standards concerning the independence of the judiciary (including its impartiality) ([64]), Opinion No 3 addresses ethics of judges ([65]), Opinion No 6 is on fair trial within a reasonable time ([66]), Opinion No 11 discusses the quality of judicial decision ([67]), and Opinion No 15 focuses on the specialisation of judges ([68]).

As well as the need to give respect to all persons involved in hearings flowing from EU legal norms and the values and principles expressed by the European and international bodies, it is legitimate for court and tribunal members to seek assistance from outside sources of expertise relevant to their deliberations. Whilst this judicial analysis does not seek to endorse any particular piece of research, it must be acknowledged that the law of the CEAS recognises that decision-makers (including court and tribunal members) do not have a monopoly

([62]) The Bangalore Principles of Judicial Conduct, op. cit., fn. 60, were adopted by the Judicial Group on Strengthening Judicial Integrity, a UN endeavour. They build on existing international and national codes and documents which are referred to at pp. 9 and 10 of the document.
([63]) The opinions of the Consultative Council of European Judges are available at: http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp
([64]) Consultative Council of European Judges (2001), Opinion No 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges.
([65]) Consultative Council of European Judges (2002), Opinion No 3 on the Principles and Rules Governing Judges' Professional Conduct, in Particular Ethics, Incompatible Behaviour and Impartiality.
([66]) Consultative Council of European Judges (2004), Opinion No 6 on Fair Trial within a Reasonable Time and Judges' Role in Trials Taking into Account Alternative Means of Dispute Settlement.
([67]) Consultative Council of European Judges (2008), Opinion No 11 on the Quality of Judicial Decisions.
([68]) Consultative Council of European Judges (2012), Opinion No 15 on the Specialisation of Judges.

of wisdom and expertise in the matter of evidence and credibility assessment. Article 10(3)(d) APD (recast) provides that 'the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues'.

Further, potentially relevant research suggests that ordinarily an approach which understands and respects the needs of the interviewee or witness is likely to yield fuller information ([69]). This may be particularly pertinent in the context of oral hearings. Findings of the aforementioned research, which studied international protection interviews, indicate that 'interviewer qualities of empathy, patience, acceptance and non-judgemental listening emerged as the strongest factor in facilitating disclosure' ([70]).

Although this research was carried out in the context of international protection interviews by the determining authority in the United Kingdom, the qualities which lead to better disclosure of an applicant's case, in particular empathy, patience and non-judgmental listening, would appear to apply as much to members of courts and tribunals as to administrative decision-makers. This is particularly so where there is an oral hearing enabling the member of a court or tribunal to form a more specific impression than he/she would if the case was being dealt with on the papers. Whether the procedure before a court or tribunal is written or oral, it is the responsibility of the member of a court or tribunal to enable the applicant's account to be fully identified and considered at the hearing of their case.

At the same time, the abovementioned qualities always need to be balanced with the need for an objective and impartial assessment of the facts (see Section 4.3.2) coupled with the requirement for rigorous scrutiny of an application (see Section 4.3.3). This may mean in appropriate cases, for example, that it is legitimate for a court or tribunal to allow a particularly robust cross-examination. Having said this, the court or tribunal member has a responsibility to curtail any improper or aggressive questioning.

3.4.2 Emotion at the oral hearing

Also of possible relevance is research regarding the subject of emotion and the law ([71]). Any conversation, interview or oral hearing is an interaction between people and the responses of any one person in the interaction will affect the others. People show distress differently (along a spectrum from openly distressed to withdrawn) ([72]) and respond differently (e.g. anger/irritation). Such presentations may be a poor indicator for the credibility of the claim ([73]).

Accordingly, members of courts or tribunals should be aware of how to mitigate the effects of dissociation, anxiety, anger and other emotions in the hearing and should also take responsibility for their own emotional responses at hearings. This is pertinent whether the procedure is purely written or also includes an oral examination. It is one aspect of taking 'reasonable

([69]) Bögner, D., Brewin, C. and Herlihy, J. (2009), 'Refugees' experiences of Home Office interviews: A qualitative study on the disclosure of sensitive personal information', *Journal of Ethnic and Migration Studies*, p. 525. See also Memon, A., Meissner, C. A. and Fraser, J. (2010), 'The Cognitive Interview: A Meta-Analytic Review and Study Space analysis of the Past 25 Years', *Psychology, Public Policy, & Law*, 340-372.

([70]) Bögner, D., Brewin, C. and Herlihy, J., ibid., p. 525.

([71]) Maroney, T. (2011), 'Emotional regulation and judicial behavior', *California Law Review*, 1481-1551, who argues that the 'cultural script of judicial dispassion' should give way to an understanding of the importance of recognising and working with emotion in the courtroom, and proposes a model of 'emotion regulation'.

([72]) Kaufmann, G., Drevland, G. C. B., Wessel, E., Overskeidand, G. and Magnussen, S. (2003), 'The importance of being earnest: Displayed emotions and witness Credibility', *Applied Cognitive Psychology*, 21-34.

([73]) See e.g. ibid. for a study in which a witness who cried when reporting an allegation of rape was more likely to be believed than a witness who told the same story but did not cry.

steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties' ([74]).

3.4.3 Manner of decision-making

In similar fashion, research on the manner of decision-making may also be potentially relevant. Longstanding research on decision-making distinguishes between fast, 'gut-instinct' decision-making and slow, 'effortful' decision-making (both being necessary to navigate the everyday world). This suggests that decision-makers, including members of courts and tribunals, should strive to be well-rested, not distracted from their task, physically well and emotionally aware in order to ensure that they are able to make decisions with full consideration ([75]).

Members of courts and tribunals in their capacity as decision-makers may consider of potential relevance Chapter VIII, 'The decision-maker is a human being' in Volume 1 of the Hungarian Helsinki Committee *Credibility assessment training manual* ([76]). It contains exercises for raising decision-makers' awareness of situational and personal factors that might affect their decision-making on any particular occasion.

In its study, *Beyond proof*, UNHCR summarises:

> The antidote to subjectivity in both individuality and thinking processes is awareness. Assessing credibility requires interviewers and decision-makers to engage in self-assessment so that they recognise the extent to which their own emotional and physical state, values, views, assumptions, prejudices, and life experiences influence their decision-making. It is critical that determining authorities and individual decision-makers have a basic understanding and awareness of these influences so that they can take steps to minimise subjectivity and partiality as far as possible ([77]).

3.4.4 The effects of considering distressing material

Another aspect of decision-making in the area of asylum law concerns the possible impact of dealing with claims that may involve deliberating on accounts of some of the worst human rights abuses from across the world. Decision-makers are expected to decide such matters as whether applicants are giving a credible account of harrowing experiences or are deliberately telling untruthful accounts of persecution. The effects of repeatedly hearing distressing material have been documented by a wide range of professionals, including members of courts and tribunals ([78]) (see also Section 3.4.4 concerning 'compassion fatigue').

([74]) Bangalore Principles, op. cit., fn. 60, 6.3. See also Consultative Council of European Judges, Opinion No 15, op. cit., fn. 68.
([75]) See Kahneman, D. (2011), *Thinking, fast and slow*, Penguin Books Ltd, for a useful summary of the research.
([76]) Hungarian Helsinki Committee, *Credibility assessment training manual, Vol. 1*, op. cit., fn. 27, pp. 129-140.
([77]) UNHCR (2011), *Beyond proof*, op. cit., fn. 14, p. 77. Internal references originally in this excerpt refer to: Thomas, R., *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart Publishing), p. 166; Millbank, J. (2009), '"The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations', *International Journal of Refugee Law* (IJRL), vol. 21, no 1; Macklin, A., *Truth and Consequences: Credibility Determination in the Refugee Context*, International Association of Refugee Law Judges, 1998 Conference; Graycar, R. (1995), 'The gender of judgements: an introduction', in Thornton, M. (ed.), *Public and private: Feminist legal debates* (OUP), p. 267.
([78]) See e.g. Rousseau, C., Crépeau, F., Foxen, P. and Houle, F. (2002), '*The Complexity of Determining Refugeehood: A Multidisciplinary analysis of the Decision-making Process of the Canadian Immigration and Refugee Board*', JRS 43-70; Jaffe, P. (2003), 'Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice', *Juvenile and Family Court Journal* 1-9; Westaby, C. (2010), '"Feeling like a Sponge": The Emotional Labour Produced by Solicitors in their Interactions with Clients Seeking Asylum', *International Journal of the Legal Profession* 153-174; Ciorciari, J. D. and Heindel, A. (2011), 'Trauma in the courtroom', in van Schaak, B., Reicherter, D. and Youk, C. (eds.), *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge* (Documentation Center of Cambodia); McCann, L. and Pearlman, L. A. (1990), 'Vicarious Traumatization: A Framework for Understanding Psychological Effects of Working with Victims', *Journal of Traumatic Stress*, pp. 131-149.

It is useful to distinguish the different ways that distressing material can affect decision-makers. Volume 1 of the *Credibility assessment training manual* distinguishes signs of 'burnout' from the more specific, secondary or vicarious traumatisation, resulting from daily exposure to distressing material. 'Burnout' is something that can occur in many jobs. However, the academic literature suggests that there are specific problems that can arise in response to hearing about other people's traumatic experiences ([79]).

([79]) Vicarious or secondary traumatisation includes responses similar to post-traumatic stress in those directly affected by traumatic experiences. It can also involve longer-term changes in thoughts or beliefs about the world, such as employing humour to laugh off or cynicism to disbelieve accounts, without due consideration; becoming a 'saviour' to, or over-involved with, claimants; noticing a shift in thoughts or beliefs in one's personal sense that the world is a terrible place, no one is to be trusted, or everyone is a liar. A useful tool for self-assessment is the Professional Quality of Life Measure (PROQOL), based on extensive psychological research and freely available on the internet. See also Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 1, op. cit., fn. 27, Chapter VIII.

Part 4: Specific principles and standards applicable to evidence and credibility assessment

Part 4 first introduces Article 4 QD (recast) concerning the 'assessment of facts and circumstances' and how this process takes place in two separate stages. Subsequent Sections 4.2-4.9 set out the principles and standards which apply to establishing and assessing the facts and circumstances.

4.1 Introduction to Article 4 QD (recast)

Article 4 is the key provision of the QD (recast) relating to evidence and credibility assessment. It reads as follows:

Article 4 QD (recast)

Assessment of facts and circumstances

1. Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.

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

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

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

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

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

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

(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.

4. The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:

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

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

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

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

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

The rules provided by Article 4 QD (recast) have both substantive and procedural implications. As noted earlier, there are complementary provisions of the APD (recast) which touch upon the subject matter of Article 4 QD (recast), more specifically Articles 10-18 APD (recast) which refer to Article 4 QD (recast), particularly with regard to information which is essential for the assessment of the application and the means at the disposal of the applicant to substantiate the application.

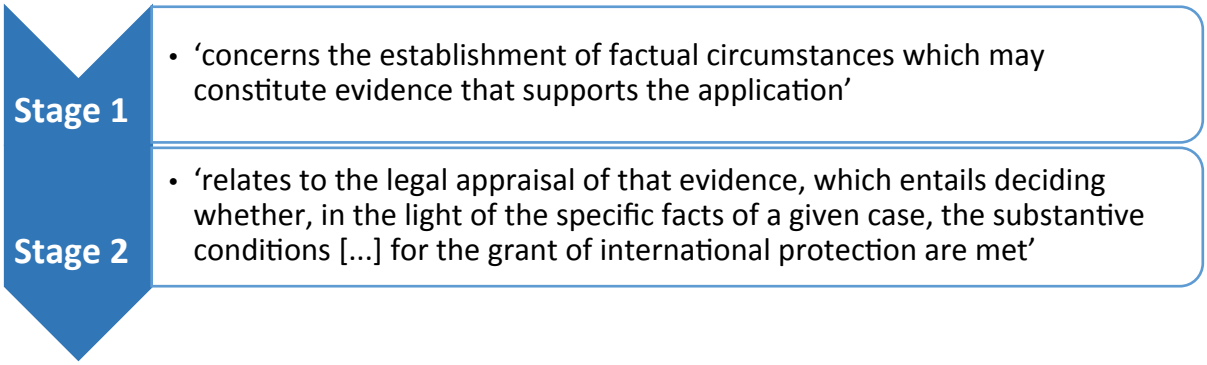
The CJEU's approach to the interpretation of Article 4 in *A, B and C*, makes clear that it is to be interpreted in accordance with EU law methods of interpretation, with particular regard to its context and purpose ([80]).

([80]) CJEU, *A, B and C*, op. cit., fn. 13. See also, EASO, *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis,* August 2016, op. cit., fn. 3.

The reference to 'Member States' in Article 4 includes all levels of decision-making within a state, including the judiciary ([81]). In this context Article 46 APD (recast) on the right to an effective remedy has to be observed (see Section 3.1.1).

As is clear from its title, Article 4 QD (recast) relates to the **'assessment of facts and circumstances'**. In line with the CJEU judgment in *MM,* the 'assessment' of applications for international protection takes place in **two separate stages** ([82]). This two-stage assessment is detailed in Figure 2 below.

Figure 2: Two-stage assessment of applications for international protection



This judicial analysis is primarily concerned with Stage 1. It is only incidentally concerned with Stage 2, as that stage is in essence the subject of *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis* ([83]).

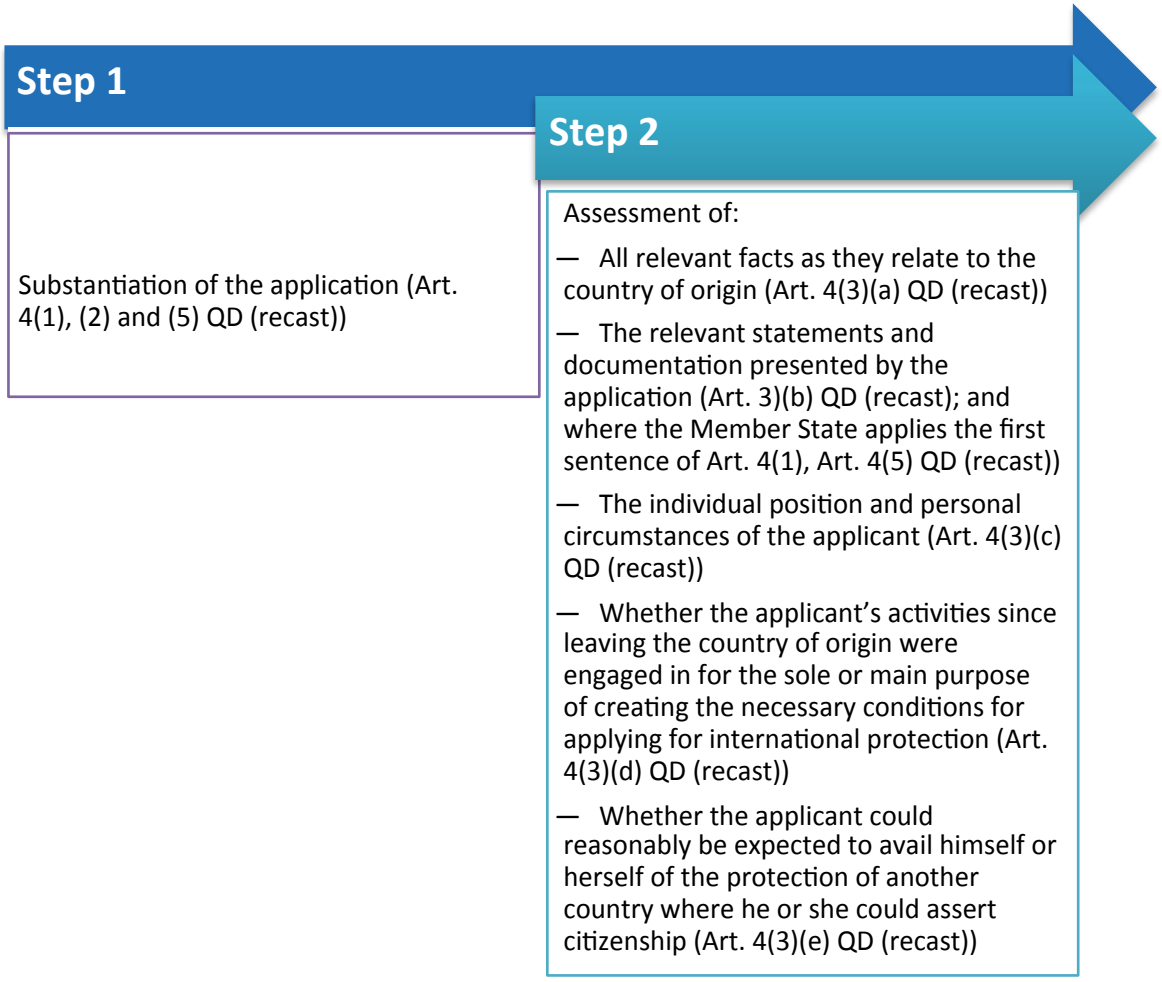
On the basis of Article 4 QD (recast), it is possible to subdivide Stage 1 into two steps as illustrated in Figure 3 below.

([81]) For example, in Germany details are provided under federal law obliging courts, determining authorities and applicants (see particularly German Asylgesetz (Asylum Act; formerly: Asylum Procedure Act (e.g. sections 15 and 25(1)). The Federal Administrative Court (Germany) has e.g. referred to Art. 4 QD (now Art. 4 QD (recast)) in the case of an applicant from Azerbaijan who claimed to be persecuted there because of his Armenian ethnicity and applied for asylum in Germany. The case was remanded to the lower court for further assessment particularly concerning the question, whether the applicant could reasonably be expected to avail himself of the protection of Armenia according to Art. 4(3)(e) QD by asserting the Armenian citizenship (judgment of 29 May 2008, BVerwG 10 C 11.07, BVerwG:2008:290508U10C11.07.0, para. 34).

([82]) CJEU, judgment of 22 November 2012, *MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, case C-277/11, EU:C:2012:744, paras. 64 and ff

([83]) EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, op. cit., fn. 3, Section 1.3.1.

Figure 3: Two-step process for establishing the factual circumstances (Stage 1)



The checklists in Appendix A may provide further assistance on how to go about this assessment.

4.2 Substantiation of the application

4.2.1 Applicant's duty to substantiate the application

Article 4(1) QD (recast) provides that 'Member States **may** consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection' ([84]). Whilst use of the term 'may' makes clear that it is not mandatory for Member States to treat it as a duty of the applicant, if a Member State does so then this provision has mandatory effect. The QD (recast) does not define the term '**substantiate**'. The wording of Article 4(1), together with Article 4(2) and (5), suggests that 'to substantiate' **means to provide statements and submit documentary or other evidence at the applicant's disposal in support of the application** ([85]). The concrete elements needed to substantiate the application are stated in Article 4(2) QD (recast) (see Section 4.2.4 below). Where a Member

([84]) Emphasis added.
([85]) UNHCR, *Beyond proof*, op. cit., fn. 14, p. 85; Dörig, H., 'Asylum Qualification Directive 2011/95/EU (Articles 1-10)', in Hailbronner, K. and Thym, D. (eds.) (2016), *EU Immigration and Asylum Law, A Commentary* (2nd edn, Beck, C. H.), p. 1134, Art. 4, no 7.

State imposes a duty of substantiation, the applicant is obliged to take positive steps to support his/her application with information. This obligation does **not**, however, require that an applicant formulate the application in terms of a legal claim or identify its basis in law.

The duty to substantiate the application does not entail a duty to provide documentary or other evidence in support of every relevant fact asserted by the applicant. This is made clear not only by the qualification that the duty to substantiate only extends to 'documentation at the applicant's disposal' (Article 4(2) QD (recast)) (see Section 4.2.4 below), but primarily by Article 4(5) QD (recast). Article 4(5) applies '[w]here Member States apply the principle according to which it is the duty of the applicant to substantiate the application', and stipulates that, '[w]here aspects of the applicant's statements, which are not supported by documentary or other evidence, those aspects shall not need confirmation' if certain conditions are met. It, therefore, provides alleviations from (or relaxation of) the duty to present documentary or other evidence supporting the applicant's statements. This is in recognition of the fact that there may be little documentary or other evidence to support an applicant's statements and that some asserted facts cannot readily be supported by documentary or other evidence. In addition, it recognises that, for example, the applicant's circumstances or circumstances in the country of origin may make it impossible to obtain relevant documentary or other evidence. In accordance with Article 4(5) QD (recast), however, the applicant should provide a satisfactory explanation regarding any lack of relevant documentary or other evidence (see Section 4.3.7 below).

With respect to expulsion cases, the ECtHR has stated, in similar vein, that it is incumbent on persons who allege that their expulsion would amount to a breach of Article 3 ECHR to adduce, to the greatest extent practically possible, material and information allowing the authorities of the contracting state concerned, as well as the Court, to assess the relevant risk a removal may entail ([86]).

Article 4(1) QD (recast) does not refer to there being a burden of proof on the applicant, only that Member States may consider it the **duty of the applicant to 'substantiate' the application** ([87]). Reference to a burden of proof is not necessarily a helpful concept when eliciting the meaning of the duty to substantiate an application. The CJEU does not use the word 'proof' in connection with Article 4(1) QD, but makes clear in its *MM* judgment that the applicant's duty is to submit all elements needed to 'substantiate' the application for international protection ([88]).

In any event, the national case-law of Member States adopts varying views regarding the burden of proof. For example, according to the case-law of the German Bundesverwaltungsgericht (Federal Administrative Court) no procedural burden of proof (*formelle Beweislast*) rests on the applicant ([89]). Courts are thus, as a rule, obliged to investigate the facts of a case *ex officio* ([90]). Applicants are 'personally required to cooperate in establishing the facts of the case' ([91]). If necessary elements of the claim are not confirmed in the court's assessment procedure, the burden to substantiate the application (*materielle Beweislast* ([92])) rests on the

([86]) ECtHR, *JK and Others v Sweden*, op. cit., fn. 20, para. 92, as well as paras. 96-97.
([87]) Dörig, *H.*, op. cit., fn. 85, p. 1130, Art. 4 no.29.
([88]) CJEU, *MM*, op. cit., fn. 82, para. 65.
([89]) Federal Administrative Court (Germany), BVerwG 9 C 434.93, op. cit., fn. 44, p. 1123; see also Dörig, H., op. cit., fn. 85, p. 1134, Art. 4 para. 7. The Federal Administrative Court (Germany), judgment of 19 July 2012, BVerwG 10 C 2.12, *Neue Juristische Wochenschrift* 2012, 3461 decided that, even if the parties to the proceedings did not call into question the findings of fact of the lower court, the higher court may be obliged to make further inquiries (here: concerning requirements of relevant foreign law which was seen as finding of facts in this context).
([90]) German Code of Administrative Court Procedure, op. cit., fn. 44, Art. 86(1).
([91]) German Asylum Act, op. cit., fn. 81, Art. 15.
([92]) Substantive burden of proof.

applicant ([93]). That means that the burden of proof becomes relevant only if, after full investigation, an item of fact crucial for the success of the claim cannot be established to the full conviction of the court. A similar understanding forms the basis for the case-law of the Polish Naczelny Sąd Administracyjny (Supreme Administrative Court) ([94]). On the other hand, in Ireland and the United Kingdom applicants are considered to carry the burden of proof ([95]).

According to Article 13(1) APD (recast), 'Member States shall impose upon applicants the obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) [QD (recast)]'. In addition to this binding requirement, Article 13(2)(b) APD (recast) stipulates that 'Member States **may** provide that […] applicants have to hand over documents in their possession relevant to the examination of the application, such as their passports' ([96]). According to Article 13(2)(d), 'Member States **may** provide that […] the competent authorities may search the applicant and the items which he or she is carrying' ([97]). If Member States do so provide, these provisions are mandatory. Pursuant to Article 12(1)(a) APD (recast), Member States must ensure that all applicants are informed in a language which they understand or are reasonably supposed to understand of such 'obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities' (see Section 4.2.3 below).

It should also be noted that Member States may assume that an applicant has implicitly withdrawn or abandoned an application, in particular, when it is ascertained that the applicant failed to respond to requests to provide information essential to the application in terms of Article 4 QD (recast) or has not appeared for a personal interview, unless the applicant demonstrates within a reasonable time that the failure was due to circumstances beyond his/her control (Article 28(1)(a) APD (recast)). For further information, see EASO, *Asylum procedures and the princip*le of non-refoulement - *Judicial analysis,* 2018 ([98]).

4.2.2 Applicant's duty to substantiate the application 'as soon as possible'

Article 4(1) QD (recast) incorporates a temporal rule. The Member State may impose a duty on the applicant to submit the relevant elements 'as soon as possible'. The term 'as soon as possible' should be interpreted taking into account the point in time at which the applicant was informed, pursuant to Article 12(1)(a) APD (recast), in a language he/she understands, of his/her duty to substantiate the application, the time frame and the means at his/her disposal for fulfilling this obligation (see Section 4.2.3). On occasion, an applicant may not realise that an element is relevant to his/her application. Once a decision-maker has informed the applicant

([93]) See e.g. Federal Administrative Court (Germany), judgment of 13 February 2014, BVerwG 10 C 6.13, BVerwG:2014:130214U10C6.13.0. In a case concerning subsidiary protection the Federal Administrative Court decided that the lower court had not sufficiently explored from which country of origin the plaintiff had come to Germany. The plaintiff should have been heard concerning this question at the oral hearing. The lower court had relied on information, which the higher court regarded as not sufficiently precise, given by the applicant during administrative proceedings.

([94]) See Supreme Administrative Court (Poland), judgment of 20 April 2011, II OSK 903/10, and judgment of 20 April 2014, II OSK 1067/13. See also Supreme Administrative Court (Czech Republic), judgment of 30 September 2008, *SN v Ministry of Interior*, 5 Azs 66/2008-70 (see EDAL English summary).

([95]) In Ireland, the primary burden of proof rests with the applicant to make out his or her case and there is what might only be described as a subsidiary burden on the decision-maker. According to the Supreme Court: 'This type of investigation would […] be a major part of the duty to ascertain and evaluate that which is referred to in para. 196 [of the UNHCR Handbook, op. cit., fn. 28]. […] This information cannot, however, replace the need for the provision of factual evidence by the Appellant of incidents of actual anti-Semitic persecution of himself […]. The burden of proof of establishing that he personally had a well-founded fear of persecution rests on him. This is the subjective element in the definition and cannot be provided by the assessor'. See Supreme Court (Ireland), judgment of 1 March 2002, *Z v Minister for Justice Equality and Law Reform & ors* [2002] IESC 14, 2002. See also Court of Appeal (England and Wales, United Kingdom), judgment of 11 October 1995, *Sandralingham v Secretary of State for the Home Department; Ravichandran v Secretary of State for the Home Department*, [1996] Imm AR 97; [1995] EWCA Civ 16.

([96]) Emphasis added.

([97]) Emphasis added.

([98]) EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018, op. cit., fn. 3, Subsection 4.2.10.

of the relevance of the element and/or has effectively requested it, it is then the applicant's duty to submit it as soon as possible after being so informed ([99]).

In the CJEU case of *A, B and C*, C had lodged a first application for asylum on grounds other than his homosexuality, which was rejected by the determining authority. C then lodged a second application for asylum based on his homosexuality. The determining authority rejected the second application on the ground that his statements concerning his homosexuality were not credible considering, inter alia, that C ought to have mentioned his declared sexual orientation in the first application and examination procedure. In its judgment, the CJEU ruled that the obligation to submit all elements needed 'as soon as possible' is tempered by the requirement imposed on the competent authorities, under Article 13(3)(a) APD (now Article 15(3)(a) APD (recast)) and Article 4(3) QD (now Article 4(3) QD (recast))'

> to conduct the interview taking account of the personal or general circumstances surrounding the application, in particular, the vulnerability of the applicant, and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant. Thus, to hold that an applicant for asylum is not credible, merely because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution, would be to fail to have regard to [that] requirement' ([100]).

The Court noted that 'it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset' ([101]).

Mental disorder, illness or cases where the person concerned is an unaccompanied minor in the sense of Article 2(i) QD (now Article 2(l) QD (recast)) may also constitute good reasons for not substantiating an application as soon as possible ([102]). In this regard, it should be noted that according to recital (29) APD (recast), applicants who may be in need of special procedural guarantees (due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence) 'should be provided with adequate support, **including sufficient time**, in order to create the conditions necessary for their effective access to procedures and **for presenting the elements needed to substantiate their application for international protection**' ([103]).

In Germany, the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court of Baden-Württemberg) decided that an applicant must be enabled to substantiate his/her application, even if he/she did not submit a relevant element 'as soon as possible', as the exclusion of such an element could have extremely serious consequences for him/her ([104]).

In cases in which applicants allege that their expulsion would violate Article 3 ECHR, the ECtHR has acknowledged the fact that with regard to applications for international protection, 'it may

([99]) Dörig, H., op. cit., fn. 85, p. 1135, Art. 4 para. 10; Baldinger, D. (2013), *Rigorous Scrutiny Versus Marginal Review, Standards on Judicial Scrutiny and Evidence in International and European Asylum Law* (Wolf Legal Publishers, pp. 354 and ff.; and Noll, G. (2005), 'Evidentiary Assessment and the EU Qualification Directive', *UNHCR New Issues in Refugee Research*, Research Paper, No 117, p. 6.

([100]) CJEU, *A, B and C*, op. cit., fn. 13, paras. 70 and 71.

([101]) Ibid., paras. 69 and ff.

([102]) Dörig, H., op. cit., fn. 85, p. 1135, Art. 4, para. 11. See also Bögner, D., Herlihy, J. and Brewin, C. (2007), 'The Impact of Sexual Violence on Disclosure during Home Office Interviews', *British Journal of Psychiatry*, 75-81; and Bögner, D., Brewin, C. and Herlihy, J., 'Refugees' experiences of Home Office interviews: A qualitative study on the disclosure of sensitive personal information', op. cit., fn. 69, pp. 1-17.

([103]) Emphasis added.

([104]) Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court of Baden-Württemberg, Germany), decision of 24 February 2017, A 11 S 368/17.

be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if such evidence must be obtained from the country from which he or she claims to have fled. The lack of direct documentary evidence thus cannot be decisive per se' ([105]).

According to UNHCR:

> […] [T]he term 'as soon as possible' is in practice, defined by the time frame and arrangements of the procedure. […] With regards to the provision of both statements and documentary or other evidence, UNHCR urges determining authorities to ensure that the procedure allows, and policy guidance instructs, decision-makers to take into account the individual and contextual circumstances of the applicants, including the means at their disposal to obtain documentary or other evidence and translations, where required ([106]).

4.2.3 The duty of the determining authority as regards substantiation of the application by the applicant

The determining authority has certain duties as regards the substantiation of the application by the applicant as summarised in Table 6 below.

Table 6: Duties of the determining authority as regards substantiation of the application

The determining authority:	
Duty no 1	Must ensure that all applicants are informed of their duty to substantiate the application, the means at their disposal and time frame to fulfil this duty.
Duty no 2	Must ensure that applicants are given the opportunity to substantiate their application in a personal interview.
Duty no 3	Must cooperate with the applicant at the stage of determining the relevant elements of the application. In this respect, a Member State may be better placed than an applicant to gain access to certain types of documents.

Concerning the duty to inform applicants of their duty to substantiate the application, and pursuant to Article 12(1)(a) APD (recast), **Member States must ensure that all applicants are informed** in a language which they understand or are reasonably supposed to understand, **of their duty to substantiate the application,** the time frame for so doing, the means at their disposal for fulfilling the obligation to submit the elements referred to in Article 4 QD (recast), as well the consequences of non-compliance. This information must be given to applicants in time to enable them to exercise the rights guaranteed in the APD (recast) and to comply with the obligations described in Article 13 APD (recast).

Concerning the duty to provide an opportunity for substantiation at the personal interview, and in accordance with Article 14(1) APD (recast), '[b]efore a decision is taken by the determining authority, **the applicant shall be given the opportunity of a personal interview** on his or her application for international protection' ([107]). The personal interview provides the main opportunity for the applicant to substantiate the application. As such, pursuant to Article 16 APD (recast):

([105]) ECtHR, *JK and Others v Sweden*, op. cit., fn. 20, para. 92.
([106]) UNHCR, *Beyond proof*, op. cit., fn. 14, pp. 102 and ff.
([107]) Emphasis added.

> When conducting a personal interview on the substance of an application for international protection, the determining authority shall ensure that the applicant is given an adequate opportunity to present elements needed to substantiate the application in accordance with Article 4 [QD (recast)] as completely as possible. This shall include the opportunity to give an explanation regarding elements which may be missing and/or any inconsistences or contradictions in the applicant's statements.

For further details with respect to the requirements in Articles 14-17 APD (recast) concerning the personal interview see Section 4.2.6.

According to the second sentence of Article 4(1) QD (recast), '[i]t is the duty of the Member State to assess the relevant elements of the application'. While the first sentence of Article 4(1) is optional, this second sentence is mandatory.

Concerning the duty to cooperate with the applicant, in *MM*, the CJEU stated that under Article 4(1), 'although it is generally for the applicant to submit all elements needed to substantiate the application, the fact remains that **it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application'** ([108]). The CJEU reiterated in *A, B and C* that despite the applicant being 'best placed to provide evidence to establish his own sexual orientation, the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of assessing the relevant elements of that application' ([109]). As the applicant cannot normally be assumed to know what facts and documentary or other evidence may be relevant, in accordance with this duty to cooperate, the Member State should provide appropriate guidance to the applicant and use appropriate questioning in the personal interview to elicit any relevant elements.

The CJEU further stated in *MM*:

> This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled ([110]).

In this respect, the CJEU in *MM* drew attention to the fact that **'a Member State may also be better placed than an applicant to gain access to certain types of documents'** ([111]). According to the Court:

> [This] interpretation […] finds support in Article 8(2)(b) [APD (now Article 10(3)(b) APD (recast))], pursuant to which Member States are to ensure that precise and up-to-date information is obtained on the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited ([112]).

([108]) CJEU, *MM*, op. cit., fn. 82, para. 65 (emphasis added).
([109]) CJEU, *A, B and C*, op. cit., fn. 13, para. 56.
([110]) CJEU, *MM*, op. cit., fn. 82, para. 66. Concerning the obligation of courts or tribunals by national law to gather evidence *proprio motu,* see Section 3.1.2.1 above.
([111]) CJEU, *MM*, op. cit., fn. 82, para. 66 (emphasis added).
([112]) Ibid., para. 67.

This may mean that the duty of cooperation between the applicant and the Member State extends in certain circumstances to the latter obtaining elements to substantiate the application in the meaning of the first sentence of Article 4(1) ([113]).

Where the determining authority deems it relevant for the assessment of an application in accordance with Article 4, it shall arrange for a medical examination or inform applicants that they may arrange for a medical examination concerning signs that might indicate past persecution or serious harm (Article 18 APD (recast)). In this regard and by way of example, according to Section 10(5) of the Czech Act on Asylum ([114]), the administrative authority (Ministry of Interior) has a duty to inform the applicant for international protection about the possibility to undergo such a medical examination.

Taking into account Article 4(1) QD, as well as the subsequent case-law of the CJEU and UNHCR documents, the ECtHR has noted that 'it is the shared duty of an asylum seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings' ([115]).

See Sections 4.2.5 and 4.8 on Member States' distinct obligation to obtain information on the country of origin and countries of transit.

4.2.4 Evidence or elements to be submitted

The concrete **'elements'** needed to substantiate the application according to Article 4(1) QD (recast) are listed in Article 4(2) and reproduced in Table 7 below.

Table 7: Elements to substantiate an application for international protection (Article 4(2) QD (recast))

Applicant's statements and all the documentation at the applicant's disposal regarding:	The applicant's age
	Background, including that of relevant relatives
	Identity
	Nationality(ies)
	Country(ies) and place(s) of previous residence
	Previous asylum applications
	Travel routes
	Travel documents
	The reasons for applying for international protection

The list in Article 4(2) QD (recast) contains both relevant material ('the applicant's statements' and 'all the documentation at the applicant's disposal') and the facts to which the material should relate. It also encompasses the elements relevant for reconstruction of the applicant's journey, as well as those related to his/her international protection needs.

The neutrality of the terms 'element' and 'substantiate' indicates that, in principle, every form of evidence capable of evidencing the risk can be submitted ([116]). Whilst Article 4(2) only refers

([113]) On the applicant's duty of cooperation, see e.g. Administrative and Labour Court of Budapest (Hungary), judgment of 4 July 2012, *SN v Office of Immigration and Nationality*, 3.K.31192/2012/6 (see EDAL English summary).
([114]) Czech Republic, Act No 325/1999 Coll. on Asylum, 11 November 1999 (as amended).
([115]) ECtHR, *JK and Others v Sweden*, op. cit., fn. 20, para. 96.
([116]) Baldinger, *D.*, op. cit., fn. 99, pp. 349 and ff.

to the applicant's statements and all the documentation at the applicant's disposal, it is clear from Article 4(5) QD (recast) which refers to 'documentary **or other evidence'** ([117]) and the CJEU's judgment in *A, B and C*, which refers to 'assessing statements and documentary or **other evidence'** ([118]), that the elements may include evidence, other than documentary evidence, such as objects, audio recordings, and digital data. Evidence may include anything that asserts, confirms, supports or bears on relevant facts. Evidence may be verbal or documentary, including written, graphic, digital and visual materials. It may also encompass exhibits such as physical objects and bodily scarring, as well as audio and visual recordings ([119]). It does not matter whether information is stored for instance by electronic means (for example, on a smartphone, laptop, etc.) or printed on paper. Table 8 below contains a non-exhaustive list of types of evidence.

Table 8: Types of evidence

Oral	— statements of applicant — statements of family members — statements of witnesses — statements of experts	
Documents	— identity card/passport — birth certificate — medical reports — forensic reports — legal reports — court decisions or judgments — witness reports — reports on country of origin	— reports on age assessment — reports on language assessment — printed emails — letters — travel documents — arrest warrants — (official) reports of the police — media reports
Visual	— social media — photographs — videos — drawings	
Audio	— audio recordings	
Exhibits	— physical objects — fingerprints — bodily scarring	

Whilst the elements which may substantiate an application encompass a broad range of types of evidence, all should be consistent with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, enshrined in Article 1 of the Charter, and the right to respect for private and family life, guaranteed by Article 7 thereof. Respect for such fundamental rights prohibits, for example, the performance of sexual acts or submission of videos of intimate acts to substantiate an application based on sexual orientation ([120]). The CJEU added that 'the effect of authorising or accepting such types of evidence would be to incite other applicants to offer the same and would lead, de facto, to requiring applicants to

([117]) Emphasis added.
([118]) CJEU, *A, B and C*, op. cit., fn. 13, para. 54.
([119]) UNHCR, *Beyond proof*, op. cit., fn. 14, pp. 90 and ff.
([120]) CJEU, *A, B and C*, op. cit., fn. 13, para. 65.

provide such evidence' ([121]). For more on the methods for assessing the credibility of the applicant's statements and documentary and/or other evidence, see Section 4.4.

Documentation **at the applicant's disposal** goes beyond documentation in the applicant's possession. Instead, documentation is at the applicant's disposal, when he/she **may reasonably be expected to be able to obtain it** ([122]). In this context the applicant's individual and contextual circumstances should be taken into account, including the circumstances in the country of origin or place of habitual residence. The documents he/she can reasonably be expected to obtain must be assessed in the light of the applicant's own background and circumstances and must not be coloured by unreasonable assumptions or preconceptions about what documents should be available.

As far as the applicant's **identity and nationality** are concerned, Article 13(2)(b) APD (recast) should be observed. According to this norm, Member States may provide that applicants for international protection 'have to hand over documents in their possession relevant to the examination of the application, such as their passports'.

Article 9 of the Eurodac regulation (recast) requires each Member State to promptly take the fingerprints of every applicant for international protection of at least 14 years of age ([123]). Whilst neither the Eurodac regulation (recast) nor the Dublin III Regulation explicitly stipulates that an applicant is obliged to provide fingerprints, courts in some Member States have invoked provisions of the APD (recast) to construe an obligation on the applicant to provide fingerprints. In accordance, with Article 31(8)(i) APD (recast), Member States may provide that the examination procedures be accelerated and/or conducted at the border or in transit zones if 'the applicant refuses to comply with an obligation to have his or her fingerprints taken' ([124]). Some obligations are also contained in Article 13 APD (recast) and may have the consequence that the asylum procedure is ended without a substantive examination (Articles 27, 28 and 31 APD (recast)) ([125]). For further information, see EASO, *Asylum procedures and the princip*le of non-refoulement - *Judicial analysis,* 2018 ([126]).

The determination of an applicant's nationality sometimes causes difficulties. The meaning of the term 'nationality' in Article 4(2) QD (recast) is not the same as in Article 10(1)(c) QD (recast) on reasons for persecution ([127]). For details, see Section 5.1 below which analyses assessment of evidence relating to nationality.

([121]) Ibid., para. 66.

([122]) See Upper Tribunal (United Kingdom), judgment of 3 October 2016, *MW* (Nationality; Art 4 QD; duty to substantiate) [2016] UKUT 453 (IAC). See also UNHCR, *Beyond proof*, op. cit., fn. 14, p. 93; and Garlick, M. in Grütters, C., Guild, E. and de Groot, S. (2013), *Assessment of Credibility by Judges in Asylum Cases in the EU*, Wolf Legal Publishers, p. 59.

([123]) See Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) [2013] OJ L 180/1.

([124]) See e.g. in France, where the 2015 Asylum law (Art. L. 723-2 of the Code on the entry and stay of foreigners and asylum law) provides for the application to be assessed in the accelerated procedure the applicant has refused to give his/her fingerprints as provided for under the Eurodac regulation (recast).

([125]) See e.g. German Federal Administrative Court (Bundesverwaltungsgericht), judgment of 5 September 2013, case 10 C 1.13, DE:BVerwG:2013:050913U10C1.13.0, including in English. The decision refers mainly to the obligations of the applicants under the APD. Under German national law if a person does not pursue the application, there is a possibility for the authorities to end the asylum procedure without a substantive examination of the request (German Asylum Act, op. cit., fn. 81, Arts. 32 and 33). It is seen as a lack of interest in the procedure if the person does not provide analysable fingerprints. Legally the non-provision of fingerprints is seen as an abandonment of the procedure. See Sections 32, 33 (1) of the German Asylum Procedure Act (now: Asylum Act, op. cit., fn. 81).

([126]) EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018, op. cit., fn. 3, Subsections 3.5.2 and 4.2.9.

([127]) The German and Italian versions of Art. 4(2) and Art. 11(1)(c) QD (recast) use the term 'Staatsangehörigkeit(en)'/'cittadinanza' (citizenship), while in Art. 10(1)(c) the term 'Nationalität'/'nazionalità' is used.

The inclusion of **'travel route'** in Article 4(2) may have relevance both in assessing an application for international protection ([128]) and in deciding the question of the applicability of the Dublin III Regulation for determining the Member State's responsibility for examining an application lodged in one of the Member States by a third-country national (see Section 5.8 below). For instance, the German Federal Administrative Court has decided that an asylum procedure may be discontinued according to German procedural law ([129]) on the basis of the fact that the applicant did not comply in a timely manner with a justified request to present a written account of his travel routes before arriving in Germany, and of any applications for asylum that may have been lodged in other countries ([130]).

The elements also include the applicant's statements and all the documentation at the applicant's disposal regarding the **reasons for applying for international protection.** The applicant's statements regarding the reasons for applying for international protection encompass submissions made by the applicant him or herself, or on his/her behalf by a representative. Examples of documentation which may be relevant include documents which may corroborate the applicant's asserted background (professional, political, religious, social, etc.) and documents such as arrest warrants, police reports, medical reports, written or oral statements made by family members or other witnesses relating to harm inflicted on the applicant or threats of such harm. COI from various organisations is another important source of evidence and information as follows from Article 4(3)(a) QD (recast).

4.2.5 Obtaining information on country of origin and countries of transit

Member States have an **investigative burden** with regard to the information listed in Article 4(3) QD (recast) which is separate from the applicant's duty to substantiate the application ([131]). Article 4(3)(a) requires the assessment of applications for international protection to take into account 'all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied' ([132]). This norm applies, inter alia, to obtaining information about the **country of origin**. Obtaining such information is part of the Member State's investigative burden.

Furthermore, according to Article 10(3)(b) APD (recast), Member States shall ensure that **'precise and up-to-date information** is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the **general situation prevailing in the countries of origin** of applicants and, where necessary, in countries through which they have **transited'** ([133]). Such information must be made available to the personnel responsible for examining applications and taking decisions. This includes information concerning relevant laws and regulations of these countries 'and the manner in which they are applied' (Article 4(3)(a) QD (recast)). Recital (39) APD (recast) underlines the importance of precise and up-to-date information from relevant sources 'in determining whether a situation of uncertainty prevails in the country of origin of an applicant'.

([128]) Information regarding the travel route may be indicative of when the applicant left the country of origin.
([129]) See Sections 32 and 33(1) of the German Asylum Procedure Act (now: Asylum Act, op. cit., fn. 81).
([130]) Federal Administrative Court (Germany), judgment of 17 June 2014, BVerwG, 10 C 7.13, BVerwG:2014:170614U10C7.13.0, including in English.
([131]) Noll, G., op. cit., fn. 99, p. 5.
([132]) Art. 4(3) QD recast is cited in full at the start of Section 4.1.
([133]) Emphasis added.

The requirements of Article 10(3)(b) APD (recast) reflect awareness that certain kinds of evidence may not be available to the applicant. This provision ensures that relevant evidence on country conditions is not overlooked by the decision-maker. According to Article 12(1)(d) APD (recast), applicants, and if applicable, their legal advisers or other counsellors, 'shall have access to the information referred to in Article 10(3)(b) […], where the determining authority has taken that information into consideration for the purpose of taking a decision on their application'.

In addition (and of special importance to any judicial analysis), according to Article 10(4) APD (recast) courts and tribunals shall, 'through the determining authority or the applicant or otherwise, have access to the above-stated general information referred to in Article 10(3)(b) APD (recast), necessary for the fulfilment of their task'. See Section 4.8.4.1 for further information specifically regarding courts and tribunals' access to COI.

The need to obtain relevant COI is also recognised in the laws and guidance of Member States, the jurisprudence of the ECtHR, international sources such as the IARLJ Checklist on COI ([134]), and UNHCR and Hungarian Helsinki Committee materials ([135]).

COI should be obtained in accordance with the principles set out in Section 4.3 concerning principles for the assessment of evidence. Regarding the standards for assessing COI, see Section 4.8.

4.2.6 Obtaining the elements to substantiate the application — the personal interview

According to Article 4(3)(b) APD (recast), the assessment of an application for international protection includes taking into account 'the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm'.

Under Article 14(1) APD (recast), before a decision is taken by the determining authority, the applicant shall be given the opportunity of a personal interview on his/her application for international protection. The **oral testimony of the applicant** is almost always crucial.

The personal interview is the main opportunity for the applicant to provide statements regarding, inter alia, the reasons for applying for international protection; and for the determining authority to elicit and identify all the material facts. The applicant's ability to discharge his/her duty to provide such statements and the determining authority's ability to identify the material facts as well as any further relevant elements to substantiate the application will, therefore, depend on the personal interview being conducted in accordance with the APD recast's provisions. The personal interview is also important because secondary EU law does not explicitly guarantee the applicant a right to an oral hearing before a judicial body. The CJEU has not yet interpreted the term 'fair trial' in Article 47 of the EU Charter in the context of international protection. Even if national law may provide for courts and tribunals to direct an

([134]) IARLJ, *A Structured Approach to the Decision-Making Process*, op. cit., fn. 1, with 'Judicial criteria for assessing country of origin information (COI): a Checklist and Explanation' prepared by Mackey, A. and Treadwell, M., 2015/17, at p. 33.
([135]) Gyulai, G. (2011), *Country information in asylum procedures — Quality as a legal requirement in the EU*, Hungarian Helsinki Committee.

oral hearing in certain situations, from the standpoint of Article 46(3) APD (recast), it cannot be excluded that proceedings before a court or tribunal may be purely written.

According to Article 13(2)(f) APD (recast), the competent authorities may record the applicant's oral statements provided he/she has previously been informed thereof. This requirement is permissive as are the other requirements of Article 13(2) APD (recast). It is, therefore, necessary to consider the relevant transposing legislation of Member States in connection with the obligations of applicants in a given national context.

The requirement to give the applicant the opportunity of a **personal interview** in accordance with Articles 14 to 17 APD (recast) on the substance of his/her application for international protection is central to the procedural fairness of the process leading to the administrative decision.

Such an interview shall, according to Article 14(1) APD (recast), be conducted by the personnel of the determining authority. However, Member States may provide that in case of a large number of simultaneous applications the personnel of another authority may be temporarily involved to conduct such interviews.

In addition, Article 14(2) APD (recast) sets out:

Article 14(2) APD (recast)

The personal interview on the substance of the application may be omitted where:

(a) the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available; or

(b) the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control. When in doubt, the determining authority shall consult a medical professional to establish whether the conditions that makes the applicant unfit or unable to be interviewed is of a temporary or enduring nature.

Where a personal interview is not conducted pursuant to Article 14(2)(b) or, where applicable, with a dependant, 'reasonable efforts must be made to allow the applicant or the dependant to submit further information' (Article 14(2) APD (recast)). According to Article 14(3) APD (recast), '(t)he absence of a personal interview in accordance with this Article shall not prevent the determining authority from taking a decision on an application for international protection.'

According to Article 15 APD (recast):

Article 15 APD (recast)

1. A personal interview shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have other family members present.

2. A personal interview shall take place under conditions which ensure appropriate confidentiality.

3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:

(a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability [see also recital (32) APD(recast)];

(b) wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests, unless the determining authority has reason to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;

(c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests, unless the determining authority has reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;

(d) ensure that the person who conducts the interview on the substance of an application for international protection does not wear a military or law enforcement uniform;

(e) ensure that interviews with minors are conducted in a child-appropriate manner.

4. Member States may provide for rules concerning the presence of third parties at a personal interview.

Article 16 APD (recast) further provides:

Article 16 APD (recast)

When conducting a personal interview on the substance of an application for international protection, the determining authority shall ensure that the applicant is given an adequate opportunity to present elements needed to substantiate the application in accordance with Article 4 [QD (recast)] as completely as possible. This shall include the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in the applicant's statements.

The determining authority must, therefore, ensure that questioning during the personal interview affords the applicant the opportunity to fully explain the reasons for the application and to explain missing elements and/or any inconsistencies or contradictions ([136]).

In view of the fact that Member States 'must make sure they do not rely on an interpretation [of an instrument of secondary legislation] which would be in conflict with the fundamental rights protected by the EU' ([137]), Article 16 APD (recast) may be considered a reflection of the general principle of EU law of the right of defence and the right to be heard which is inherent in that principle ([138]). This principle is reflected in well-established case-law of the ECtHR ([139]). According to the CJEU, the right to be heard must apply in all proceedings which are liable to culminate in a measure adversely affecting a person ([140]). The observance of the right to be heard is required even when the applicable legislation does not expressly provide for such a procedural requirement ([141]).

More specifically, this right to be confronted with missing elements and inconsistencies or contradictions means, as the CJEU has stated in the case of *M*:

> Where necessary, the competent authority must also take account of the explanation provided regarding a lack of relevant elements, and of the applicant's general credibility. Therefore, the right to be heard before the adoption of a decision on an application for subsidiary protection must allow the applicant to set out his views on all those elements, in order to substantiate his application and to allow the authorities to carry out the individual assessment of the facts and circumstances that is provided for in Article 4 of [the QD] with full knowledge thereof […] ([142]).

In this context, the CJEU mentions the possibility for the applicant to annex documentary evidence to his/her application ([143]). Moreover, 'provided that a procedural mechanism of that kind is sufficiently flexible to let the applicant express his views and that he can, if need be, receive appropriate assistance, it is such as to allow him to comment in detail on the elements that must be taken into account by the competent authority and to set out, if he thinks it appropriate, information or assessments different from those already submitted to the competent authority when his asylum application was examined' ([144]). 'The right of the applicant […] to comment in writing on the grounds that may substantiate his application provides him with the opportunity to set out his views on the assessment of such information or material by the competent authority in taking a decision on his asylum application' ([145]). This means that in the context of the right of defence, it is not as such necessary that the determining authority give an opportunity to the applicant to explain missing elements and/or inconsistencies or contradictions at a personal interview. This may be provided in writing.

([136]) See Győr Administrative and Labour Court (Hungary), judgment of 24 June 2016, *17.K.27.132/2016/6*; Council for Aliens Law Litigation (Belgium), decisions of 6 May 2013, no 102472, and 17 May 2013, no 103053. See also in France, Code on the Entry and Stay of Foreigners and Asylum Law, Art. R 733-16, from which it may be inferred that where a court finds an inconsistency between the applicant's statements and COI, the COI must be placed in the procedure so that the applicant may provide an explanation for the inconsistency.

([137]) CJEU, *MM*, op. cit., fn. 82, para. 93; see *mutatis mutandis*, CJEU, judgment of 5 June 2014, *Mahdi v Administrativen sad Sofia-grad (Bulgaria)*, C-146/14 PPU, EU:C:2014:1320, paras. 45-46, 50, 55.

([138]) CJEU, *MM*, op. cit., fn. 82, para. 81.

([139]) The ECtHR's Grand Chamber judgment in the case of *JK and Others v Sweden*, op. cit., fn. 20, para. 93, states: 'Owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of doubt when assessing the credibility of their statements and the documents submitted in support thereof. Yet, when information is provided which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions'.

([140]) CJEU, *MM*, op. cit., fn. 82, para. 85; CJEU, judgment of 9 February 2017, case C-560/14, *M v Minister for Justice and Equality Ireland and the Attorney General*, EU:C:2014:1320, para. 31.

([141]) CJEU, *MM*, op. cit., fn. 82, para. 86; CJEU, *M*, op cit., fn. 140, para. 26.

([142]) CJEU, *M*, op cit., fn. 140, paras. 36-37.

([143]) Ibid. para. 39.

([144]) Ibid. para. 40.

([145]) Ibid. para. 45; see also paras. 48 and 50.

However, despite the fact that the CJEU, in the cases *MM* and *M*, states that the right to be heard should be 'fully guaranteed' ([146]), it has yet to address Article 16 APD (recast). On a contextual interpretation of this article, 'fundamental rights, such as respect for the rights of defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed' ([147]). Thus, not every irregularity in the exercise of the rights of defence in an administrative procedure will render unlawful the decision taken ([148]). To make such a finding of unlawfulness, the national court or tribunal must — where it considers that a procedural irregularity affecting the right to be heard has occurred — assess whether, in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the individual concerned had been able to put forward information ([149]).

Questioning should also be appropriate to elicit any relevant material facts and probe their credibility. In this regard, the CJEU made clear in *A, B and C* that while questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purposes of the assessment, the assessment of applications on the basis solely of stereotyped notions, in this case associated with homosexuals, does not satisfy either the requirement to take account of 'the individual position and personal circumstances of the applicant' or that requiring 'the person who conducts the interview [to be] competent to take account of the personal and general circumstances surrounding the application' ([150]). Therefore, questioning must be tailored to the personal and general circumstances surrounding the application. The CJEU further stated:

> [W]hile the national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum, questions concerning details of the sexual practices of that applicant are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life as affirmed in Article 7 thereof ([151]).

According to Article 17(1) APD (recast), Member States 'shall ensure that either a thorough and factual report containing all substantive elements or a transcript is made of every personal interview'. A verbatim transcript is not required.

As stated in Article 17(2) APD (recast) Member States may also provide for audio or audio-visual recording of the personal interview. In this context it is to be noted that according to Article 13(2)(f) APD (recast) 'the competent authorities may record the applicant's oral statements, provided he/she has previously been informed thereof'.

([146]) CJEU, *MM*, op. cit., fn. 82, para. 91; CJEU, *M*, op. cit., fn. 140, para. 26.
([147]) See *mutatis mutandis*, CJEU, judgment of 11 December 2014, case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, EU:C:2014:2431, para. 43.
([148]) See *mutatis mutandis*, CJEU, case C-383/13 PPU, *MG and NR v Staatssecretaris van Veiligheid en Justitie*, EU:C:2013:533, paras. 39-41.
([149]) Ibid., para. 40.
([150]) CJEU, *A, B and C*, op. cit., fn. 13, paras. 60-62, these requirements being set out in what is now Art. 4(3)(c) QD (recast) and Art. 15(3)(a) APD (recast) respectively.
([151]) Ibid., para. 64.

According to Article 17(3) APD (recast):

Article 17(3) APD (recast)

Member States shall ensure that the applicant has the opportunity to make comments and/or provide clarification orally and/or in writing with regard to any mistranslations or misconceptions appearing in the report or in the transcript, at the end of the personal interview or within a specified time limit before the determining authority takes decision. To that end, Member States shall ensure that the applicant is fully informed of the content of the report or of the substantive elements of the transcript, with the assistance of an interpreter, if necessary. […]

Pursuant to Article 17(5) APD (recast), '(a)pplicants and their legal advisers or other counsellors, as defined in Article 23, shall have access to the report or the transcript and, where applicable, the recording, before the determining authority takes a decision'.

The report or transcript of the interview is likely to contain the main elements substantiating the application. Given the scope for, for example, erroneous recording or translation of the applicant's statements, it is essential that the applicant be afforded an effective opportunity to review the report of the personal interview.

The main requirements for carrying out personal interviews according to the APD (recast) are summarised in Table 9 below. In their assessment of the applicant's statements and any other evidence obtained in the personal interview, courts and tribunals should, therefore, examine whether the determining authority has conducted the personal interview in accordance with these requirements (see Part 3 above).

Table 9: Main requirements for carrying out personal interviews under APD (recast)

<table>
<tr><td rowspan="7">General principles on mandatory personal interviews of applicants
(Art. 14 APD (recast))</td><td rowspan="5">→ To be conducted by the personnel of the determining authority, except where simultaneous applications for international protection by a large number of applicants make it impossible in practice (Art. 14(1) APD (recast)), and ensure that:</td><td>‘(a) […] the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant’s cultural origin, gender, sexual orientation, gender identity or vulnerability’ (Art. 15(3)(a) APD (recast))</td></tr>
<tr><td>‘(b) whenever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests, unless the determining authority has reason to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner’ (Art. 15(3)(b) APD (recast))</td></tr>
<tr><td>‘(c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conduct the interview […]’ (Art. 15(3)(c) APD (recast))</td></tr>
<tr><td>‘(d) […] the person who conducts the interview on the substance of an application for international protection does not wear a military or law enforcement uniform’ (Art. 15(3)(d) APD (recast))</td></tr>
<tr><td>‘(e) […] interviews with minors are [to be] conducted in a child-appropriate manner’ (Art. 15(3)(e) APD (recast))</td></tr>
<tr><td colspan="2">→ ‘A personal shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have other family members present’ (Art. 15(1) APD (recast)).</td></tr>
<tr><td colspan="2">→ ‘A personal interview shall take place under conditions which ensure appropriate confidentiality’ (Art. 15(2) APD (recast)).</td></tr>
<tr><td colspan="2">→ ‘Member States shall ensure that either a thorough and factual report containing all substantive elements or a transcript is made of every personal interview’ (Art. 17(1) APD (recast)); that ‘the applicant is fully informed of the content of the report or of the substantive elements of the transcript, with the assistance of an interpreter if necessary’ and ‘has the opportunity to make comments and/or provide clarification orally and/or in writing with regard to any mistranslations or misconceptions appearing in the report or in the transcript, at the end of the personal interview or within a specified time limit before the determining authority takes a decision’ (Art. 17(3) APD (recast)); and that ‘[a] pplicants and their legal advisers or other counsellors […] shall have access to the report or the transcript and, where applicable the recording, before the determining authority takes a decision’ (Art. 17(5) APD (recast)).</td></tr>
<tr><td colspan="2">→ ‘Member States may provide for audio or audiovisual recording of the personal interview’ (Art. 17(2) APD (recast)), provided the applicant ‘has previously been informed thereof’ (Art. 13(2)(f) APD (recast)).</td></tr>
<tr><td>Optional exceptions to mandatory personal interview if:
(Art. 14(2) APD (recast))</td><td colspan="2">(a) ‘[T]he determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available; or
(b) the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control. When in doubt, the determining authority shall consult a medical professional to establish whether the conditions that makes the applicant unfit or unable to be interviewed is of a temporary or enduring nature’. (Art. 14(2)(a) and (b) APD (recast)).</td></tr>
</table>

4.2.7 Access to expert evidence

According to Article 10(3)(d) APD (recast), Member States must ensure that the personnel of the determining authority 'examining applications and taking decisions have the possibility to seek advice, whenever necessary, from **experts on particular issues,** such as medical, cultural, religious, child-related or gender issues' ([152]). Depending on national judicial procedures, a court or tribunal may have access to such expert evidence, through the determining authority or the applicant or, for example, by commissioning expert evidence or utilising such evidence from another case of its own motion ([153]).

Expert evidence may be needed concerning an application or appeal or action where there are relevant issues which require a particular expertise which may not otherwise be available to the parties or to decision-makers. A basis for obtaining expert evidence may be derived, inter alia, from Article 4(3)(c) QD (recast), Articles 14(2)(b), 18(1), 24 and 25(5) APD (recast) ([154]).

Pursuant to Article 10(3)(d) APD (recast), in order to ensure an appropriate examination of an application, the determining authority may have to seek advice from a **medical expert.** Medical evidence may be sought to support various aspects of an applicant's claim, for example, where it might substantiate indications of past persecution or serious harm (Article 18(1) APD (recast)) ([155]).

Medical evidence may also be sought in order to determine whether the applicant requires special procedural guarantees and/or has special reception needs (Articles 14(2)(b), 24 and 25(5) APD (recast)). This may include the need to obtain medical advice, where there are indications of mental ill health, in order to ensure that the assessment of the application is carried out on an individual basis and takes account of the applicant's position and personal circumstances in accordance with Article 4(3)(c) QD (recast) ([156]). Further information regarding the assessment of medical evidence may be found in Section 4.7.2.

An expert is often called upon to provide independent **country-specific information** in asylum cases ([157]). The expert may for instance be asked whether factual claims made by the applicant are consistent with the context from which they arise. Questions may also be asked with respect to the consequences of established facts. However, expert evidence should be confined to issues on which an expert has relevant expertise and should not trespass on the role of the fact-finder whose task it is to decide whether an applicant's account is credible ([158]).

([152]) Emphasis added.

([153]) In German court practice expert evidence received in asylum proceedings is shared with other judges of the court. Texts are anonymised with respect to the applicants. Courts have over the years acquired considerable resource materials on conditions in countries of origin and other asylum-related questions. In addition, court decisions and other relevant material are accessible on websites (for further information concerning access to relevant databases see Tiedemann, P. (2014), *Flüchtlingsrecht: Die materiellen und verfahrensrechtlichen Grundlagen* (Springer), pp. 175 and ff.). An Information and Documentation Centre in Wiesbaden gives judges access — in addition to other information — to about 160 000 documents, inter alia, numerous reports from asylum proceedings, among them enquiries and status reports of the Foreign Office in individual cases, transcripts of witness and expert statements, written expert opinions and statements of NGOs. Based on such information the search for appropriate experts is easier for judges. See Stanek, H., ' ', Akademie der Diözese Rottenburg-Stuttgart, 20 November 2014.

([154]) Art. 4(3)(c) QD (recast) requires the assessment of the application to be carried out on an individual basis and take into account the individual position and personal circumstances of the applicant, including factors such as background, gender and age; Art. 18(1) APD (recast) concerns when the determining authority may arrange for a medical examination of the applicant; Art. 24 APD (recast) concerns applicants in need of special procedural guarantees; and Art. 25 APD (recast) concerns guarantees for unaccompanied minors.

([155]) Council for Aliens Law Litigation (Belgium), decision of 2 July 2013, no 106216.

([156]) See e.g. Upper Tribunal (United Kingdom), judgment of 4 February 2016, OO (Gay Men) Algeria CG [2016] UKUT 00065 (IAC), in which the Upper Tribunal had access to the evidence of a consultant psychiatrist regarding the applicant's mental health.

([157]) For example, see Upper Tribunal (United Kingdom), judgment of 1 October 2015, AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC), paras. 6-29 in which the Upper Tribunal had access to both the written and oral evidence of an expert on conditions in Iraq; Upper Tribunal (United Kingdom), judgment of 2 June 2015, BM and Others (returnees — criminal and non-criminal) Democratic Republic of the Congo (CG) [2015] UKUT 293 (IAC), in which the Upper Tribunal (United Kingdom) undertook a detailed analysis and evaluation of, inter alia, expert evidence on the Democratic Republic of the Congo.

([158]) Council for Aliens Law Litigation (Belgium), decision of 14 February 2017, no 182265.

By way of illustration of the use of country expert evidence, in a case which concerned the risk of persecution faced by a homosexual or bisexual man on return to Algeria, the United Kingdom Upper Tribunal (UKUT) had access to both written and oral evidence from two experts on Algeria ([159]). Their evidence addressed issues in Algeria such as:
— prosecution for homosexual behaviour;
— the influence of Sharia law;
— arrests of homosexual men;
— risk of targeted or arbitrary attacks or abusive treatment by police;
— violence against homosexual men;
— attitudes towards homosexuality;
— discrimination;
— forced marriages;
— living as a homosexual man in the country.

Issues on which expert evidence may be of assistance include those pertaining to religion. For example, while it is clear that **religious** persecution constitutes grounds for refugee status, assessment of religion-based asylum applications is complex and challenging due to the inherently internal and personal nature of religion and belief. This is compounded by the fact that persecution on the basis of religion or belief encompasses a wide range of human rights violations and relates to complex dynamics of communal identities, politics, conflicts and organisations. In this context expert knowledge is often valuable ([160]). Access to relevant expert evidence on the conditions in the applicant's country of origin is of crucial importance.

In the context of **gender-based asylum claims** (for instance in the case of women and girls facing gender-based violence in their countries of origin), experts often play a pivotal role in explaining gender-based violence by providing information and opinions on the political, social, cultural, familial, and economic contexts for this violence (concerning gender see Section 6.5) ([161]). By way of example, in a case concerning the risk of persecution on return to Albania faced by trafficked women, the UKUT had access to written and oral evidence from an anthropologist specialising in trafficking and Albania, a clinical psychologist specialising in violence against women, and a consultant psychiatrist ([162]).

As further examined in Sections 4.7 and 5.2 below, access to expert evidence, including medical examinations, may be relevant in the case of minor applicants, especially to determine their age in case of doubt (see Article 25(5) APD (recast)).

4.2.8 Collection of information on individual cases and confidentiality

The APD (recast) provides in Articles 30 and 48 rules concerning the **confidentiality of information** on individual cases. The principle of confidentiality is particularly important because of the vulnerable situation in which many applicants find themselves. This principle is regulated in the aforementioned articles in mandatory terms.

([159]) Upper Tribunal (United Kingdom), OO (Gay Men) Algeria CG, op. cit., fn. 156, paras. 15-94 in which the UKUT had access to both written and oral country expert evidence on Algeria and written and oral evidence from an expert specialising in political and security issues in North Africa and the Middle East.
([160]) See concerning the United Kingdom: Asylum Advocacy Group and All Party Parliamentary Group for International Freedom of Religion or Belief, Fleeing Persecution: Asylum Claims in the United Kingdom and Religious Freedom Grounds, 2016.
([161]) See Harris, L. M. (2012), 'Expert evidence in gender-based asylum cases: cultural translation for the court', *Benders Immigration Bulletin* 1811-1826; for details with respect to Art. 9(2)(f) QD (recast) concerning acts of gender-specific or child-specific nature see Dörig, H., op. cit., fn. 85, p. 1180, Art. 9, para. 50.
([162]) Upper Tribunal (United Kingdom), judgment of 18 March 2010, AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC). See also Council for Aliens Law Litigation (Belgium), decision of 26 February 2013, no 97865 concerning women in Islam and homosexuality in Sudan.

According to Article 30 APD (recast):

Article 30 APD (recast)

For purposes of examining individual cases, Member States shall not:

(a) disclose information regarding individual applications for international protection, or the fact that an application has been made, to the alleged actor(s) of persecution or serious harm;

(b) obtain any information from the alleged actor(s) of persecution or serious harm in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant or his or her dependants, or the liberty and security of his or her family members still living in the country of origin.

These requirements aim at protecting the applicant, his/her dependants or family members from dangers caused by the alleged actor(s) of persecution or serious harm during the asylum procedure. In the view of UNHCR, 'State responsibility in this regard extends not only to direct but also to indirect disclosure to alleged actors of persecution [or serious harm]' ([163]). Concerning disclosure see also Section 6.3.

The same goes for Article 48 APD (recast). This provides that 'Member States shall ensure that authorities implementing this Directive are bound by the confidentiality principle as defined by national law, in relation to any information they obtain in the course of their work'. That means that it is in principle the national law of the Member State to which reference must be made. However the relevance of higher-ranking **EU law in the context of data protection and protection of privacy,** which has become more developed in recent times, must be considered ([164]). This includes the rights guaranteed under the EU Charter (see also recital (16) QD (recast)). Article 7 (right to respect for private and family life) and Article 8 (protection of personal data) of the Charter may be especially relevant.

4.3 Principles for the assessment of facts and circumstances

The principles set out in this section and listed in Table 10 below apply to the entire assessment of an application for international protection including the evaluation of future risk. They apply to the examination of applications in all procedures at administrative level, including accelerated and border procedures ([165]), and to the hearing of appeals or actions by courts and tribunals.

([163]) UNHCR, UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 10 February 2005, p. 27. In addition, according to UNHCR, 'the authorities must therefore seek in advance the written consent of asylum-seekers to check their personal data in the country of origin (see UNHCR, Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information, 31 March 2005, para. 8).

([164]) See Simitis, S. (2014), *Bundesdatenschutzgesetz* (8th edn, Nomos), pp. 189 and ff. and 1116 and ff. referring inter alia to CJEU, judgment of 13 May 2014, Grand Chamber, case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPS) and Mario Costeja González, EU:C:2014:317; see also CJEU, Judgment of 17 July 2014, joined cases C-141/12 and C-372/12, *YS v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v M and S*, EU:C:2014:2081. In this context also, the General Data Protection Regulation, by which the European Commission intends to strengthen and unify data protection for individuals within the EU, must be observed (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1, 4 May 2016).

([165]) Art. 31(8) APD (recast) enables Member States to provide an accelerated examination procedure and Art. 43 APD (recast) enables the provision of procedures to decide the admissibility of an application and/or the substance of the application at the border or transit zones of Member States.

Table 10: Principles for assessing facts and circumstances

1	Individual assessment
2	Objective and impartial assessment
3	Rigorous scrutiny
4	Disclosure of information relied upon
5	Assessment based on all relevant elements
6	Assessment based on material facts
7	No general requirement that applicant's statements be supported by documentary or other evidence
8	Assessment in cases of doubt
9	Standard of proof/level of conviction

4.3.1 Individual assessment

Article 4(3) QD (recast) ([166]) requires the **assessment of an application for international protection to be carried out on an individual basis.**

The necessary individuality of each application is made clear by the requirement that the decision-maker must take into account the factors in Article 4(3)(a)-(e) QD (recast). Save for (a), these set out matters personal to the applicant. By way of example, Article 4(3)(b) requires that the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm' be taken into account. Further, Article 4(3)(c) provides that 'the individual position and personal circumstances of the applicant, including factors such as background, gender and age, be taken into account so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm'.

This includes taking into account individual subjective factors as an aspect of the individual position and personal circumstances of an applicant when they are relevant in the determination of the level of risk to which he/she will be exposed in his/her country of origin. By way of example, in *Y and Z* the CJEU said that the subjective circumstance that the observance of a certain religious practice in public which was of particular importance to the applicant concerned in order to preserve his/her religious identity, was a relevant factor to be taken into account in determining the level of risk to which he/she would be exposed in his/her country of origin on account of his/her religion, even if the observance of that practice did not constitute a core element of faith for the religious community concerned ([167]).

As already set out above in Section 4.1, Article 4(3)(c) QD (recast) identifies **background** as a factor to be taken into account. This includes an applicant's personal history and his/her cultural, educational and religious background, all of which may be relevant in assessing the credibility of a claim for international protection ([168]).

([166]) Art. 10(3)(a) APD (recast) requires Member States to ensure that applications are examined and decisions are taken individually.

([167]) CJEU, judgment of 5 September 2012, Grand Chamber, joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, EU:C:2012:518, para. 70. See EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, op. cit., fn. 3, Section 1.5.2.2.

([168]) See e.g. Refugee Board (Poland), decision of 29 August 2013, RdU-246-1/S/13 (see EDAL English summary), a case dealing with linguistic analysis where the Board said that certain inaccuracies in the detail actually lent credibility to the testimony and that this was evident particularly if one took into account the fact that the foreign woman was a simple person without any education. See also, Supreme Administrative Court (Czech Republic), *LO v Ministry of Interior*, op. cit., fn. 53, for further details about the case.

Gender is also identified as a factor to be taken into consideration in the assessment of the facts and circumstances ([169]). Its importance is emphasised by the provisions of Article 10(3)(d) APD (recast) setting out the requirements for the examination of applications for international protection and providing that Member States shall ensure that 'the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary from experts on particular issues, such as […] gender issues'. For more on these issues see Section 6.5 below.

In respect of the personal interview, Article 15(3)(a) APD (recast) requires Member States 'to take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds of their applications in a comprehensive manner', including by 'ensur[ing] that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's […] gender, sexual orientation, gender identity […]'.

The CJEU has so far not yet had the occasion to clarify the meaning of gender in the context of EU law on international protection ([170]), but some light on the meaning of gender in the context of the meaning of a particular social group is shed by recital (30) QD (recast) which states:

Recital (30) QD (recast)

For the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution.

As noted above, Article 15(3)(a) APD (recast) does not only require the person conducting the interview to take into account an applicant's gender but also his/her **'sexual orientation' [and/or] 'gender identity'.**

The Yogyakarta Principles relating to sexual orientation and gender identity, developed by a group of international human rights experts in 2007, give a definition of sexual orientation and gender identity as laid out in Table 11 below.

([169]) See UNHCR, *Guidelines on international protection no 1: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (7 May 2002) UN Doc HCR/GIP/02/01.

([170]) The CJEU has touched upon the meaning of gender when considering the principle of equal treatment for men and women with regard to working conditions under Directive 76/207/EEC [1976] OJ L 39/40. Having to determine, inter alia, whether the dismissal of a transsexual person because of gender reassignment constituted a breach of that directive, the CJEU ruled that it was. In so concluding, the Court only implicitly relied on the notion of gender as presently understood, ruling that 'the scope of the directive cannot be confined simply to discrimination based on the fact that the person is of one or other sex', but was also applicable in case of gender reassignment. See CJEU, Judgment of 30 April 1996, case C-13/94, *P v S and Cornwall County Council*, EU:C:1996:170C-JEU, para. 20. For national case-law, see e.g. Supreme Administrative Court (Czech Republic), judgment of 29 July 2015, *KB* v *Ministry of Interior*, 4 Azs 114/2015-27, where the court observed that Muslim women, who have during their marriage given birth to a child whose father is not their husband, share a common characteristic that cannot be changed (a child from non-marital relationship) within the meaning of Art. 10(1)(d) QD and that at the same time they may be perceived as a distinct group by the surrounding predominantly Muslim society and become the subject of rejection or discrimination. The Supreme Administrative Court therefore concluded that married Muslim women with a non-marital child may be, under certain circumstances related to the situation in the country of origin, considered as a social group within the meaning of the aforementioned provision of the QD.

Table 11: The 2007 Yogyakarta Principles definitions ([171])

Sexual orientation	… 'is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.'
Gender identity	… 'is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.'

Article 4(3)(c) (recast) also identifies **age** as a relevant factor. There are special protection and procedural guarantees for minors which are considered at Sections 5.2.1,5.2.2 and 5.2.3, while issues relating to evidence and credibility assessment in cases involving minors are considered at Section 5.2.4. It is also important to keep in mind that ill-treatment which may not rise to the level of persecution for an adult may do so in the case of a child and that a child's youth, immaturity and vulnerability will be related to how that child experiences or fears harm ([172]). Old age may also make an applicant vulnerable and in need of special procedural guarantees. Old age may also be a relevant factor when assessing an applicant's statements and the need to be realistic about what an applicant can be expected to know or remember (see further Section 6.1 below).

Article 24 APD (recast) requires Member States to assess whether an applicant is in need of special procedural guarantees. Recital (29) APD (recast) indicates non-exhaustively that such guarantees may be needed 'due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence'.

An individual assessment must, therefore, take into consideration an applicant's **vulnerability.** This includes, but is not limited to, the matters set out in recital (29) (see further Section 6.7). The notion of vulnerability thus includes gender and sexual orientation/gender identity further analysed in Sections 6.5 and 6.6 below and the impact of traumatic experiences considered further in Section 6.2, which is of particular relevance when assessing the statements of victims of torture, rape or other serious forms of violence.

Disability, serious illness and mental disorders and any other vulnerability ([173]), where established, must also be taken into account in the assessment of a claim as it may affect the way and the extent to which an applicant is able to give a consistent and coherent account of the basis of his claim in the personal interview or in any subsequent statements and so impact on the assessment of credibility. For example, the Supreme Administrative Court of the Czech Republic held, with the reference to the UNHCR guidelines on gender-related persecution, that victims of gender-related persecution need special treatment and assistance, especially if they have suffered serious physical and/or psychological trauma. The court considered that they may be afraid of officials or of punishment imposed by their family or surrounding society. In the case of victims of sexual or other comparable violence, it may be necessary to conduct a second or even third interview in order to establish a certain level of confidence between

([171]) *The Yogyakarta Principles: principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, p. 6. See also the UNHCR, *Guidelines on international protection no. 9: Claims to refugee status based on sexual orientation and/or gender identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees* (23 October 2012) UN Doc HCR/GIP/12/09.

([172]) Upper Tribunal (United Kingdom), judgment of 24 November 2016, *JA* (child and risk of persecution) Nigeria [2016] UKUT 560, para. 16.

([173]) For further background information on vulnerable groups and practical tools guidance for administrative decision-makers see the EASO Tool for Identification of Persons with Special Needs, 2016.

the applicant and the official conducting the interview in order to obtain all the relevant information. It is also important to bear in mind possible emotional distraction, the traumas suffered and cultural differences. The aim of the interview, the focus of which is the testimony of rape or other sexual violence, is not to find out about all possible details of the abuse, but rather to focus on events before and after the violent act and related circumstances. It must be taken into account that often the person does not know the reasons why she/he was sexually abused. The court concluded that if the testimony about traumatic events is hesitant, incomplete or presented with certain reservation, it cannot be assessed to the detriment of the applicant ([174]).

In *JL* (medical reports — credibility) ([175]), the UKUT referred to the Joint Presidential Guidance to be followed in United Kingdom asylum tribunals on the assessment of evidence from vulnerable applicants, which gives the following advice:

> Consider the evidence, allowing for possible different degrees of understanding by witnesses and [applicants] compared to those who are not vulnerable, in the context of evidence from others associated with the [applicant] and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
>
> The decision should record whether the tribunal has concluded the [applicant] (or a witness) is a child, vulnerable or sensitive, the effect the tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the bunal was satisfied whether the [applicant] had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind ([176]).

It is therefore essential to identify whether an applicant has a vulnerability and the extent to which it affects the assessment of material evidence ([177]).

The fact that the application must be considered individually does not necessarily require applicants to have given a credible account of all the elements of their claim ([178]). For example, despite a lack of credibility in their statements, there may be a medical report which is considered decisive ([179]). Similarly, even though their account of events in their country of origin causing them to leave may be rejected as unreliable or incredible when the decision-maker is assessing what facts have been established, their claim may nonetheless succeed at the second stage of the assessment, if they have established that they are members of a group known to be generally at real risk of serious harm ([180]).

([174]) Supreme Administrative Court (Czech Republic), *KB* v *Ministry of Interior*, op. cit., fn. 170.

([175]) Upper Tribunal (United Kingdom), judgment of 28 January 2013, *JL* (medical reports-credibility) [2013] UKUT 145, para. 26.

([176]) United Kingdom Tribunals Judiciary, Joint Presidential Guidance Note No 2 of 2010, Child, Vulnerable Adult and Sensitive Appellant Guidance.

([177]) See Council of State (Netherlands), judgment of 7 March 2012, 201007907/1/V3, ECLI:NL:RVS:BV9262; Cour nationale du droit d'asile (National Asylum Court, France), grande formation, 30 March 2017, *Mme F*, decision no 16015058.

([178]) ECtHR, judgment of 26 July 2005, *N v Finland*, application no 38885/02, paras. 154-157, where the applicant's evidence was described as evasive but in the light of the overall evidence aspects of his evidence were found sufficiently credible to show a real risk on return. The approach is reiterated in ECtHR, *JK and Others v Sweden*, op. cit., fn. 20, para. 93.

([179]) ECtHR, judgment of 5 September 2013, *I v Sweden*, application no 61204/09, paras. 59-69; and ECtHR, judgment of 19 September 2013, RJ c France, application no 10466/11, paras. 41-43 (available in French only). The ECtHR found that a medical report carried out immediately on the arrival of the applicant by the Roissy airport medical unit described 14 recent wounds by burning. This was an important element of the case, as by their nature, gravity and recent character, the wounds constituted a strong presumption that the applicant was submitted to a treatment contrary to Art. 3 ECHR, in his country of origin. The asylum application was rejected at both administrative and judicial stages without any tentative assessment on the origin of those wounds nor on the risks they could reveal and the ECtHR held that the respondent government, by merely referring to the gaps in the applicant's account, did not dispel the strong suspicions on the origin of the wounds.

([180]) ECtHR, *Salah Sheekh v the Netherlands*, op. cit., fn. 41, paras. 148 and 149 on the Ashraf in Somalia. For further consideration of the effect of lies in an applicant's statements, see Section 4.3.6.1.

The requirement that the assessment be carried out on an individual basis does not mean that it is always necessary for applicants to show that they have been targeted or singled out. In certain cases it may be sufficient to establish that the applicant is simply a member of a class (e.g. civilians in countries with an exceptionally high level of armed conflict) ([181]) or groups (e.g. persecuted minorities) where the group is still being targeted. These cases still require an individual assessment but this is more straightforward as all that has to be shown is membership of the relevant class or group ([182]). However, in all cases the requirement remains to consider in the light of the personal circumstances of the individual concerned, whether that person has a well-founded fear of persecution or would face a real risk of suffering serious harm ([183]).

4.3.2 Objective and impartial assessment

Article 10(3)(a) APD (recast) requires:

Article 10(3)(a) APD (recast)

Member States shall ensure that decisions by the determining authority ([184]) on applications for international protection are taken after an appropriate examination. To that end, Member States shall ensure that:

(a) applications are examined and decisions are taken individually, objectively and impartially[.]

Recital (17) APD (recast) states:

Recital (17) APD (recast)

In order to ensure that applications for international protection are examined and decisions thereon are taken objectively and impartially, it is necessary that professionals acting in the framework of the procedures provided for in this directive perform their activities with due respect for the applicable deontological principles.

It is therefore the task of courts and tribunals to ensure that the determining authority has conducted an appropriate examination and that decisions are taken individually, objectively and impartially.

It goes without saying that a decision-maker should not prejudge a case or approach the evidence with a closed mind. There should be neither a presumption of credibility nor a presumption of falsehood. The requirement of **objectivity** concerns how the relevant elements of the application and the evidence produced in support (including the matters set out in

([181]) CJEU, judgment of 17 February 2009, case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, EU:C:2009:94. See also See also UNHCR, Guidelines on international protection no 12: claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions, 2 December 2016, HCR/GIP/16/12.
([182]) See EASO, Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis, December 2016, op. cit., fn. 3, Section 3.1.2.
([183]) CJEU, Y and Z, op. cit., fn. 167, para. 72 and CJEU, *Elgafaji*, op cit., fn. 181.
([184]) Defined in Art. 2(f) of the APD (recast) as 'any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases'.

Article 4(3)(a)-(e) QD (recast)) are to be assessed. It should be noted that if evidence is not analysed objectively, then the decision taken may not qualify as objective. The application must be assessed as a whole taking into account all factors relevant to the applicant including age, gender, cultural, educational and linguistic background, disabilities, health issues, trauma, sexual orientation, shame or stigma ([185]) together with all other relevant evidence. There must be an objective assessment of the evidence putting aside speculation, intuition or subjective or unfounded assumptions ([186]).

Objectivity also involves the decision-maker being aware of prejudices and preconceptions about how people behave. If evidence is disbelieved simply because the decision-maker considers that it describes an event in the country of origin that could or would not have happened in the host country, such disbelief may indicate a failure of objectivity. That event must be assessed in the context of the evidence as a whole and in particular in the light of the evidence relating to the applicant's country of origin. There may be good grounds for finding that that evidence is to be rejected but that finding must be based on a full analysis of the evidence. See also Sections 3.3.3 on cultural differences and geographic distance and 6.4 on cultural differences.

Speculative reasoning that reflects a decision-maker's personal theory of how an applicant could or should have acted, or how certain events could or should have unfolded violates the principle of objectivity unless it is based on independent, reliable, and objective sources ([187]).

In *A, B and C*, the CJEU specifically considered the issue of 'stereotyped notions' as to the behaviour of homosexuals being relied on by the competent authorities to verify the applicant's sexual orientation. It ruled that 'the assessment of applications for the grant of refugee status on the basis solely of stereotyped notions associated with homosexuals […] does not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned ([188]).

Whilst Article 10(3) APD (recast) relates to determining authorities, **objectivity** and **impartiality** are also fundamental requirements of any judicial assessment of the evidence in an appeal. Impartiality is required by the provisions of the EU Charter, Article 47 of which requires 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' ([189]).

4.3.3 Rigorous scrutiny

Recital (34) APD (recast) says that '[p]rocedures for examining international protection needs should be such as to enable the competent authorities to **conduct a rigorous examination of**

([185]) Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 1, op. cit., fn. 27, p. 48. See also Section 6.6.

([186]) Ibid., p. 47. See also Herlihy, J., Gleeson, K. and Turner, S. (2010), 'What Assumptions about Human Behaviour Underlie Asylum Judgments', *IJRL*, pp. 351-366.

([187]) See Supreme Administrative Court (Czech Republic), *SN v Ministry of Interior*, 5 Azs 66/2008-70, op. cit., fn. 94, where the court said that the decision-maker could not refuse to accept the alleged facts solely for the reason that a different course of events, or an alternative explanation other than the one presented by the applicant, was possible. See also High Court (Ireland), judgment of 21 March 2014, *ME v Refugee Appeals Tribunal & ors*, [2014] IEHC 145, in which it was held that to reject credibility based upon speculation creates an unlawful credibility finding unfairly against the applicant; Court of Appeal (England and Wales, United Kingdom), judgment of 16 December 2014, *MA (Eritrea) v Secretary of State for the Home Department* [2014] EWCA Civ 1608, para. 17: 'It would have been difficult for [the judge] to draw any further inferences from the evidence that was available without being accused of speculation given the lack of material once MA's account was disbelieved'; and Court of Session (Scotland, United Kingdom), *Wani & ors v Secretary of State for the Home Department*, op. cit., fn. 54, para. 24, '[…] a tribunal of fact making an adverse finding of credibility must only do so on reasonably drawn inferences and not simply on conjecture or speculation. Inferences concerning the plausibility of evidence must have a basis in that evidence […] nor is it appropriate for the finder of fact to construct his own hypothesis as to how events unfolded.' Other references include UNHCR, *Beyond proof*, op. cit., fn. 14, p. 77, and Herlihy, J., Gleeson, K. and Turner, S., op. cit., fn. 186.

([188]) CJEU, *A, B and C*, op. cit., fn. 13, para. 62. For more on this para. of the judgment see text at fn. 150 above.

([189]) See also the provisions of Art. 10 of the Universal Declaration of Human Rights, General Assembly Resolution 217 A, 10 December 1948.

applications for international protection' ([190]). The phraseology used by the CJEU to describe the standard of scrutiny required has been similar although not identical.

In *Abdulla*, the CJEU held that in asylum cases, 'the assessment of the extent of the risk must in all cases be carried out with vigilance and care since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union' ([191]). In *Samba* Diouf, it held that the applicant should have the right to a 'thorough review by the national court' of the legality of a final decision adopted in an accelerated procedure — and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded ([192]). In *Y and Z*, in the context of the assessment of risk, the Court cited *Abdulla* ([193]) and referred again to the need for vigilance and care ([194]).

The CJEU stressed that the right of every person to be heard before any individual measure which would affect them adversely is taken is applicable also in procedures for granting subsidiary protection (this being the procedure at issue in the case) and affirmed the importance of the right to be heard and its very broad scope in the EU legal order. The Court held that this requires the authorities to pay due attention to observations submitted by the person concerned, 'examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision' ([195]).

There is also specific provision made for a right to judicial oversight of decisions of the determining authority in the CEAS legislation. Article 46(1) APD (recast) provides that Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal against decisions taken on issues of international protection ([196]). Article 46(3) provides that, in order to comply with this requirement, provision must be made for a full and *ex nunc* examination of both facts and points of law ([197]) (in this context see Section 3.1.1 on effective remedy).

The ECtHR jurisprudence refers to close scrutiny and rigorous assessment. The Court uses the phrase 'close scrutiny' in relation to national authorities. In *Shamayev*, it stated that an applicant's complaint alleging that his/her removal would expose him/her to ill-treatment contrary to Article 3 ECHR 'must imperatively be subject to close scrutiny by a "national authority"' ([198]). The ECtHR uses the phrase 'rigorous assessment' when considering the standard to be met as part of an effective remedy. The intensity of review required from appeal bodies is that 'the assessment of the existence of a real risk must necessarily be a rigorous one' ([199]).

([190]) Emphasis added. Upheld e.g. in Council of State (Greece), decision of 29 August 2011, application no 2512/2011 (see EDAL English summary).
([191]) CJEU, judgment of 2 March 2010, Grand Chamber, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland*, EU:C:2010:105, para. 90.
([192]) CJEU, *Samba Diouf*, op. cit., fn. 34, para. 56.
([193]) CJEU, *Abdulla and Others*, op. cit., fn. 191, para. 90.
([194]) CJEU, *Y and Z*, op. cit., fn. 167, para. 77.
([195]) CJEU, *MM*, op. cit., fn. 82, para. 88.
([196]) The importance of the need for a thorough review is emphasised in Council of State (Netherlands), decision of 13 April 2016, 201506502/1/V2, op. cit., fn. 36, that the judicial review of the credibility assessment of an international protection claim will be more intensive than the previous practice. For further information, see EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018, op. cit., fn. 3, Section 6.1.
([197]) Note the qualification in Art. 46(3) to 'at least in appeals before a court or tribunal of first instance'.
([198]) ECtHR, judgment of 12 April 2005, Shamayev and Others v Georgia and Russia, application no 36378/02, para. 448 and ECtHR, JK and Others v Sweden, op. cit., fn. 20, para. 77.
([199]) ECtHR, judgment of 17 July 2008, *NA v United Kingdom*, application no 25904/07, para. 111, referring to ECtHR, judgment of 15 November 1996, Grand Chamber, Chahal v United Kingdom, application no 22414/93, para. 96, and ECtHR, judgment of 28 February 2008, Grand Chamber, *Saadi v Italy*, application no 37201/06, para. 128.

4.3.4 The principle that information relied on must be disclosed

Article 23(1) APD (recast) sets out the general principle that a legal adviser assisting or representing an applicant 'shall enjoy access to the information in the applicant's file on the basis of which the decision is or will be made'. The article then sets out five circumstances when access may be denied on condition that two cumulative conditions are met, as outlined in Tables 12 and 13 below.

Table 12: Exceptions to legal advisers' access to information in applicants' files under Article 23(1) APD (recast)

Exceptions to legal advisers' access to information in applicants' files where disclosure of information or sources would:	
1	'jeopardise national security';
2	jeopardise 'the security of the organisations or person(s) providing the information';
3	jeopardise 'the security of the person(s) to whom the information relates';
4	compromise 'the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States'; or
5	compromise 'the international relations of the Member States'.

Table 13: Two conditions for implementing an exception to legal advisers' access to information under Article 23(1) APD (recast)

Member States shall:	
(a)	'make access to such information or sources available to the authorities referred to in Chapter V [i.e. the relevant appeal body]; and'
(b)	'establish in national law procedures guaranteeing that the applicant's rights of defence are respected.'

Whilst it is for Member States to decide how this is done, Article 23(1) APD (recast) provides that this may in particular include 'grant[ing] access to such information or sources to a legal adviser or other counsellor who has undergone a security check, insofar as the information is relevant for examining the application or for taking a decision to withdraw international protection'.

This provision could be linked to the principles recognised by the CJEU ([200]) permitting the use of undisclosed evidence provided that the non-disclosure has a legitimate aim and is necessary ([201]). But it must be balanced against the duty of the Member States to 'establish in national law procedures guaranteeing that applicants' rights of defence are respected' in line with Article 23(1)(b) APD (recast).

The ECtHR takes a similar approach. In *A and Others* v *the United Kingdom*, an appeal relating to the use of undisclosed evidence before the Special Immigration Appeals Commission in the

([200]) The principles have not yet been considered in the context of international protection claims but in (judgment of 4 June 2013, Grand Chamber, case C-300/11, EU:C:2013:363) in the context of a national security case, the CJEU ruled that when the competent national authorities establish in accordance with national procedural rules that state security would be compromised by a precise and full disclosure, it is incumbent on the national court to ensure that the applicant is informed of the essence of the grounds constituting the basis of the decision in question in a manner which takes due account of the reasons for the confidentiality of the evidence.

([201]) Art. 52(1) of the EU Charter provides that subject to the principle of proportionality, limitations to the exercise of rights and freedoms recognised by the Charter 'may only be made if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

United Kingdom, the Court accepted that there was a strong and legitimate public interest in states obtaining information about terrorist groups and their associates and in maintaining the secrecy of the sources of such information ([202]). However, the applicant's rights to procedural fairness had to be balanced against this important public interest. The Court affirmed:

> Against this background, it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others. Where full disclosure was not possible, Article 5(4) ECHR [right to liberty] required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him ([203]).

Article 23(1) APD (recast) refers specifically to 'information in the appellant's file' as disclosable. However, there may be circumstances in which disclosure is sought of information not on the file as such. This may be a request for further details about how the information was obtained or who it was from, if the source is anonymous, or may relate to information relevant to an applicant's claim which is said to be in the possession of the authorities but has not been disclosed.

In France, the Cour nationale du droit d'asile (National Asylum Court) has held that the identity of an anonymous source need not be disclosed in the light of the need to protect his/her security but a summary had to be produced of the declarations, and the judge could not base a decision only on the basis of confidential information ([204]). This jurisprudence has been confirmed by the reform of French asylum law adopted in July 2015. Article L. 733-4 of the Code on the entry and stay of foreigners and asylum law provides that where the Office français de protection des réfugiés et apatrides (French Office for the protection of refugees and stateless persons) (determining authority) relies on an anonymous source in order to guarantee the security of its source, it must justify the need for confidentiality and provide a summary of the elements of this piece of information. The law also makes clear that judges cannot found their judgment exclusively on confidential information.

The United Kingdom Upper Tribunal has held that while in international protection claims there is no general duty of disclosure on the state, there was a duty on the secretary of state not to mislead by failing to disclose information which was known or ought to have been known to detract from information relied on by reference to COI reports, or other evidence. Further, the secretary of state could not make assertions 'that she knows or ought to know are qualified by other material under her control or in the possession of another government department' ([205]). A claimed failure to disclose was a matter for the tribunal to consider and in particular whether undisclosed material was relevant to the issues, whether the public immunity claim was made out and whether the material was of such significance that fairness required a direction that the material in whole or part be disclosed ([206]).

In order to maintain the balance between national interest considerations and the applicant's right to an effective remedy under Article 46(3) APD (recast) in conjunction with Article 47

([202]) ECtHR, judgment of 19 February 2009, Grand Chamber, *A and Others v United Kingdom*, application no 3455/05, paras. 202-224.
([203]) Ibid., para. 218. Compare this with the principle of proportionality under Art. 52(1) of the EU Charter.
([204]) Cour nationale du droit d'asile (National Asylum Court, France), judgment of 27 February 2015, *M. BA*, no 11015942; Supreme Administrative Court (Czech Republic), judgment of 20 June 2007, *RK v Ministry of Interior,* 6 Azs 142/2006-58, where a similar conclusion was reached.
([205]) Upper Tribunal (United Kingdom), judgment of 31 January 2013, *CM (EM country guidance; disclosure) Zimbabwe CG* [2013] UKUT 00059, para. 45 and see paras. 23-32 on the procedure for determining disclosure issues upheld in Court of Appeal (England and Wales, United Kingdom), judgment of 30 July 2013, *CM (Zimbabwe) v the Secretary of State for the Home Department* [2013] EWCA Civ 1303.
([206]) Upper Tribunal (United Kingdom), *CM (EM country guidance; disclosure) Zimbabwe CG*, op. cit., fn. 205, para. 29.

of the EU Charter, provision may need to be made for the disclosure of confidential information to qualified advisers who have undergone security checks, for directions prohibiting or restricting the further disclosure of such information, for open and closed sessions at appeal hearings, and for open and closed decisions ([207]).

4.3.5 Assessment must be based on all relevant elements

It can be deduced from the principles already referred to that the assessment of an application for international protection must be based on all the evidence ([208]). The right to good administration, an effective remedy, and an assessment which is individual, objective and impartial necessarily requires an assessment which takes all relevant matters into account.

This requirement is emphasised by the broad language of Article 4(1) QD (recast) requiring an applicant to submit all the elements needed to substantiate the application. Those elements are set out in Article 4(2) and identified as being 'all documents at the applicant's disposal […]' and 'the reasons for applying for international protection' (for the full list of such elements, see Table 7 in Section 4.2.4 above). The matters to be taken into account in assessing the application are set out in Article 4(3). Those matters whilst extensively defined are not exhaustive. The assessment requires them to be taken into account, but does not preclude taking any other relevant matter into account.

A careful and fair examination of the evidence requires that all relevant aspects of the evidence are looked at in the context of the evidence as a whole and that no aspect of the evidence be left out of account ([209]).

In this context, the Irish High Court held:

> First of all there is the principle that a judicial or quasi-judicial tribunal must have regard to all the evidence before it and cannot cherry pick the evidence. If it is to act judicially it must consider all of the evidence put before it. If there is a conflict with respect to the evidence such that the tribunal cannot resolve that conflict, other than by, for good and substantial reasons, preferring one piece of evidence over another […], then it is incumbent on the tribunal or court as the case may be, to state clearly its reasons for doing so […] It is perfectly within the province and jurisdiction of the RAT [Refugee Appeals Tribunal] […] to prefer some [country of origin] information over other information. What is critical, however, is that they give a reason for doing so. That does not mean that every piece of country of origin information must be alluded to in the judgment, but where there is a major conflict and where the status of one piece of country of origin information versus another […] is an issue of very significant importance in a case then the judgment should deal with that and if there is a preferment of one piece of evidence

([207]) CJEU, ZZ, op. cit., fn. 200, para. 64. See also ECtHR, *A and Others v United Kingdom*, op. cit., fn. 202, paras. 202-211. The use of open and closed sessions with the use of a Special Advocate to represent an appellant's interests was also found to be lawful and compliant with the ECHR by the House of Lords (United Kingdom), in judgment of 18 February 2009, *RB (Algeria) and Another v Secretary of State for the Home Department and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10.

([208]) See High Court (Ireland), judgment of 24 July 2009, *IR v Minister for Justice Equality & Law Reform & anor,* [2009] IEHC 353, para. 11, principle 4: 'The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed.'

([209]) Győr Administrative and Labour Court (Hungary), judgment of 24 June 2016, 17.K.27.132/2016/6: The OIN (determining authority) only took the statements of the applicant into account and disregarded the documents submitted. The court ruled that the fact that the OIN disregarded the documents submitted constituted such a serious breach of law that this act in itself would also be enough to quash the decision.

> over another, it should be justified so that the tribunal can be seen not to have acted arbitrarily but to have acted reasonably, rationally and impartially ([210]).

The United Kingdom Immigration and Asylum Tribunal (UKIAT) described the decision-maker's task as:

> […] to look at all the evidence in the round, to try and grasp it as a whole and to see how it fits together […]. Some aspects of the evidence may themselves contain the seeds of doubt. Some aspects of the evidence may cause doubt to be cast on other parts of the evidence. Some aspects of the evidence may be matters to which Section 8 ([211]) applies. Some parts of the evidence may shine with the light of credibility. The fact-finder must consider all these points together; and […] it is for the fact-finder to decide which are the important, and which are the less important features of the evidence, and to reach his view as a whole on the evidence as a whole ([212]).

The requirement on the applicant to submit all the elements of the claim must be read in the context of the duty of the Member State set out in Article 4(1) QD (recast) to assess the relevant elements in cooperation with the applicant. It must also be understood in light of the obligation under Article 10(3)(b) APD (recast) to ensure that up-to-date information as to the general situation prevailing in the country of origin is made available to those responsible for examining the application (for further details on these requirements, see Sections 4.2.2 and 4.2.3 above).

These requirements acknowledge that certain types of evidence will not be available to the applicant. They are designed to ensure that such matters as are relevant to the application are available to the decision-maker. It is only in these circumstances that the careful and impartial examination enjoined by the Court in *MM* can be carried out ([213]).

The practical consequence of this requirement is to ensure that there is a rigorous and thorough assessment of all the evidence ([214]). Consequently, the Irish High Court has considered that if a decision-maker decides to reject some evidence presented before the court or tribunal, he/she shall then provide 'any cogent or reasoned decision as to why the [evidence] submitted by the applicant [was] rejected' ([215]). Likewise, a United Kingdom court has judged that a decision-maker will err in law if he/she approaches the evidence in a compartmentalised way and reaches a conclusion before considering all the relevant evidence in the round, for example, by making an adverse finding on the credibility of an applicant's account and only then considering whether the findings made in a medical report are to be relied on ([216]).

([210]) High Court (Ireland), judgment of 30 November 2007, S v Minister for Justice Equality & Law Reform & ors [2007] IEHC 451.

([211]) This is a reference to Section 8 of the United Kingdom Asylum and Immigration (Treatment of Claimant's, etc.) Act 2004 providing that in determining whether to believe the statement made by or on behalf of a person who makes an asylum claim or a human rights claim, the deciding authority shall take account, as damaging the applicant's credibility, of any behaviour to which the section applies. The section then goes on to identify such behaviour.

([212]) United Kingdom Asylum and Immigration Tribunal, judgment of 5 July 2005, SM (Section 8: Judge's process) Iran [2005] UKAIT 00116, para. 10.

([213]) CJEU, MM, op. cit., fn. 82, para. 31 (UKAIT).

([214]) See High Court (Ireland), judgment of 24 July 2009, IR v Minister for Justice, Equality and Law Reform [2009] IEHC 353, para. 11 where the court lays down a set of principles for credibility assessment, see principle 4, where the court said that 'the assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived or correct instinct or gut feeling as to whether the truth is or is not being told'.

([215]) High Court (Ireland), judgment of 2 April 2015, JG (Ethiopia) v Refugee Appeals Tribunal & Ors [2015] IEHC 49, paras. 27 and 28. See also in the same sense: High Court (Ireland), judgment of 11 September 2012, Barua v Minister for Justice and Equality [2012] IEHC 456, paras. 23-32; High Court (Ireland), IR v Minister for Justice, Equality and Law Reform, op. cit., fn. 214, para. 11, principle 9.

([216]) Court of Appeal (England and Wales, United Kingdom), judgment of 17 March 2005, François Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367, paras. 20 and 24.

4.3.6 Assessment must be based on material facts

The assessment of the applicant's statements must be based on facts material to the core of the claim. Questions about events outside the core elements of the evidence are a proper basis for testing the general consistency of an account but they will not render core testimony incredible unless they undermine central, as opposed to peripheral or incidental, elements of the account ([217]).

4.3.6.1 The effect of lies

The fact that an applicant has told lies or even extensive lies does not mean by itself that they are material to or determinative of the outcome of the application without additional factors which indicate that the applicant's claim is unfounded. The obligation of the decision-maker is to respect the international obligations of the Member States towards people who do in fact fall within the protection of the Refugee Convention, however little such persons may have assisted their case by lying or acting in bad faith ([218]).

In *MA (Somalia)* ([219]), the United Kingdom Supreme Court considered the effect of lies told by an applicant in support of an application for international protection. It said that a lie may have a heavy bearing on the issue in question, or the decision-maker may consider that it is 'of little moment' but 'everything depends on the facts'. The court ruled:

> So the significance of lies will vary from case to case. In some cases, the [decision-maker] may conclude that a lie is of no great consequence. In other cases, where the [applicant] tells lies on a central issue in the case, the [decision-maker] may conclude that they are of great significance. MA's appeal was such a case. The central issue was whether MA had close connections with powerful actors in Mogadishu. The [decision-maker] found that he had not told the truth about his links with Mogadishu. It is in such a case that the general evidence about the country may become particularly important. It will be a matter for the [decision-maker] to decide whether the general evidence is sufficiently strong to counteract what we have called the negative pull of the [applicant's] lies ([220]).

In a case in which the determining authority had withdrawn international protection from a third-country national when it established that he had lied about his identity and his reasons for applying for international protection but his status was reinstated by the National Asylum Court on appeal, the French Conseil d'Etat (Council of State) ruled, that once his identity was established, the National Asylum Court must consider all relevant points of fact and law and appraise whether the beneficiary of international protection should retain that protection on the basis of the credibility of his personal statements and possible threats in case of return to his country ([221]).

([217]) IARLJ, Assessment of Credibility, CREDO project, op. cit., fn. 2, p. 36.
([218]) Court of Appeal (England and Wales, United Kingdom), judgment of 17 July 2007, GM (Eritrea), YT (Eritrea) and MY (Eritrea) v Secretary of State for the Home Department [2008] EWCA Civ 833, paras. 29-31. See also High Court (Ireland), judgment of 20 November 2012, A v Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform, (2012) IEHC 480, paras. 13-20.
([219]) Supreme Court (United Kingdom), judgment of 24 November 2010, MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49.
([220]) Ibid., para. 33.
([221]) Council of State (France), decision of 28 November 2016, *OFPRA* c *M B*, application no 389733 B.

4.3.7 Evidence assessment and confirmation of statements (Article 4(5) QD (recast))

It is important to emphasise that, whilst the Article 4(1) QD (recast) duty to substantiate an application would appear to encompass a duty to support statements with documentary or other evidence, there is **no general requirement that all aspects of the applicant's statements must be supported by documentary or other evidence.** This is made clear not only by the qualification that the duty to substantiate only extends to documents at the applicant's disposal, but primarily by the provisions of Article 4(5) QD (recast) which set out in specific terms the circumstances in which confirmation of statements with documentary or other evidence is not necessary. This provision is an acknowledgement of the difficulties faced by applicants seeking to establish their claims. Someone who has left his/her country of origin in danger of persecution or serious harm may have difficulty producing documentary or other evidence to support his/her claim ([222]), or there may simply be no documentary or other evidence to support asserted material facts.

It is important to emphasise that Article 4(5) QD (recast) must be read in the context of its preceding subparagraphs. Article 4(1) QD (recast) requires the applicant to submit the elements needed to substantiate the application for international protection (where the Member State considers it his/her duty to do so) and identifies those elements in Article 4(2) QD (recast). Article 4(3) QD (recast) sets how the assessment is to be carried out, Article 4(4) QD (recast) specifies that previous persecution is a serious indication of a future risk. Article 4(5) QD (recast) then deals with the situation where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and 'where aspects of the applicant's statements are not supported by documentary or other evidence'.

It can be seen that Article 4(5) is a narrow rule concerned only with the conditions under which an applicant can be excused the duty to confirm aspects of his/her statements where these are not supported by documentary or other evidence. The CJEU has yet to rule on whether the conditions set out in Article 4(5) are cumulative, as they appear to be on an ordinary meaning construction ([223]). However, if they are construed as cumulative, it is important to underline that meeting or failing to meet the conditions in part or in full cannot be determinative of the overall assessment of facts and circumstances addressed in Article 4(1)-(4) QD (recast). The overall assessment has to be conducted applying all the EU law principles and standards set out and analysed in Sections 4.3 to 4.9.

([222]) UNHCR Handbook, op. cit., fn. 28, para. 196 states that in most cases a person fleeing from persecution will have arrived with the barest necessities very frequently even without personal documents.

([223]) Court of Appeal (England and Wales, United Kingdom), judgment of 2 July 2014, MF (Albania) v Secretary of State for the Home Department, [2014] EWCA Civ 902; Dörig, H., op. cit., fn. 85, p. 1141, Art. 4, no 35.

Article 4(5) QD (recast)

Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:

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

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

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

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

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

These five conditions laid down in Article 4(5) QD (recast) are examined in the subsections which follow.

4.3.7.1 Genuine effort to substantiate the application

The first condition is set out under Article 4(5)(a) is that 'the applicant has made a genuine effort to substantiate his application'.

As already indicated in Section 4.2.3 above, the obligation on Member States to cooperate actively is balanced by the requirement on the applicant to make a genuine effort to substantiate the application as part of his/her duty of substantiation under Article 4(1), where Member States use the faculty provided by the first sentence of this article. A failure to make a genuine effort does not, as the CJEU in *MM* makes clear, relieve Member States of the duty to cooperate as this arises where confirmation is lacking 'for any reason whatsoever' ([224]). It is nonetheless clear that the Court had uppermost in mind evidence such as relevant 'precise and up-to-date information' on the country of origin and obtaining documentary evidence to which a Member State might have better access ([225]).

4.3.7.2 Submission of all relevant elements at the applicant's disposal and explanation regarding any lack of other relevant elements

The second condition set out at Article 4(5)(b) QD (recast) is that 'all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements'. This requirement links with the requirement

([224]) CJEU, MM, op. cit., fn. 82, para. 66.
([225]) Ibid., paras. 67 and 66.

set out in Article 4(5)(a). An applicant making a genuine effort to obtain the relevant elements, for example by contacting family members where it is practical to do so, should normally be in a position to give a satisfactory explanation regarding elements which are lacking. In any event, Article 4(2) mentions all the documentation at the applicant's disposal as elements needed to substantiate the application for international protection. For the meaning of 'at the applicant's disposal', see Section 4.2.4. In the context of Article 4(5)(b), a satisfactory explanation will need to explain why documents or other evidence, which the applicant is reasonably capable of producing, have not in fact been produced ([226]).

4.3.7.3 Coherent and plausible statements not running counter to available specific and general information

The third condition set out at Article 4(5)(c) QD (recast) is that 'the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case'.

Firstly, **the applicant's statements must be coherent.** This requires the statements to be understandable and make sense in the context of the applicant's individual position and personal circumstances and background considered as a whole.

Secondly, **the applicant's statements must be plausible.** In *Shepherd*, in the context of an applicant seeking to qualify for refugee status under Article 9(2)(e) QD, the CJEU referred to the need to establish the facts relied on 'with sufficient plausibility' ([227]). Although the CJEU has yet to interpret the term 'plausible', its meaning is clearly narrower in scope than credibility (since an account may not be credible even though it is plausible). Its meaning appears to overlap to some extent with the following words in Article 4(5)(c), namely 'not run[ning] counter to available specific and general information'. Yet 'plausible' cannot merely be a synonym, as then it would have no specific field of application. UNHCR has stated that 'plausibility relates to what **seems** reasonable, likely or probable' (emphasis added) ([228]).

Thirdly, **the applicant's statements must not run counter to available specific and general information relevant to the applicant's case.** This is an aspect of consistency in that it should at least not be inconsistent with specific evidence which could be COI, medical or other relevant expert evidence which meets the standards set out in Sections 4.7 and 4.8 ([229]). The reference to general information can relate to the context in which specific incidents are said to have occurred or to the general situation in the country of origin. However, in some particular cases applicants may be able to identify specific circumstances that give credibility to their own story even if they run counter to general COI. Decision-makers and members of courts and tribunals should remain alive to possible exceptions.

([226]) See e.g. Supreme Court (Slovenia), judgment of 3 April 2012, I Up 163/2012, (see EDAL English summary); and ECtHR, judgment of 20 March 1991, Cruz Varas v Sweden, application no 15576/89, para. 78.
([227]) CJEU, judgment of 26 February 2015, case C-472/13, Andre Lawrence Shepherd v Bundesrepublik Deutschland, EU:C:2015:117, para. 43.
([228]) UNHCR, *Beyond proof: Credibility assessment in EU asylum systems: Summary*, May 2013, p. 60.
([229]) As noted by the Hungarian Metropolitan Court, however: 'small discrepancies that are not related to the matter should not be taken into account': Metropolitan Court (Hungary), SMR v Office of Immigration and Nationality, op. cit., fn. 58.

4.3.7.4 Application made at the earliest possible time

Article 4(5)(d) QD (recast) requires the applicant to have 'applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so'.

This requirement must be read in the light of the reference in Article 10(1) APD (recast) which provides that 'Member States shall ensure that applications for international protection are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible'. Nonetheless, a failure to make a timely application is to be taken into account when assessing whether unsupported statements require confirmation.

What amounts to good reasons will depend upon the circumstances of each individual applicant. There may be strong personal, social and cultural reasons, for example in cases involving sexual violence, for not making a claim at the earliest opportunity (see Section 6.2). In any event, an opportunity must be given to explain any delay which may be relied on against an applicant.

4.3.7.5 General credibility of the applicant has been established

The final condition in Article 4(5)(e) QD (recast) is that 'the general credibility of the applicant has been established'. The reference to the general credibility of the applicant stands in contrast to the understanding given to credibility in the wider context of the assessment of the elements needed to substantiate an application for international protection ([230]). In this wider context, credibility is generally considered not to refer to the general truthfulness of applicants but to the overall credibility of their account and, in particular, the statements and documentary or other evidence produced in support of an application (see Section 1.2.8 above) ([231]). There is no guidance to date in CJEU judgments on the interpretation to be given to the 'general credibility of the applicant'. Necessarily, given the limited scope of Article 4(5), a failure to meet such a condition cannot be conclusive as to the credibility of the applicant's overall account.

4.3.8 Assessment in cases of doubt

In many cases, there will remain areas of doubt about aspects of the application. This can be so even where an applicant has made a genuine effort to substantiate his/her account. It can also be so when the Member State has done its best to cooperate with the applicant in the assessment of the claim by obtaining and taking into account COI and by giving the applicant an opportunity to produce further evidence and comment on areas of concern.

([230]) The wording of Art. 4(5)(c) and (e) QD (recast) reflects the wording of the UNHCR Handbook, op. cit., fn. 28, para. 204 which says that the benefit of the doubt should only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. When this is read in the light of para. 202 which refers to the examiner's personal impression of the applicant, it is questionable whether the Handbook is drawing a distinction between the credibility of the statements and the credibility of the applicant.

([231]) ECtHR, JK and Others v Sweden, op. cit., fn. 20, para. 93: 'Even if the applicant's account of some details may appear somewhat implausible, the Court has considered that this does not necessarily detract from the overall general credibility of the applicant's claim' [emphasis added]. See ECtHR, judgment of 5 July 2005, Said v the Netherlands, application no 2345/02, para. 53, and, *mutatis mutandis*, ECtHR, N v Finland, op. cit., fn. 178, paras. 154-155, 26 July 2005. See also High Court (Ireland), judgment of 24 November 2016, OO v Refugee Appeals Tribunal & ors, [2016] IEHC 734. Article 31(8)(e) APD (recast), which sets out a ground upon which Member States may accelerate the examination procedure and/or conduct it at the border, also focuses on the applicant's claim: 'the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing […]' [emphasis added].

As set out in Section 4.3.7, Article 4(5) QD (recast) sets out the conditions to be met where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not confirmed by documentary or other evidence. In such cases, 'those aspects shall not need confirmation' where the requirements identified in subparagraphs (a)-(e) are met.

In a number of Member States, issues relating to confirmation of aspects of an applicant's statements are addressed by reference to what is variously called the principle or rule of the benefit of the doubt ([232]). In this regard, it should be noted that exceptionally the Dutch language version of Article 4(5) QD (recast) actually states '*wordt […] het voordeel van de twijfel gegund*', which means 'shall […] be given the benefit of the doubt' instead of the words 'those aspects shall not need confirmation'. As established by the CJEU, the different language versions of EU legislation are all equally authentic ([233]) and 'must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part' ([234]).

The ECtHR also refers to it being frequently necessary to give an applicant the benefit of the doubt ([235]). In *JK and Others* v *Sweden,* for example, the Court held:

> Owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof. Yet when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions. […] Even if the applicant's account of some details may appear somewhat implausible, the Court has considered that this does not necessarily detract from the overall general credibility of the applicant's claim […] ([236]).

The ECtHR's reference to the benefit of the doubt appears to be based on the view of the UNHCR set out in its Handbook that 'if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt' ([237]).

Indeed, the ECtHR further expressed the view that both the standards developed by UNHCR and Article 4(5) QD (recast) 'recognise, explicitly or implicitly, that the benefit of the doubt should be granted in favour of an individual seeking international protection' ([238]).

However, in some jurisdictions (for example, Germany and the United Kingdom), Article 4(5) QD (recast) ([239]) is not treated as an expression of the principle of the 'benefit of the doubt'. There are seen to be two main differences. First, as the IARLJ has pointed out in its study on credibility assessment, this principle derives from criminal law. In this context the burden is on the state to demonstrate that, on the totality of the evidence before the court, there is no residual doubt which a reasonable person might entertain as to the guilt of the accused ([240]).

([232]) See e.g. Supreme Administrative Court (Czech Republic), SN v Ministry of Interior, 5 Azs 66/2008-70, op. cit., fn. 94.
([233]) CJEU, judgment of 6 October 1982, case C-283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, EU:C:1982:335, para. 18.
([234]) CJEU, judgment of 27 October 1977, case 30/77, Regina v Pierre Bouchereau, EU:C1977:172, para. 14.
([235]) ECtHR, JK and Others v Sweden, op. cit., fn. 20. See also ECtHR, judgment of 10 September 2015, RH v Sweden, application no 4601/14, para. 58, ECtHR, judgment of 20 July 2010, N v Sweden, application no 23505/09, para. 53; ECtHR, judgment of 9 March 2010, RC v Sweden, application no 41827/07, para. 50.
([236]) ECtHR, JK and Others v Sweden, op. cit., fn. 20, para. 93.
([237]) UNHCR Handbook, op. cit., fn. 28, para. 196. See also paras. 203 and 204.
([238]) ECtHR, JK and Others v Sweden, op. cit., fn. 20, para. 97.
([239]) Article 4(5) QD in the United Kingdom as the United Kingdom did not take part in the adoption of the QD (recast).
([240]) IARLJ, Assessment of Credibility, CREDO project, op. cit., fn. 2, p. 50.

Article 4(5) QD (recast) does not follow this approach. It regulates an alleviation of the duty to present evidence in favour of the applicant, but does not shift the burden of proof from the applicant to the state ([241]). Second, Article 4(5) is limited to cases where there is a lack of corroboration: 'where aspects of the applicant's statements are not supported by documentary or other evidence'. As a result, it is more limited in scope than the notion as set out in paragraph 204 of the *UNHCR Handbook* (where the precondition for affording an applicant the benefit of the doubt is that 'all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts') ([242]).

In the absence of guidance from the CJEU on this issue there are differing views on whether decision-makers should apply the benefit of the doubt as a rule or a principle, whether it adds anything of substance to the provisions of Article 4(5) QD (recast), or whether (even if it does apply) it is simply an aspect of applying a lower standard of proof or level of conviction.

In any event, these differing views do not detract from the need for a thorough analysis of the evidence taking into account, as appropriate, the difficulties faced by applicants for international protection in providing evidence to substantiate their application.

4.3.9 Standard of proof/level of conviction ([243])

Whilst the QD (recast) sets out the material conditions (criteria) for eligibility for refugee and subsidiary protection status, it does not refer directly to the level of conviction or standard of proof for establishing the facts and circumstances.

Article 2(d) QD (recast) setting out the definition of 'refugee' for the purposes of the directive mirrors the definition in the Refugee Convention including the phrase 'owing to a well-founded fear of being persecuted'.

In this context in *Y and Z* the CJEU held:

> It should be noted in that regard that, in the system provided for by the Directive, when assessing whether, in accordance with Article 2(d) thereof, an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution ([244]).

The Court took a similar approach to the issue of how an applicant would behave on return. It held that 'an applicant's fear of being persecuted is well founded if […] the competent authorities consider that it may reasonably be thought that […] he will engage in religious practices which will expose him to a real risk of persecution' ([245]).

([241]) Upper Tribunal (United Kingdom), judgment of 10 December 2014, KS (benefit of the doubt) [2014] UKUT 552 (IAC), para. 85; consenting: Dörig, H., op. cit., fn. 85, p. 1142, Art. 4 QD, para. 39.
([242]) Upper Tribunal (United Kingdom), KS (benefit of the doubt), op. cit., fn. 241, para. 83.
([243]) Diverse terminology is used regarding the standard of proof/degree of conviction and this terminology is not used in all Member States.
([244]) CJEU, Y and Z, op. cit., fn. 167, para. 76.
([245]) Ibid., para. 80.

In Article 2(f) QD (recast), a 'person eligible for subsidiary protection' is defined as a person who does not qualify as a refugee but 'in respect of whom substantial grounds have been shown for believing that the person concerned [...] would face a real risk of suffering serious harm [...]'. This can be seen as reflecting the jurisprudence of the ECtHR which began with the decision in *Cruz Varas* ([246]) and has been used consistently by the Court since then. It is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that if the measure complained of were to be implemented, he/she would be exposed to a real risk of being subjected to treatment contrary to Article 3 ECHR. A mere possibility is not enough ([247]). The same approach is implicit in the CJEU's judgment in *Elgafaji* when considering serious harm within Article 15 QD ([248]). In closely corresponding terms, Article 19(2) of the EU Charter refers to a 'serious risk' that an individual 'would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

In **civil law jurisdictions** (unlike common law jurisdictions), if the law simply says that a condition must be fulfilled then generally the party which has the burden of proof (prosecutor in a criminal case or a plaintiff in a civil case) must persuade the court '100 %' that this condition is fulfilled. Another situation, however, arises when a certain degree of probability is already inherent in the material law, as is the case with 'well-founded fear' of persecution and 'real risk' of serious harm. In such a situation, even in a civil law jurisdiction, the judge must work with this degree of probability as a part of the material rules by which he/she is bound. This is precisely the case with international protection cases.

Therefore, in civil law jurisdictions the judge must be convinced that the applicant in fact fulfils the criteria for recognition of refugee status or eligibility for subsidiary protection. But the material standard of his/her conviction is defined by the provisions of the QD (recast) ([249]). In the case of refugee status it is whether his/her fear of being persecuted is well founded. According to the German Federal Administrative Court, this is the case when there is a substantial probability ('*beachtliche Wahrscheinlichkeit*') that he/she will be persecuted, but this does not require a probability of more than 50 % ([250]). A well-founded fear can exist even if there is less than a 50 % probability that persecution will occur, although the mere theoretical possibility of persecution is not sufficient. The same applies to granting subsidiary protection. The material standard of conviction for the judge in subsidiary protection cases is the real risk of serious harm for the applicant. This, in essence, is the same standard as applied for refugee status when considering whether the applicant's fear is well founded ([251]).

Common law jurisdictions approach the assessment of evidence on the basis of considering whether an applicant has met a required standard of proof. In civil cases in Ireland and the United Kingdom, the standard of proof is the balance of probabilities. The Irish High Court, having reviewed United Kingdom and international case-law, concluded that the standard of proof being 'the balance of probabilities — coupled with, where appropriate, the benefit of the doubt' is the appropriate standard to apply in international protection cases ([252]). However, when considering whether an applicant has shown a well-founded fear of persecution, the

([246]) ECtHR, Cruz Varas v Sweden, op. cit., fn. 226, para. 69.
([247]) ECtHR, Saadi v Italy, op. cit., fn. 199, paras. 128 and 131.
([248]) CJEU, Elgafaji, op. cit., fn. 181, para. 43.
([249]) Federal Administrative Court (Germany), judgment of 14 July 2011, BVerwG 10 B 7.10, BVerwG:2010:140710B10B7.10.0, para. 8; Federal Administrative Court (Germany), judgment of 16 April 1985, BVerwG 9 C 109.84, BVerwGE 71, 180, 181.
([250]) Federal Administrative Court (Germany), judgment of 7 February 2008, BVerwG 10 C 33.07, BVerwG:2008:070208B10C33.07.0, para. 37, available in English at http://www.bverwg.de. See also Supreme Court (Spain), judgment of 9 December 2015, application no 1699/2015, ECLI:ES:TS:2015:5211, p. 9 (see EDAL English summary).
([251]) Federal Administrative Court (Germany), judgment of 1 June 2011, BVerwG 10 C 25.10, BVerwG:2011:010611U10C25.10.0, para. 22, available in English at http://www.bverwg.de.
([252]) See High Court (Ireland), ON v Refugee Appeals Tribunal & ors, op. cit., fn. 49, para. 63.

United Kingdom House of Lords held that it was enough to establish a reasonable degree of likelihood which could be described as 'a serious possibility', 'substantial grounds for thinking', or a 'reasonable chance' of persecution; this standard being lower than the civil standard of the balance of probability ([253]). The same standard applies to subsidiary protection and Article 3 claims, summarised as whether there are substantial grounds for believing that there is a real risk of serious harm, that test being no different from the test applied in asylum claims ([254]). Similarly, in some continental law jurisdictions, courts also use the standard of reasonable degree of likelihood, which is below 50 % probability ([255]).

There remain a number of issues relating to evidence assessment and credibility on which the CJEU has yet to give guidance. These include those just alluded to: whether the test of well-founded fear in the Article 2(d) QD (recast) differs from the test of real risk in Article 2(d) QD (recast) ([256]); whether the approach to the assessment of evidence differs in the light of the diverse phraseology used and whether both the common law approach to the assessment of facts with its reliance on a particular standard of proof and the civil law approach are compatible with EU law.

4.4 Methods for assessing the credibility of the applicant's statements and documentary and/or other evidence

Credibility assessment involves the process of inquiring into whether all or part of the statements or other evidence presented by the applicant relating to the material facts can be accepted in order to determine qualification for international protection. Material facts are those facts and circumstances which are legally relevant for qualification for international protection. Findings on credibility should be made in accordance with all the principles set out in Section 4.3.

The standards set out in this Section apply to the examination of applications in all administrative procedures, including accelerated and border procedures ([257]).

The assessment of the applicant's statements and documentary or other evidence submitted in support of the application must be consistent with the provisions of the Charter and the directives as set out by the CJEU in *A, B and C*. In consequence, the competent authorities must modify their methods for assessing such statements having regard to the specific features of each category of application ([258]).

([253]) House of Lords (United Kingdom), judgment of 16 December 1987, R v Secretary of State for the Home Department, Ex parte Sivakumaran [1988] AC 958, the House expressly indicating that the phraseology adopted indicated that a lesser degree of probability than the normal civil standard was sufficient. See also Supreme Court (United Kingdom), MA (Somalia) v Secretary of State for the Home Department, op. cit., fn. 219, para. 20, the court, without deciding on the point, proceeded on the basis that 'real possibility' was the correct test to apply to past and present facts both in Refugee Convention and Article 3 ECHR cases. The court indicated that it would be desirable for it to decide authoritatively on the point on another occasion.

([254]) House of Lords (United Kingdom), judgment of 26 May 2005, R v Secretary of State for the Home Department ex parte Bagdanavicius [2005] UKHL 38, para. 7; and United Kingdom Immigration Appeals Tribunal, judgment of 17 January 2001, Kacaj (Article 3 — Standard of Proof — Non-state actors) Albania [2001] UKIAT 00018, para. 12, where the Tribunal said that the test formulated by the ECtHR required the decision-maker and appellate body to ask themselves whether there are substantial grounds for believing that the applicant faces a real risk of relevant ill-treatment, that being no different from the test applicable to asylum claims. See also Supreme Court (United Kingdom), judgment of 7 July 2010, HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31 affirming the approach in the Court of Appeal (England and Wales, United Kingdom) in Batayav v Secretary of State for the Home Department [2003] EWCA Civ 1489.

([255]) See e.g. Administrative Court (Slovenia), judgment of 24 April 2015, I U 411/2015-57, para. 118.

([256]) For further discussion on the well-founded fear and the real risk tests, see EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, op. cit., fn. 3, Sections 1.8.1 and 2.7.1 respectively.

([257]) See Arts. 31(8) and 43(1) APD (recast) on accelerated and border procedures.

([258]) CJEU, A, B and C, op. cit., fn. 13, para. 54.

The CJEU in *A, B and C,* in response to a reference for a preliminary ruling on whether Article 4 QD and Articles 3 and 7 of the EU Charter imposed limits 'on the method of assessing the credibility of a declared sexual orientation', rephrased the question as whether these provisions imposed limits on the competent national authorities 'when they assess the facts and circumstances concerning the declared sexual orientation of an applicant for asylum' ([259]). When answering the questions submitted, the Court did so in the context of considering 'the methods of assessing statements and documents or other evidence'.

The Court rejected the argument put forward by the applicants that the competent authorities examining an application for asylum based on a fear of persecution on grounds of sexual orientation must hold the declared sexual orientation to be an established fact on the basis solely of the declarations of the applicant. It held that 'those declarations constitute, having regard to the particular context in which the applications for asylum are made, merely the starting point in the process of assessment of the facts and circumstances envisaged under Article 4 [QD]' ([260]).

It followed that, although it was for the applicant to identify his sexual orientation, which was an aspect of his personal identity, applications based on grounds of that sexual orientation were, in the same way as applications based on other grounds of persecution, subject to the assessment process provided for in that directive ([261]). The methods used by the competent authorities to assess the statements and documentary or other evidence submitted in support of the application must, however, be consistent with the provisions of the QD (recast) and APD (recast), and with the fundamental rights guaranteed by the Charter ([262]).

The Court then went on to consider the methods used to assess the statements and documentary evidence submitted in support of an application. It rejected four methods of assessment as set out in Table 14:

Table 14: Approaches to assessment rejected by the CJEU in *A, B and C*

1	The assessment of applications on the basis solely of stereotyped notions or founded on questions based only on stereotyped notions would be contrary to the requirements of Article 4(3)(c) QD (recast) requiring the authorities to take account of the individual position and personal circumstances of the applicant ([263]). The inability of an applicant to answer such questions cannot in itself constitute sufficient grounds for concluding that the applicant lacks credibility ([264]).
2	At interview, questions concerning details of the sexual practices of the applicant would be contrary to the right to respect for private and family life as affirmed by Article 7 of the EU Charter ([265]).
3	Allowing sexual acts to be performed, the submission of applicants to 'tests' to demonstrate their sexuality or the production by applicants of evidence such as films of their intimate acts would infringe human dignity contrary to Article 1 of the EU Charter ([266]).
4	Finding a lack of credibility merely because an applicant does not reveal his/her sexuality at the first opportunity given to set out the grounds for the application would fail to take into account the individual position and personal circumstances of each applicant and be contrary to Article 4(3) QD (recast) ([267]).

([259]) Ibid., para. 48.
([260]) Ibid., para. 49.
([261]) Ibid., para. 52.
([262]) Ibid., para. 53. See e.g. Győr Administrative and Labour Court (Hungary), judgment of 1 June 2016, 13.K.27.101/2016/7, the Court held that the psychological examination and report of the applicant's sexual orientation by a psychologist could not be accepted as it was contrary to Articles 4 and 7 of the EU Charter as interpreted by the CJEU in A, B and C, op. cit., fn. 13.
([263]) CJEU, A, B and C, op. cit., fn. 13, paras. 62 and 73.
([264]) Ibid., para. 63.
([265]) Ibid., para. 64.
([266]) Ibid., para. 65.
([267]) Ibid., paras. 67-70.

The CJEU accepted that the credibility of an applicant's account will be an important element in the assessment of evidence submitted in support of an application for international protection, but it is important to note that the references to credibility ([268]) are confined to the context of an assessment of the applicant's account and not to his/her personal credibility as such. Similarly, in its *Y and Z* judgment, the CJEU stated that '[t]he assessment of the extent of the risk […] will be based solely on a specific evaluation of the facts and circumstances, in accordance with the rules laid down in particular by Article 4 of the Directive' ([269]).

The QD (recast) contains a specific rule in respect of an applicant's statements. The main method of assessing the applicant's statements is by considering whether it is confirmed by documentary or other evidence of any type as set out in Section 4.3.7.

4.5 Credibility indicators

Given that Article 4(5) QD (recast) is limited to a specific rule as regards confirmation of statements, it is necessary to consider what guidance is given by the QD (recast) and the APD (recast) as regards the wider task for decision-makers of assessing evidence and credibility. This brings us back to the point made earlier that EU law only provides limited norms governing evidence and credibility assessment. In addition, the jurisprudence of the CJEU in international protection cases has so far only dealt with relatively few issues relating to the assessment of evidence and credibility. In consequence, it has given relatively little guidance to date on the indicators to be considered when assessing the credibility of an applicant's statements.

That said, the principles set out in Section 4.3 and on the methods of assessment in Section 4.4, read together with the conditions in Article 4(5) of the QD (recast) set out at Section 4.3.7, provide a basic framework within which the competent national authorities, acting under the supervision of their courts ([270]), must undertake the assessment of facts under Article 4(3) QD (recast) and the examination of the merits of an application for international protection. The assessment of the credibility of the applicant's statements and evidence is, therefore, carried out within the rules of procedure and evidence of each Member State subject to compliance with the requirements of the EU Charter and the provisions of any relevant directive ([271]).

The lack of specific EU law norms governing evidence and credibility assessment is not, however, the end of the matter, since there is an abundance of Member State case-law. The ECtHR has, in addition, considered the adequacy of the assessment made by the authorities of the contracting state when assessing issues of international protection under Article 3 ECHR. Building on these sources, it is possible to identify further criteria or indicators to be used when assessing credibility, as outlined in Figure 4 and the subsequent subsections below. These sources have, in turn, drawn on the very considerable work done by background studies

([268]) Ibid., paras. 59, 63 and 69.

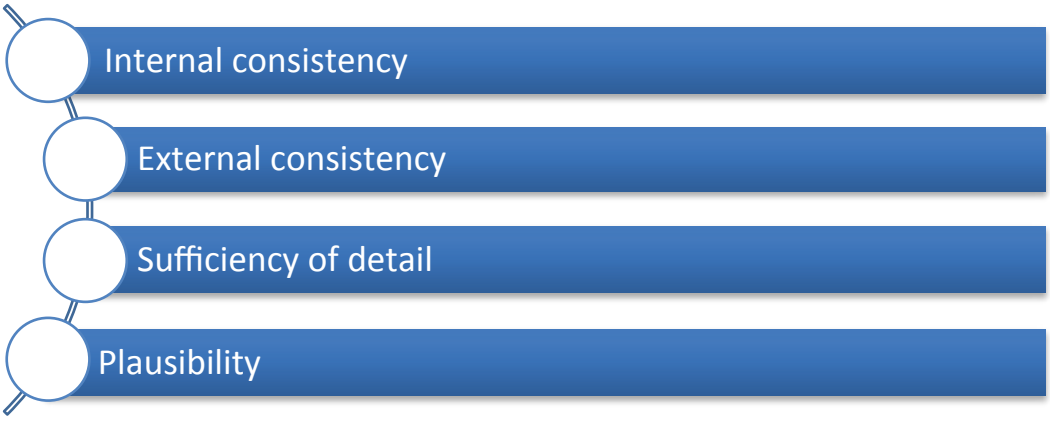
([269]) CJEU, Y and Z, op. cit., fn. 167, para. 77. A 2015 workshop in Berlin held by the IARLJ (Europe) Chapter sought to build on the Court's jurisprudence on methods of credibility assessment by reference to national case-law. Its results are set out in Berlit, U., Dörig, H. and Storey, H. (2015), 'Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach', *IJRL*, vol. 27, no 4, 649-666.

([270]) CJEU, MM, op. cit., fn. 82, para. 70.

([271]) In the Opinion of Advocate General Sharpston in A, B and C v Staatssecretaris van Veiligheiden Justitie (17 July 2014, joined cases C-148/13, C-149/13 and C-150/13, EU:C:2014:2111, paras. 32 and 50), she expressed the view that the assessment of credibility fell within the ambit of national rules as neither the EU Charter, the QD, nor the APD lays down any specific rules on the assessment of credibility. The Court, however, approached the questions referred in a different way (see Section 4.4) and in its Y and Z judgment (op. cit., fn. 167, para. 77), the CJEU referred to the assessment of risk being carried out in accordance with the rules laid down 'in particular by Article 4 of the [QD] Directive'.

on 'credibility indicators' ([272]). At the same time, the indicators that have been developed in national case-law and background studies, which are set out in the following subsections, reflect a common understanding of what the task involves based on widespread usage.

Figure 4: Credibility indicators



The need to have a common understanding as regards indicators of credibility arises from the principle requiring an impartial and objective assessment of each application and helps to ensure a transparent and consistent assessment. The indicators are to be applied to the material facts taking into account all the evidence with the purpose of determining which material facts can be accepted as established for the purpose of assessing risk.

It is important to note that the reference to, and application of, credibility indicators does not mean that in all cases certainty can always be acquired about the veracity of the applicant's account.

The term 'indicators' reflects recognition that there are no strict norms in this area of law and it is not possible to set out necessary or sufficient conditions for such assessment. A credibility indicator is no more than an indicator. An indicator perceived to be negative can be outweighed by other positive indicators or by factors relating to, for example, background, age or culture as considered further in Part 6. No one indicator can be determinative.

The indicators should be applied taking into account the principle of an individual assessment and the applicant's own particular circumstances and background, including, as already indicated in Section 4.3.1, factors such as age, education, culture, religion, gender, sexual orientation, health and vulnerability and how these impact on the application of the indicators in the circumstances of each particular case (see also Part 6).

It is also important that this section be read in in the context of the procedural standards referred to in Section 4.5.8 below, as compliance with proper procedural standards is relevant when considering the applicability of the indicators.

([272]) See e.g. IARLJ, Assessment of Credibility, CREDO project, op. cit., fn. 2; IARLJ, A Structured Approach to the Decision Making Process, op. cit., fn. 1; UNHCR, *Beyond proof*, op. cit., fn. 14, UNHCR, The Heart of the Matter: Assessing Credibility when Children Apply for Asylum in the European Union, CREDO report, December 2014; Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 1, op. cit., fn. 27; Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 2, op. cit., fn. 27.

4.5.1 Internal consistency

Internal consistency concerns findings regarding consistency, and any inconsistencies, discrepancies or omissions, in the statements and other evidence presented by applicants in their written communications and interviews, at all stages of processing their application and appeal until final disposal. The focus here is on the extent to which an applicant's account or story hangs together.

Consistently with national case-law, the ECtHR has said that an applicant's basic story should be consistent throughout the proceedings even if some aspects of the account may be uncertain or 'somewhat remarkable' provided they do not undermine the overall credibility of the claim ([273]). The Court has also said that when assessing the general credibility of the statements, complete accuracy of dates and events cannot be expected ([274]). A point may nevertheless be reached, even taking into account the need to give applicants the benefit of the doubt when assessing their evidence, that information presented gives strong reasons to question the veracity of the submissions. In such cases an applicant must provide a satisfactory explanation for the alleged discrepancies ([275]).

It is for the court or tribunal to assess the impact of any contradictions or omissions on the credibility of the applicant's statements on the material facts. Applicants cannot always be expected to have detailed knowledge or exact recall of matters such as times, dates and events (see Sections 6.1, 6.2, 6.3 and 6.4). Thus, whilst an inconsistency might be indicative of a lack of credibility, it may also be indicative of an applicant who is trying to remember what he/she experienced rather than what he/she stated previously (see Section 6.1). Proper consideration should also be given to any explanation for discrepancies and omissions arising from factors such as an applicant's, age, gender, sexual orientation or other vulnerability (see Section 4.3.1) ([276]).

Consideration must also be given to the fact that when initially interviewed an applicant may only have had the opportunity of putting his/her account briefly ([277]) or it may be that at that stage he/she was in fear of the authorities ([278]) or had limited understanding of what was required.

Delay in raising a particular issue may amount to an inconsistency in that it reflects a change in the way an applicant seeks to support a claim. However, it is clear from *A, B and C* that delay by itself does not in every instance justify a finding of a lack of credibility. It is one of the factors to be taken into account ([279]). Similarly, late submission of statements and late presentation of evidence may negatively affect credibility, unless valid explanations are provided ([280]). Further, the fact that some aspects of the evidence are rejected does not necessarily mean that the basic substance of the account has been undermined (see Section 4.3.6).

([273]) ECtHR, Said v the Netherlands, op. cit., fn. 231, para. 53, where the Court said it was difficult to imagine by what means other than desertion the applicant might have left the army. Even if the account of his escape might appear somewhat remarkable, the Court considered that it did not detract from the overall credibility of the applicant's claim that he was a deserter.
([274]) See e.g. ibid.; ECtHR, decision of 17 January 2006, Bello v Sweden, application no 32213/04. See also Section 6.1.
([275]) ECtHR, JK and Others v Sweden, op. cit., fn. 20, para. 93; and ECtHR, RH v Sweden, op. cit., fn. 235, para. 58.
([276]) See e.g. Court of Cassation, Civil Division VI (Italy), judgment of 5 March 2015, no 4522; Administrative Court of Giessen (Germany), judgment of 25 February 2014, no 1 K 2449/11.GI.A; High Court (Ireland), judgment of 16 September 2013, NM (Togo) v Refugee Appeals Tribunal & anor [2013] IEHC 436.
([277]) ECtHR, judgment of 18 November 2014, MA v Switzerland, application no 52589/13, para. 60. See also Court of Appeal (England and Wales, United Kingdom), judgment of 9 April 2014, JA (Afghanistan) [2014] EWCA Civ 450, para. 25 where the Court commented on the requirement to consider with care the extent to which reliance could properly be placed on answers given by an applicant in his initial and screening interviews.
([278]) UNHCR Handbook, op. cit., fn. 28, para. 198.
([279]) CJEU, A, B and C, op. cit., fn. 13.
([280]) See ECtHR, Cruz Varas v Sweden, op. cit., fn. 226, para. 78.

In any event, it is important to take into account that consistency is not necessarily an indication of credibility. It may sometimes indicate an account that has been memorised by a dishonest applicant. Conversely, inconsistencies may be indicative of an honest applicant trying to recall details of what he/she has experienced (see Section 6.1 below) or as a result of speaking about a traumatic event which he/she had previously been unable or unwilling to disclose (see Sections 6.2 and 6.3 below).

It is also important to consider the consistency of an applicant's statements with the documentary evidence produced by him/her in support of the application ([281]). Further consideration of documentary evidence is set out at Section 4.6.

4.5.2 External consistency

External consistency relates to consistency between the applicant's account (as given in his/her personal interview and/or in other statements) and generally known information, other evidence such as evidence from family or other witnesses, medical and documentary evidence relating to issues relevant to the claim, COI, and any other relevant country evidence ([282]). The importance of considering the consistency of the applicant's statements with such evidence is explicit from the inclusion in Article 4(5)(c) QD (recast) of a requirement that 'the applicant's statements […] do not run counter to available specific and general information […]'.

Accordingly the applicant's statements should not be inconsistent with items of external evidence such as COI, medical or other relevant expert evidence which meets the standards set out in Sections 4.6, 4.7 and 4.8.

The applicant's evidence should also be consistent with any statements made by family members or others related to the material facts. In assessing such evidence, any reasons (including those set out when considering internal inconsistency), which may explain inconsistencies and omissions, must be taken into account ([283]) with the further caution that different witnesses may see different parts of the same event or only recall some parts of it.

The applicant's statements should be consistent with generally known information. If the applicant's account contradicts known facts about matters such as dates, locations and the viability of making particular journeys or even scientific or biological facts, it may raise serious concerns about credibility ([284]).

As regards COI, the assessment of risk inevitably involves considering the applicant's claim against the background of the conditions in the country of origin. The consistency of an applicant's statements with COI and other expert evidence is thus an important factor in deciding whether the applicant has substantiated the claim ([285]). In some particular cases, applicants

([281]) ECtHR, *MA v Switzerland*, op. cit., fn. 277, paras. 62-67 provides a helpful illustration of how the ECtHR assessed the weight to attach to a summons and judgment produced by an applicant confirming at para. 62 that the veracity of the applicant's story must also be assessed in the context of the documents submitted.

([282]) See e.g. ECtHR, judgment of 1 October 2002, *Tekdemir v the Netherlands*, applications no 46860/99 and 49823/99; National Asylum Court (France), judgment of 25 January 2017, *M. T*, no 15037987.

([283]) Supreme Administrative Court (Czech Republic), judgment of 6 February 2008, *ES* v *Ministry of Interior*, 1 Azs 18/2007-55, where the court said that if the administrative authority finds out that statements made by different applicants for international protection about identical facts are contradictory, it is obliged to provide them with a possibility of explaining those contradictions before concluding that their statements lack credibility.

([284]) Court of Appeal (England and Wales, United Kingdom), judgment of 26 July 2006, Y v Secretary of State for the Home Department, [2006] EWCA Civ 1223, para. 25 where the court said that a decision-maker was not required to take at face value an account of facts proffered by an applicant, no matter how contrary to common sense and human behaviour the account may be and is entitled to find in an appropriate case that an account of events is so far fetched and contrary to reason as to be incapable of belief.

([285]) ECtHR, *JK and Others v Sweden*, op. cit., fn. 20, para. 79.

may be able to identify specific circumstances that give credibility to their own story even if they run counter to general COI. Decision-makers and members of courts and tribunals should remain alive to possible exceptions. The absence of COI to support a material fact does not necessarily mean that the incident did not occur or that the fact cannot be accepted. Much will depend on the context and the extent to which it is considered likely there would be COI regarding that incident. Equally there is a need to be alert to situations where some applicants may tailor their claims to be consistent with relevant COI which they consider assists their claim. See also Section 4.8.4.2 on COI and confirmation.

4.5.3 Sufficiency of detail

Generally it is reasonable to expect that a claim for international protection be substantively presented and sufficiently detailed, at least in respect of the most material facts of the claim. Insufficiency of detail may also constitute what is referred to in Article 4(5)(b) QD (recast) as a lack of 'relevant elements'.

If an applicant claims to have been arrested at a demonstration for the first time in his/her life, it would be surprising if no precise particulars can be given of when, where, how, etc. this took place, although this raises the issue of how much detail can reasonably be expected. In each case, a balanced and objective assessment is needed of whether the account presented by an applicant reflects what can be expected from someone in his/her particular circumstances, who is relating a genuine personal experience.

This will involve taking into account factors personal to the applicant such as education and background, which may or may not explain why he/she is unable to provide such detail (see Section 4.3.1). There may be a practical difficulty such as limited space on the application form. For some applicants, the personal interview will be the first time they have ever been asked to speak in a formal setting about themselves and their situation. It will also involve consideration of issues relating to memory, disclosure, culture, and vulnerability as set out in Sections 6.1, 6.3, 6.4, and 6.7 below ([286]). Such considerations may not necessarily excuse a lack of detail in the applicant's evidence but they do have to be taken into account.

An applicant's ability to provide sufficient detail will also depend on the quality and atmosphere of the personal interview ([287]). If applicants are interrupted or questions are put in a distrustful way, this may prevent them from responding fully, especially in relation to events which are difficult or painful to describe. The extent of the detail in an applicant's statement may also depend on whether he/she has had legal advice and on the quality of that advice. Therefore, the level of detail to be expected will depend on the facts of each case as required by the principle of individual assessment.

([286]) See e.g. Szeged Administrative and Labour Court (Hungary), judgment of 27 May 2014, 7.K.27.145/2014/9, concerning realistic expectations regarding memory and the need to focus the credibility assessment on the material facts.

([287]) Supreme Administrative Court (Czech Republic), judgment of 24 February 2004, *YA* v *Ministry of Interior*, 6 Azs 50/2003-89 (see EDAL English summary). The court stated that the personal interview with the applicant could not be carried out in general terms only, without requesting specific information from the applicant.

Similar considerations apply in assessing evidence where an applicant has been asked detailed questions about issues relating to religion ([288]), sexual orientation ([289]) or political opinion. Clearly the extent of an applicant's knowledge about the issue which forms the basis of his/her claim is relevant to an assessment of whether the claim is credible but the extent of the detailed knowledge to be expected will depend on the factors already considered. By way of example, in *A, B and C,* the CJEU said that the inability of an applicant to answer questions based on stereotyped notions associated with homosexuals could not in itself constitute sufficient ground for concluding that there was a lack of credibility ([290]).

An applicant may give vague answers but nonetheless may be giving a true account. If an adverse inference is to be drawn from vague answers, the lack of detail giving rise to the cause for concern should be identified at least in broad terms ([291]).

In the light of the various factors considered in this section, it is hardly surprising that in *HK* v *Secretary of State*, the EWCA said that the difficulty of the fact-finding exercise in asylum cases, where the evidence could be 'pretty unsatisfactory in extent, quality and presentation', was an acute problem ([292]).

4.5.4 Plausibility

As already noted, Article 4(5)(c) QD (recast) identifies plausibility as one of the conditions necessary to excuse an applicant from confirming his/her statements (see Section 4.3.7.3). In *Shepherd*, in the context of an applicant seeking to qualify for refugee status under Article 9(2)(e) QD, the CJEU referred to the need to establish the facts relied on 'with sufficient plausibility' ([293]). Although the CJEU has yet to interpret the term 'plausible', its meaning is clearly narrower in scope than credibility (since an account may not be credible even though it is plausible). Its meaning appears to overlap to some extent with the following words in Article 4(5)(c) QD (recast), namely 'not run[ning] counter to available specific and general information'. Yet 'plausible' cannot merely be a synonym as then it would have no specific field of application. UNHCR has stated that 'plausibility relates to what **seems** reasonable, likely or probable' (emphasis added) ([294]).

In *HK* v *Secretary of State*, the Court of Appeal of England and Wales (EWCA) said:

> […] in many asylum cases, some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue. The ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familiar factors, such as consistency with what the appellant has said before, and with other factual evidence (where there is any) ([295]).

([288]) Supreme Administrative Court (Czech Republic), judgment of 25 June 2015, *AR* v *Ministry of Interior*, 4 Azs 71/2015-54. The court said that when assessing the credibility of the applicant as a Christian, the decision-maker should have focused during questioning on the assessment of the applicant's life prior to the conversion, the conversion itself, an evaluation of the conversion by the applicant, the applicant's knowledge regarding his new religion and his religious activities. The conclusion on credibility could not normally be based solely on partial loopholes in the applicant's knowledge of specific details of Christianity.
([289]) See Section 6.6 and Table 32.
([290]) CJEU, A, B and C, op. cit., fn. 13.
([291]) United Kingdom Immigration Appeal Tribunal, judgment of 12 June 2003, JB (Democratic Republic of the Congo) [2003] UKIAT 00012.
([292]) Court of Appeal (England and Wales, United Kingdom), judgment of 20 January 2006, HK v Secretary of State for the Home Department [2006] EWCA Civ 1037, para. 27. See also Court of Appeal (England and Wales, United Kingdom), judgment of 16 December 2004, Gheisari v Secretary of State *for the Home Department* [2004] EWCA Civ 1854, paras. 10-11 and 20-21.
([293]) CJEU, Shepherd, op. cit., fn. 227, para. 43.
([294]) UNHCR, *Beyond proof: Summary*, op. cit., fn. 228, p. 60.
([295]) Court of Appeal (England and Wales), HK v Secretary of State for the Home Department, op. cit., fn. 292.

Care needs to be taken when relying on plausibility or its lack, because in general terms the concept relates to general assumptions about what is considered likely to happen. In the context of assessing claims for international protection, such assumptions may be influenced by culture, language and tradition (see Section 3.3.3). A finding of a lack of credibility should not be based on conjecture or speculation ([296]). In this context it may be particularly important to examine the reasons behind a finding of plausibility/implausibility. The Irish High Court has held that reasons must be given for finding an asserted fact implausible. It stated:

> The tribunal member found the applicant's evidence of fleeing to Chad 'unacceptable', and stated that 'it seems incredible that he coincidentally got a lift from a truck some 3 km from the place of violence and fled to Chad, across Lake Chad in a car ferry [...]'. […] To my mind, there is no cogent or logical rationale set out in the decision for the rejection of the applicant's account of how he got to Chad. In that circumstance, I cannot accept the respondents' argument that the finding falls into the category recognised by Hathaway as being built 'entirely upon a series of coincidences and chance too implausible on accumulative basis to be believed'. The absence of any reason for the finding means it cannot stand ([297]).

When considering plausibility there may be an overlap with findings on internal or external consistency but this serves to emphasise that the decision-maker must bear in mind that plausibility must be assessed in the context of the applicant's background, education, gender and culture.

In this context in *Y* v *Secretary of State*, the EWCA set out the importance of considering evidence in its proper context as follows:

> There seems to me to be very little dispute between the parties as to the legal principles applicable to the approach which an adjudicator […] should adopt towards issues of credibility. The fundamental one is that he should be cautious before finding an account to be inherently incredible, because there is a considerable risk that he will be over influenced by his own views on what is or is not plausible, and those views will have inevitably been influenced by his own background in this country and by the customs and ways of our own society. It is therefore important that he should seek to view an [applicant's] account of events, […], in the context of conditions in the country from which the [applicant] comes. The dangers were well described in an article by Sir Thomas Bingham, […] in a passage quoted by the IAT in *Kasolo* v *SSHD* 13190 […] ([298]).

Similarly, in *MM (DRC — plausibility) Democratic Republic of the Congo*, the UKIAT held that the assessment of credibility:

> […] can involve a judgement as to the likelihood of something having happened based on evidence and or inferences. The particular role of background evidence here is that it can assist either way with that process, revealing the likelihood of part or the whole of

([296]) High Court (Ireland), *IR* v *Minister for Justice Equality & Law Reform*, op. cit., fn. 205, para. 11, Principle 5.
([297]) High Court (Ireland), judgment of 22 September 2015, IFO v Refugee Appeals Tribunal & ors [2015] IEHC 586.
([298]) Court of Appeal (England and Wales), Y v Secretary of State for the Home Department, op. cit., fn. 284, para. 26. See Bingham, T. (1985), 'The Judge as Juror: The Judicial Determination of Factual Issues', in *Current Legal Problems*, Vol. 38, OUP, p. 14. In the article, Sir Thomas Bingham (later Lord Bingham) said that: 'An English judge may have, or think that he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships' engineer, or a Yugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibl[y] assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even — which may be quite different — in accordance with his concept of what a reasonable man would have done.'

> what was said to have happened actually having happened. It can be of especial help in showing that adverse inferences can be apparently reasonable when based on an understanding of life in this country and yet are less reasonable when the circumstances of life in the country of origin are exposed ([299]).

4.5.5 Demeanour

Demeanour has been described as 'the sum of a witness's conduct, manner, behaviour, delivery, inflection […] In short, anything which characterises his mode of giving evidence but does not appear in a transcript of what he actually said' ([300]).

Using demeanour as a basis for credibility assessment in the context of international protection claims should be avoided in virtually all situations ([301]). Demeanour is considered a poor indicator of credibility. If used as a negative factor, the judge must give sustainable reasons as to why and how the demeanour and presentation of the applicant contributed to the credibility assessment taking into account relevant capacity, ethnicity, gender and age factors. It should only be used (if at all) in the context of an understanding of an applicant's culture and background ([302]). However, it is correct to note that on frequent occasions courts and tribunals refer to the importance of having had the opportunity of seeing and hearing the witnesses. For example, the ECtHR 'accepts that, as a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned' ([303]). Accordingly, demeanour may have some impact in an oral hearing. The Irish High Court has given the following guidance on an assessment based on demeanour:

> [T]he decision-maker must be careful not to misplace reliance upon demeanour and risk construing as a deliberate lack of candour a demeanour which may be the result of nervousness, of the stress of the occasion and even of the embarrassment of being an asylum seeker. An apparent hesitation and uncertainty may well be attributable to difficulties in language and comprehension ([304]).

Accordingly, the decision-maker should generally avoid placing reliance on demeanour and appearance save in exceptional cases and then only in an evidenced understanding of the relevant culture. A particular demeanour or manner of expression may be intimately tied to the applicant's cultural background (see Section 6.4 below) or to anxiety about the potential outcome of the application for international protection.

([299]) United Kingdom Immigration Appeal Tribunal, judgment of 27 January 2005, MM (DRC-plausibility) Democratic Republic of the Congo [2005] UKIAT 00019, para. 15.
([300]) Bingham, T. (August 2000), *The Business of Judging: Selected Essays and Speeches*, OUP, p. 5.
([301]) IARLJ, Assessment of Credibility, CREDO project, op. cit., fn. 2, p. 41. See also, High Court (Ireland), judgment of 1 December 2016, MA (Nigeria) v Refugee Appeals Tribunal & Ors [2016] IEHC 16, for an informative overview of Irish case-law on 'demeanour' in the context of credibility assessments; Bender, R., Nack, A. and Treuer, W.-D. (2014), *Tatsachenfeststellung vor Gericht: Glaubhaftigkeits- und Beweislehre Vernehmungslehre*, Beck, 4th edition, paras. 224-227: 'The attempt to use demeanour to directly detect lies has clearly failed. […] Anomalies of behaviour often linked to lies such as nervousness and a diversion of one's gaze' have in fact proved to be less common among false statements (unofficial translation).
([302]) IARLJ, Assessment of Credibility, CREDO project, op. cit., fn. 2, p. 41.
([303]) See e.g. ECtHR, RC v Sweden, op. cit., fn. 235, para. 52; ECtHR, judgment of 26 June 2014, ME v Sweden, application no 71398/12, para. 78.
([304]) High Court (Ireland), judgment of 15 April 2011, HR v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform [2011] IEHC 151, para. 7. See also High Court (Ireland), JG (Ethiopia) v Refugee Appeals Tribunal & Ors, op. cit., fn. 215, para. 24.

4.5.6 Credibility indicators considered as a whole

As noted earlier, indicators of credibility are just that: they are indicators, not strict criteria or conditions. Whilst the four indicators identified above (internal and external consistency, sufficiency of detail and plausibility) reflect those applied in practice by courts and tribunals, none can be treated as determinative. Their significance in any particular case will vary considerably. It will always be necessary to consider their cumulative impact ([305]). In this regard, the Administrative Court of the Republic of Slovenia has introduced a structured approach to credibility assessment in its case-law ([306]).

The above analysis discloses that there is no simple answer to the question of how to assess credibility in international protection cases, save to repeat that the assessment must be carried out on the basis of the evidence as a whole taking into account the principles, methods and indicators set out in this analysis. These need to be applied sensitively ([307]), objectively and impartially to avoid either an ill-considered and simplistic rejection, or a naïve and unquestioning acceptance, of an account.

4.5.7 Other factors which may be relevant to assessing the facts

Pursuant to Article 31(8) APD (recast), Member States may provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be accelerated and/or conducted at the border or in transit zones in accordance with Article 43 in 10 specified conditions. As these are conditions which may justify an accelerated and/or border procedure, some may be considered as an illustration of specific factual circumstances which are relevant to assessing the facts. Even taken as having more general application and not as 'conditions' but simply factors, each individual factor still needs to be treated with caution. The applicant is still entitled to an individual and complete assessment of the application in accordance with the principles already set out. The reason for inclusion in an accelerated procedure must moreover be considered in the context of the evidence as a whole. Those conditions in Article 31(8) APD (recast) of conceivable relevance are set out in Table 15 below.

([305]) Turin Appeals Court (Italy), judgment of 30 May 2011, no RG 717/2011.

([306]) Administrative Court (Slovenia), judgment of 19 August 2009, I U 979/2009-9, which was reiterated in the judgment of the Administrative Court of 29 August 2012, I U 787/2012-4, paras. 84-94. The Supreme Court (Slovenia) confirmed that structured approach in its judgment in the case of I Up 471/2012, op. cit., fn. 58, paras. 21-22).

([307]) Court of Session, (Scotland, United Kingdom), Inner House, judgment of 11 December 2001, Asif v Secretary of State for the Home Department [2001] Scot CS 283, para. 16, where the court said: '[…] we accept, without reservation, that credibility is an issue which must be approached with care and sensitivity to cultural differences and the very difficult position in which applicants escaping from persecution often find themselves for a variety of reasons. It is, however, a matter of everyday experience that the credibility of witnesses can, and often must, be tested by examining what they say in regard to peripheral matters as well as central ones […] the credibility of applicants has to be judged, and, if a judgment is to be made, it is very difficult to see that it can be made without reference to the ordinary tests of consistency and inconsistency, always applied with due sensitivity'.

Table 15: Selected set of conditions for accelerating applications for international protection under Article 31(8) APD (recast)

(c)	'the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity and/or nationality that could have had a negative impact on the decision; or
(d)	'it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality; or
(e)	'the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country of origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection […]; or
(g)	'the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal; or
(h)	'the applicant entered the territory of the Member State unlawfully or prolonged his or her stay unlawfully and, without good reason, has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible, given the circumstances of his or her entry; or
(i)	'the applicant refuses to comply with an obligation to have his or her fingerprints taken in accordance with [the relevant regulations]. […]'

4.5.8 Consideration of procedural standards

The requirement to apply and maintain high standards of procedural fairness arises from the rights to good administration and to an effective remedy set out in Articles 41 and 47 of the EU Charter. Fair procedures are necessary to ensure applicants have a full opportunity of providing all the elements needed to substantiate their application for international protection. By way of example, a proper assessment of whether an applicant's statements are consistent and sufficiently detailed requires consideration of whether he/she was given the opportunity in a personal interview of providing the necessary details and of giving 'an explanation regarding elements which may be missing and/or any inconsistencies or contradictions' to the extent that they have become apparent at that stage (Article 16 APD (recast)). In this context it is useful to recall the ECtHR's judgment in *JK and Others* v *Sweden*, noting that 'it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof'. Yet when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions ([308]).

In the context of applications for international protection, these standards are given effect in the APD (recast), which sets out basic principles and guarantees in Chapter II (see Section 4.3 above). The importance of complying with these procedures is, in particular, to ensure that an applicant's right to be heard is guaranteed. In *MM*, the CJEU said that 'the right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure before the adoption of any decision liable to affect his interests adversely' ([309]). In his opinion in *MM* the Advocate General said:

> [T]he observance of this procedural safeguard is of cardinal importance. Not only does the person concerned play an absolutely central role because he initiates the procedure

([308]) ECtHR, JK and Others v Sweden, op. cit., fn. 20, para. 93. See text at fn. 236 above citing this para. of the judgment in full.
([309]) CJEU, MM, op. cit., fn. 82, para. 88.

> and is the only person able to explain, in concrete terms, what has happened to him and the background against which it has taken place, but also the decision will be of crucial importance to him ([310]).

The issue of the scope of the right to be heard in EU law is raised again in *M* ([311]), a reference to the CJEU by the Irish Supreme Court following the judgment in *MM.* The Advocate General, in his opinion states:

> As regards the substance of the right to be heard, it is clear from the Court's case-law that that right guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely. That right also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision ([312]).

In the Advocate General's view, the right to be heard has a dual function: 'first, to enable the case to be examined and the facts to be established in as precise and correct a manner as possible and, second, to ensure that the person concerned is in fact protected' ([313]). He states further that:

> […] fundamental rights, such as respect for the rights of the defence, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed ([314]).

Subject to this, the assessment of a claim for international protection may be fundamentally flawed where, through inappropriate procedures, an applicant has not had the opportunity of presenting his/her claim and supporting evidence in as full a manner as fairly and reasonably possible (see Section 4.2.6 above) ([315]).

4.6 Standards for assessing documentary evidence

The extent and variety of the documentation which might be produced in support of an application for international protection is clear from the elements identified in Article 4(2) QD (recast) and the factors to be taken into account in the assessment under Article 4(3). These will range from official documents such as passports and identity documents issued by government bodies in the country of origin to documents personal to the applicant such as medical evidence and documents such as newspaper articles showing or purporting to show that the applicant is of adverse interest to the authorities or non-state actors. Documents must be considered in

([310]) Opinion of Advocate General Bot of 26 April 2012, case C-277/11, MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General, EU:C:2012:253, para. 43.
([311]) Opinion of Advocate General Mengozzi of 3 May 2016, case C-560/14, M v Minister of Justice and Equality Ireland, EU:C:2016:320, para. 29.
([312]) Ibid., para. 30, quoting directly from CJEU, MM, op. cit., fn. 82, paras. 87 and 88.
([313]) Ibid.
([314]) Ibid., para. 33.
([315]) See EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018, op. cit., fn. 3. See also IARLJ, Assessment of Credibility, CREDO project, op. cit., fn. 2, p. 44.

the context of the evidence as a whole particularly when considering the consistency of the evidence relied on by the applicant (see also Section 4.2.4 above).

According to the EASO guidelines for determining authorities, documents can usefully be assessed according to the criteria laid down in Figure 5 below ([316]) and set out in the subsections which follow.

Figure 5: Criteria for assessing documentary evidence

4.6.1 Relevance

If a document is not relevant to the outcome of an application it can be discounted. An applicant should, where appropriate, nevertheless be given an opportunity to explain why, in his/her opinion, it is relevant.

4.6.2 Existence and form

Existence and form relate to whether the document is genuine and authentic in the sense of whether it is what it purports to be as opposed to being counterfeit or a genuine document which has subsequently been falsified. Depending on the document and the particular circumstances of the case, the competent authority may have an obligation to investigate whether a document is genuine ([317]). Ability to assess the authenticity of documents is a crucial and very difficult issue for decision-makers ([318]). Moreover, reliable expertise as to the authenticity of documents supposedly drafted by the police or the judiciary of the country of origin is not generally available in the host country. In certain circumstances, it may require investigations in the country of origin yet without jeopardising the confidentiality of the international protection claim (see also Section 4.2.8 above).

([316]) These steps are taken from the EASO, *Practical guide: evidence assessment*, EASO practical guide Series, March 2015, p. 13. Note recital (10) APD (recast) stating that, when implementing the Directive, Member States should take into account guidelines developed by EASO. The EASO guidelines have no special status for courts and tribunals but nevertheless provide a helpful analysis of how documentary evidence can be evaluated.

([317]) ECtHR, judgment of 2 October 2012, Singh et autres c Belgique, application no 33210/11 (in French only), for further details of this case see text at fn. 319-321 below. See also ECtHR, judgment of 7 January 2014, AA v Switzerland, application no 58802/12, paras. 61-63.

([318]) In Norway, the administrative procedure includes verification of the applicant's documentation by an expert body Nasjonalt ID-senter — the Norwegian Identity and Documentation Centre. This Centre authenticates travel and identity documents and develops tools and methods that can be employed when an applicant's identity is undocumented.

However, the Court of Appeal in Ireland has held that the decision-maker is not under a general obligation to investigate whether a document is genuine. It stated:

> […] a decision-maker is not *obliged* as a general rule to conduct *his or her own investigations* in order to vouchsafe the authenticity of a document relied on by an applicant for international protection, although there may be special circumstances where this is indeed required. While it is clear from the decision of the European Court of Human Rights in *Singh* v *Belgium* that contracting states may be under such an obligation in particular cases where the authenticity of the documentation is critical and the implications for the claimants otherwise potentially grave, there is, however, no general rule to this effect ([319]).

In *Singh* v *Belgium,* the applicant relied on documentation in the form of emails from a UNHCR official in New Delhi with attached attestations which stated that the applicants had been recorded as refugees under UNHCR's mandate ([320]). The ECtHR found that there had been a failure by the state in its assessment of credibility of the applicant's claim by not carrying out an additional investigation as to the authentication of these documents which were described as 'not insignificant' and where a check on authentication would be easy to make with UNHCR ([321]). The failure to take such steps in the context of the facts of this particular case could not be viewed as the careful and rigorous investigation expected of national authorities. This judgment is not, however, authority for the proposition that there is a general duty on Member States to undertake an investigation ([322]).

4.6.3 Content, nature and author

Content, nature and author relate to whether the document is reliable. A document may be genuine, in the sense that it is what it purports to be, but its contents may be unreliable and fail to substantiate the applicant's statements. On the other hand, the fact that a document cannot be shown to be forged does not mean that for that reason alone it can be treated as reliable. The onus is on the applicant to show that the document is genuine and reliable.

Factors such as internal consistency, the level of detail, consistency with other evidence and in particular COI and whether the information comes from a direct source may need to be assessed. This also applies to issues about who the author is, what his/her qualifications are, the reliability of the information on which the document is based and the purpose for which the document was prepared.

([319]) Court of Appeal (Ireland), judgment of 27 February 2017, AO v Refugee Appeals Tribunal & ors, [2017] IECA 51, para. 45.
([320]) Ibid., para. 76.
([321]) Ibid., paras. 87 and 88. See also ECtHR, MA v Switzerland, op. cit., fn. 277, paras. 62-68.
([322]) See ECtHR, AA v Switzerland, op. cit., fn. 317, para. 61. The Court of Appeal (England and Wales, United Kingdom) has also held that there is no general obligation to make inquiries although an obligation may arise in particular cases: Court of Appeal (England and Wales, United Kingdom), judgment of 18 July 2014, PJ (Sri Lanka) v Secretary of State for the Home Department [2014] EWCA Civ 1011, paras. 30-32; Court of Appeal (England and Wales, United Kingdom), judgment of 22 March 2016, MA (Bangladesh) v Secretary of State for the Home Department [2016] EWCA Civ 173.

The content, nature and author of documentary evidence were for instance discussed by the Belgian Council for Aliens Law Litigation with regard to witnesses' statements. The Council considered that statements by a private source could carry some weight and noted:

> It has to be examined whether its author can be identified, its content can be verified and if the information it contains is sufficiently precise and coherent to make a useful contribution to the establishment of the facts in the case at hand. This appreciation must be made on a case-by-case basis. When the witness can be heard, it is for the authority in charge of the instruction to determine whether it should proceed with his/her hearing in order to assess his/her credibility ([323]).

Documents must be considered with the same degree of scrutiny as the applicant's own statements: the principles applicable to the assessment of evidence in Section 4.3 above apply not only to statements, whether oral or written, but also to all the documentation submitted in support of the application (324). Documents must not be assessed in isolation but in the light of the evidence as a whole. In any event, before an adverse finding is made, an applicant should have or have had a proper opportunity of providing an explanation or commenting on the concerns raised.

4.7 Standards for assessing expert evidence

4.7.1 General standards

An expert witness is someone whose level of specialised knowledge or skill in a particular field is such that it qualifies him/her to give an opinion on factual matters falling within the area of their expertise. Expert evidence may therefore be produced in support of an application or appeal where there are relevant issues which require a particular expertise which may not otherwise be available to the parties or to decision-makers. Article 10(3)(d) APD (recast) confirms this by providing that 'the personnel examining applications and taking decisions have the possibility of seeking advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues'. In international protection cases, this may also cover issues relating to age, language and political and social issues in an applicant's country of origin.

The process for determining the value of expert opinions differs from that for determining the probative value of documentary evidence. The latter typically includes the quality of the examinations, the findings of the evidence and the context of the alleged persecution or serious harm. For expert opinions, it includes the expertise of the expert, the degree of certainty attached to the findings and the presence of potential conflicting expert opinions.

([323]) Council for Aliens Law Litigation (Belgium), decision of 23 February 2011, no 56.584, para. 4.2 (unofficial translation) (see also EDAL English summary).

([324]) Court of Session (Scotland, United Kingdom), Outer House, judgment of 12 June 2007, SD v Secretary of State for the Home Department, [2007] CSOH 97 at para. 6, the respondent had disregarded 'two police reports and four letters' because it was not clear whether they were translations or copies or both and they had come from an unknown source. The court held that although the onus of proof was not high, it was for the applicant to establish the provenance of the documents submitted and it was within the decision-maker's discretion to disregard them if he failed to do so. See also Court of Session (Scotland, United Kingdom), Outer House, judgment of 13 May 2010, RY v Secretary of State for the Home Department, [2010] CSOH 65 at paras. 31-33, where the court accepted that the respondent was entitled to have concerns about the provenance of documents in the context of adverse credibility findings and the ease of availability of fraudulently obtained documents.

An expert witness, whether providing evidence to or appearing before a court or tribunal, or working at the request of a party, has a primary duty to be independent, objective and unbiased. Expert witnesses must have acquired sufficient knowledge and experience of the issues relevant to their evidence and must also be familiar with the breadth of current practice or opinion ([325]). In order to establish their expertise, they must be in a position to show that they are qualified in the area of knowledge on which they seek to give evidence either as a practitioner or as an academic ([326]). By extension, weight cannot be given to expert evidence that goes beyond the expert's field of competence. This was, for instance, the case before the Scottish Court of Session where a linguistic expert analysed the applicant's knowledge of the country and culture ([327]).

The duties of an expert were summarised by the UKUT ([328]) and reproduced in Table 16 below.

Table 16: Duties of an expert as summarised by the UKUT

(i)	to provide information and express opinions independently, uninfluenced by the litigation;
(ii)	to consider all material facts, including those which might detract from the expert witness' opinion;
(iii)	to be objective and unbiased;
(iv)	to avoid trespass into the prohibited territory of advocacy;
(v)	to be fully informed;
(vi)	to act within the confines of the witness's area of expertise; and
(vii)	to modify, or abandon one's view, where appropriate.

According to this jurisprudence, the expert must make a critical and objective analysis of the information before him/her and give an honest and informed opinion. As the UKAIT notes, '[a]ny opinion offered that is unsupported by a demonstration of the objectivity and comprehensive review of material facts required of an expert witness is likely to be afforded little weight' ([329]). Experts should be cautious of offering an opinion on matters falling within the province of the decision-maker (in the context of appeals the credibility of an account given by an applicant is primarily a matter for courts and tribunals at least of the first instance). In appropriate cases he/she should be in a position to assess the relevant likelihood of other explanations or causes as, for example, in medical evidence dealing with the existence of scarring and how it has been caused ([330]).

Some national jurisdictions have judged that a court or tribunal should not discount or reject an expert report or witness without giving reasons ([331]). Just as the expert witness must not seek to intrude on the task of the judicial or quasi-judicial fact-finder (if relevant), so the judicial or quasi-judicial fact-finder should not purport to be an expert in the relevant discipline.

([325]) Note Art. 18 APD (recast) states that a medical examination 'shall be carried out by qualified medical professionals' and 'Member States may designate the medical professionals who carry out such medical examinations'. See also Council for Aliens Law Litigation (Belgium), decision of 13 July 2015, no 149559.
([326]) Council for Aliens Law Litigation (Belgium), decision of 23 January 2017, no 181122; Council for Aliens Law Litigation (Belgium), decision of 27 February 2017, no 183047.
([327]) Court of Session (Scotland, United Kingdom), Inner House, judgment of 12 July 2013, MABN and KASY v the Advocate General for Scotland [2013] CSIH 68. This view was endorsed by the Supreme Court (United Kingdom), judgment of 21 May 2014, Secretary of State for Home Department v MN and KY [2014] UKSC 30, and by the High Court (Ireland), judgment of 15 August 2016, HRA v Minister for Justice Equality & Law Reform & anor [2016] IEHC 528.
([328]) Upper Tribunal (United Kingdom), judgment of 3 October 2014, MOJ and others (return to Mogadishu) Somalia CG [2014] UKUT 442, para. 25.
([329]) Upper Tribunal (United Kingdom), judgment of 5 November 2015, AAW (expert evidence — weight) Somalia [2015] UKUT 00673 (IAC), para. 25.
([330]) Upper Tribunal (United Kingdom), judgment of 23 April 2014, KV (Scarring — medical evidence) Sri Lanka [2014] UKUT 230. See also the Court of Appeal (England and Wales, United Kingdom), judgment of 7 March 2017 in this case, KV (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 119.
([331]) This requirement was clearly underlined by the Council of State (France), decision of 10 April 2015, *M. B*, application no 372864 B.

In one case, the French National Asylum Court had discarded the relevance of a medical report by merely referring to the general lack of credibility of the applicant's account. Considering the detailed descriptions of wounds and trauma appearing in that report, the French Council of State found that the National Asylum Court erred in law as it was bound to assess the risks they could reveal and to detail the reasons which led it to consider that the report was not relevant ([332]).

This judgment coincides, *mutatis mutandis*, with the rationale relied upon by the ECtHR in two cases decided in 2013. In *I* v *Sweden* and *RJ* c *France*, the Court, whilst endorsing the negative credibility findings made by national asylum authorities both at the administrative and judicial stages, held that the medical reports submitted by the applicants constituted strong presumptions that they had been subject to ill-treatment contrary to Article 3 ECHR and that they should consequently have been separately assessed with regard to the issue of future risk. In *I* v *Sweden*, the relevance of the medical findings was moreover supported by the fact that the scars, if seen by the authorities upon return, could give rise to a suspicion that the applicant had been involved in violent and recent oppositional activities ([333]). In both cases, the national courts concerned had relied upon the fact that, given the lack of credibility of applicants' accounts, the medical reports were not conclusive regarding the authors and the reasons for the ill treatment ([334]).

Expert evidence is not to be treated in isolation but must be considered as part of the evidence as a whole ([335]).

4.7.2 Medical evidence and medical experts

Expert medical evidence is often submitted in international protection applications at the administrative stage and/or in proceedings before courts and tribunals. For example, medical evidence may be submitted in relation to the claim that an applicant has already been subject to persecution or serious harm; to inform the assessment of the extent to which the applicant is fit or able to be interviewed and provide evidence; or in relation to the applicant's age and/or relevant relatives. For further information on age assessment, see Section 5.2.2.

Of relevance to medical evidence bearing on the claim that an applicant has already been subject to persecution or serious harm, recital (31) APD (recast) provides:

Recital (31) APD (recast)

National measures dealing with identification and documentation of symptoms and signs of torture or other serious acts of physical or psychological violence […] in procedures covered by the Directive may, inter alia, be based on the *Manual on the effective investigation and documentation of torture and other cruel, inhuman and degrading treatment or punishment (Istanbul Protocol)*.

([332]) Council of State (France), *M. B,* no 372864 B, op. cit., fn. 331.
([333]) ECtHR, I v Sweden, op. cit., 179, paras. 59-69.
([334]) ECtHR, RJ c France, op. cit., 179, paras 41-43.
([335]) Court of Appeal (England and Wales), Mibanga v Secretary of State for the Home Department, op. cit., fn. 216; Court of Appeal (England and Wales, United Kingdom), judgment of 10 October 2006, SA (Somalia) v Secretary of State for the home Department [2006] EWCA Civ 1032, paras. 31-32; and United Kingdom Upper Tirbunal, KV (Scarring — medical evidence) Sri Lanka, op. cit., fn. 330, para. 211. See also National Asylum Court (France), judgment of 27 September 2016, M. AB, no 11022527; Council of State (Netherlands), judgment of 21 September 2016, ECLI:NL:RVS:2016:2589.

The Istanbul Protocol (IP) is very relevant, although it is not legally binding on Member States ([336]). IP is 'intended to serve as international guidelines for the assessment of persons who allege torture and ill-treatment, for the investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative body' ([337]). It sets out principles which 'outline minimum standards for states in order to ensure the effective documentation of torture' ([338]). These principles reflect the need for medical reports to show that they are based on a sound methodology. Its guidelines are not presented as a fixed protocol. Rather, 'they represent minimum standards based on the principles and should be used taking into account available resources' ([339]).

When dealing with 'Legal Investigation of Torture' in Chapter III and in the course of giving an overview covering the assessment of both physical and psychological consequences, IP states that '[i]n formulating a clinical impression for the purpose of reporting physical and psychological evidence of torture, there are six important questions to ask' ([340]). These are reproduced in Table 17 below.

Table 17: Six important questions in formulating a clinical impression for reporting physical and psychological evidence of torture as set out in the Istanbul Protocol (341)

(a)	Are the physical and psychological findings consistent with the alleged report of torture?
(b)	What physical conditions contribute to the clinical picture?
(c)	Are the psychological findings expected or typical reactions to extreme stress within the cultural and social context of the individual?
(d)	Given the fluctuating course of trauma-related mental disorders over time, what is the time frame in relation to the torture events? Where in the course of recovery is the individual?
(e)	What other stressful factors are affecting the individual (e.g. ongoing persecution, forced migration, exile, loss of family and social role, etc.)? What impact do these issues have on the victim?
(f)	Does the clinical picture suggest a false allegation of torture?

IP recommends that for each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient and that the following terms set out in the table below generally be used ([342]).

([336]) For consideration of the status of IP, see Upper Tribunal (United Kingdom), KV (Scarring — medical evidence) Sri Lanka, op. cit., fn. 330, paras. 222-224. Courts around the world have taken medico-legal reports written by experts according to the principles and standards laid out in the Istanbul Protocol as high evidentiary value. See Inter-American Commission on Human Rights, judgment of 5 March 2001, case 11.015, Hugo Juárez Cruzat et al. v Peru, report no 43/01; ECtHR, judgment of 3 June 2004, Bati and Others v Turkey, application nos 33097/96 and 57834/00; and African Commission on Human and Peoples' Rights, judgment of 2 May 2012, Gabriel Shumba v Republic of Zimbabwe, communication no 288/2004. IP's adoption by the UN General Assembly in 2000 gives it further global authority as the standard for the investigation and documentation of allegations of torture and ill-treatment. See UN General Assembly, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (22 February 2001) UN Doc A/RES/55/89, Resolution adopting the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

([337]) Office of the UN High Commissioner for Human Rights, *Istanbul Protocol, Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment* (2004) Professional Training Series No 8/Rev. 1, p. 1.

([338]) Ibid., p. 2.

([339]) Ibid., p. 2.

([340]) Ibid., para. 105.

([341]) Ibid., para. 286

([342]) Ibid., para. 187.

Table 18: Five-fold hierarchy of degrees of consistency as set out in the Istanbul Protocol (343)

(a)	**Not consistent**	The lesion could not have been caused by the trauma described.
(b)	**Consistent with**	The lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes.
(c)	**Highly consistent**	The lesion could have been caused by the trauma described, and there are a few other possible causes.
(d)	**Typical of**	This is an appearance that is usually found with this type of trauma, but there are other possible causes.
(e)	**Diagnostic of**	This appearance could not have been caused in any way other than that described.

> However, '[u]ltimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story' ([344]).

According to existing national case-law, as with any other expert, a medical expert must establish his/her credentials ([345]), including his/her qualifications, education and training, membership of professional bodies and experience, and show that he/she is familiar with the Istanbul Protocol and that its guidelines inform his/her medical opinion ([346]). Expert evidence must be restricted to the expert's area of competence and expertise and must critically examine the evidence and not adopt an unquestioned acceptance of an applicant's account. The expert must be impartial and refrain from giving any opinion on the overall credibility of the applicant or the merits of his/her case. The medical expert should set out the facts as informed and/or gathered by him/her. If the decision-maker finds that the facts that form the basis of the expert's opinion are not substantiated or are incorrect, then this will diminish the weight that can be given to the expert opinion.

A medical report concerning such an examination should ideally contain a clear statement of the doctor's opinion as to the consistency, directed to the particular injuries said to have occurred as a result of torture or other ill-treatment relied on as evidence of persecution or serious harm. Where the doctor finds there to be a degree of consistency between the injuries/scarring and the applicant's claimed causes which admit of there being other possible causes, it is useful for the medical report to examine these to gauge how likely they are, bearing in mind what is known about the applicant's life history ([347]).

One of the particularities of medico-legal reports conducted according to IP is that they contain elements of both documentary evidence and expert opinion. The documentary evidence collates all the medical findings, but does not provide an analysis of the lesions, while the purpose of an expert opinion is to inform a court or tribunal on technical issues outside its areas of expertise ([348]).

([343]) Ibid., para. 187 (emphases added). See also, IARLJ, *Guidelines on the Judicial Approach to Expert Medical Evidence*, June 2010.
([344]) Istanbul Protocol Manual, op. cit., fn. 337, para. 188.
([345]) See e.g. Supreme Court (Spain), judgment of 24 February 2012, appeal no 2476/2011, STS 1197/2012, p. 8 (see EDAL English summary), where a medical report form the Red Cross was considered as an objective one by the court given the reliability of the institution which operates under the protection of Spain and abides to the fundamental principles of impartiality, neutrality, humanity, independence among others.
([346]) Art. 18(1) APD (recast) provides: 'The medical examinations referred to in the first subparagraph shall be carried out by qualified medical professionals' and Art. 25(5) that any medical examination […] shall be carried out by qualified medical professionals.'
([347]) Thomas, R. (2014), *Administrative Justice and Asylum Appeals*, op. cit., fn. 77, p. 154 and ff. See also Reneman, M., *EU Asylum Procedures and the Right to an Effective Remedy*, Hart Publishing, under 8.5.3.
([348]) Kjærum, A. (2010), 'Combating Torture With Medical Evidence: The Use of Medical Evidence and Expert Opinions in International and Regional Human Rights Tribunals', *Torture Journal,* 119-186.

The weight which should be accorded to a medical report depends on its quality and conclusiveness. A key question is whether a sufficiently strong causal link can be established between the applicant's scars or medical problems and past torture or other ill-treatment ([349]). Where a medical report contains diagnostic conclusions which are wholly dependent upon the history or symptoms asserted by the applicant but the judge concludes, having assessed all the evidence in the round, that the applicant's account lacks credibility, this may justify placing limited weight on such evidence. Nonetheless, a medical report is independent evidence and cannot be rejected simply because it is based on an applicant's account ([350]). The expert report should inform the credibility assessment and, when assessing expert evidence, the judge must take care not to fall into the error of reaching conclusions on credibility before taking the medical evidence into account.

According to the jurisprudence of the Irish High Court, 'in considering any assessment of an applicant's credibility, decision-makers are obliged to consider the medical evidence in total before them'. Moreover, 'if such evidence is to be rejected, the reasons for rejecting the reports must be more fully addressed in the decision' and 'the requirement to more fully address reasons for rejecting medical reports which attach a higher probative value to clinical findings may be less where the balance of the evidence is overwhelmingly in favour of a finding of a lack of credibility' ([351]).

According to the jurisprudence of the German Federal Administrative Court, an applicant who claims to suffer post-traumatic stress disorder (PTSD) should substantiate his/her claim by presenting a professional medical certificate of a certain minimum standard of expertise ([352]). It must explain on what basis the medical specialist has developed his/her diagnosis and the characteristics of the disorder in the specific case. This includes information regarding how long and how often the patient has been receiving medical treatment and whether the findings of the doctor confirm the discomfort described by the applicant.

Other national jurisdictions have considered that the medical certificate should provide information regarding the severity of the disorder, the treatment required and the previous course of treatment (medication and therapy) ([353]). If the presence of PTSD is said to be based on traumatic experiences of the applicant in his/her country of origin, but this was not disclosed at the outset of the asylum procedure in the Member State, an explanation as to why the disorder was not raised earlier is usually required.

In 2016, the German Residence Act ([354]) was amended to require the provision of supporting evidence regarding any alleged disease in the form of a 'qualified medical certificate'. This medical certificate 'shall in particular contain the factual circumstances on which the medical judgment is made, the method of fact collection, technical and medical assessment of the clinical picture (diagnosis), the severity of the disease and the consequences which, according to the medical assessment, are likely to arise' ([355]).

([349]) See e.g. High Court (Ireland), judgment of 28 September 2010, RMK v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform [2010] IEHC 367, para. 26.
([350]) Court of Appeal (England and Wales, United Kingdom), judgment of 26 April 2012, AM v Secretary of State for the Home Department [2013] EWCA Civ 521.
([351]) High Court (Ireland), judgment of 10 March 2015, MM v Refugee Appeals Tribunal & Anor [2015] IEHC 158.
([352]) Federal Administrative Court (Germany), judgment of 11 September 2007, BverwG 10 C 8.07, para. 15, in *Neue Zeitschrift für Verwaltungsrecht* 2008, 142.
([353]) See e.g. Council for Aliens Law Litigation (Belgium), decision of 21 March 2013, no 99.380, para. 4.5 (see EDAL English summary).
([354]) Germany, Aufenthaltsgesetz of 25 February 2008, including in English.
([355]) Section 60a(2c) German Residence Act. Section 60a concerns temporary suspension of deportation. This is the position in German law but might arguably be regarded by the CJEU as be more prescriptive that required.

4.7.3 Country of origin information and expert evidence

Evidence about the general situation in a country of origin can be obtained not only from reports from state authorities, EASO, UNHCR, international or national non-governmental organisations (NGOs), research institutions and the media but also from expert witnesses ([356]). The general standards for the assessment of evidence apply equally to the analysis of expert evidence (see Section 4.6) ([357]).

Country expert evidence may be obtained for a variety of reasons to supplement COI reports. It may provide knowledge of the country of origin or a third country, set the applicant's case in the context of that country and explain political, economic, cultural and religious practices and other specific issues relating to a particular application such as age, culture, gender, ethnicity or language. The advantage of expert evidence is that the request for information and, therefore, the expert evidence obtained in response can be specifically tailored to the facts at issue in the assessment.

4.7.4 Language/linguistic evidence

In international protection applications, especially where there is a dispute as to the applicant's country of nationality or former habitual residence, some Member States have used linguistic analysis reports.

In a 2013 decision, the Polish Rada do Spraw Uchodźców (Refugee Board) considered that linguistic analysis must be assessed 'in the context of all the evidence gathered in the case, taking into account the principle of the benefit of the doubt' ([358]). In this case, expert analysis was undertaken by a private company specialised in determining individuals' home region on the basis of a linguistic analysis and by assessing the individual's knowledge of the region's topography ([359]). However, account had not been taken of the applicant's particular situation who, albeit allegedly from Sudan, was brought up by a Tanzanian family and then lived in a centre run by missionaries with different linguistic communities ([360]).

Such reports have also been accepted by the United Kingdom Supreme Court as admissible in principle, while emphasising the importance of examining such reports critically in the light of all the evidence and of giving adequate reasoning in support of the conclusion ([361]). It was further emphasised that it was 'not the function of an expert in the language to offer an opinion on general credibility' ([362]).

([356]) Upper Tribunal (United Kingdom), judgment of 18 May 2012, AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC), the tribunal determined that 'there may be a useful role in country guidance cases for reports by COI (country of origin) analysts/consultants' (headnote A (iv)).

([357]) In this context, IARLJ, 'Judicial Criteria for Assessing COI: a Checklist and Explanation' op. cit., fn. 134, provides a useful checklist which can assist in evaluating other forms of expert evidence.

([358]) Refugee Board (Poland), RdU-246-1/S/13, op. cit., fn. 161. as per EDAL English summary. The same approach was followed by the Supreme Administrative Court (Finland), judgment of 4 February 2013, KHO:2013:23 (see EDAL English summary). However, in the latter case, the evidence taken as a whole indicated that the applicant lacked credibility as to his/her region of origin (south Somalia).

([359]) Refugee Board (Poland), RdU-246-1/S/13, op. cit., fn. 161. as per EDAL English summary.

([360]) Ibid., as per EDAL English summary.

([361]) Supreme Court (United Kingdom), *MN and KY*, op. cit., fn. 327, para. 46. It should also be noted that at para. 44 the court said that 'it was right to emphasise that Sprakab were not infallible, that tribunal judges must be alive to the possibility of error, and that parties must be provided with the opportunity and materials necessary to enable them to challenge their evidence' and that in the original judgment of the Court of Session (Scotland, United Kingdom), *MABN and KASY v Advocate General for Scotland*, op. cit., fn. 327, the court was very critical of Sprakab at para. 59 onwards.

([362]) Supreme Court (United Kingdom), *MN and KY*, op. cit., fn. 327, para. 51(iii)b. The court held that when considering the issue of whether a language expert could comment on an applicant's lack of familiarity with his claimed place of origin: 'The report needs to explain the source and nature of the knowledge of the analyst on which the comments [on lack of familiarity] are based, and identify the error or lack of expected knowledge found in the interview material' and that 'reporters should limit themselves to identifying such lack of knowledge, rather than offering opinions on the general question of whether the claimant speaks convincingly […]', ibid.

4.8 Standards for assessing country of origin information

The definition of COI may be found in Section 1.2.5. This Section examines the legal requirement to consider COI (Section 4.8.1), and types of COI (Section 4.8.2). It then turns to discuss in detail the evaluation criteria (Section 4.8.3) and the use of COI by courts and tribunals (Section 4.8.4).

4.8.1 The legal requirement to consider COI

COI is essential for an appropriate examination of applications for international protection by determining authorities as well as for the fulfilment of the task of courts and tribunals. The forward-looking analysis of future risk — inherent in the definition of both a refugee and a person eligible for subsidiary protection, including the assessment as to whether protection would be available in the country of origin — requires that determining authorities and competent courts and tribunals have sufficient knowledge of the conditions prevailing in the applicant's country of nationality or former habitual residence. COI is also highly relevant in the assessment of the applicant's account of past circumstances. Even before the CEAS instruments laid down specific standards regarding use of COI, the practice of decision-makers at both administrative and appeal levels had increasingly evolved towards a systematic reliance on COI in the assessment of evidence and credibility. This does not mean that acquisition of this knowledge is an end in itself. UNHCR observes that 'the competent authorities that are called upon to determine refugee status are not required to pass judgment on conditions in the applicant's country of origin' ([363]). Decision-makers, including members of courts and tribunals, are rather required to assess whether an individual is in need of international protection taking into account both the applicant's specific circumstances and relevant COI.

Where Member States consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection, pursuant to Article 4(1) QD (recast), COI as such is not one of the elements explicitly mentioned in Article 4(2) QD (recast). Whereas it is obviously open to applicants to submit COI in support of their application, they have no obligation to do so.

The legal requirement for Member States to obtain and take into account COI in the assessment of an application for international protection is, however, enshrined in the secondary EU law in both substantive and procedural respects, notably in the provisions set out in Table 19 below.

This obligation flows directly from the wording of Article 4(3)(a) QD (recast), a mandatory provision. COI is also referred to in other provisions of the QD (recast). For instance, the third condition triggering the alleviated evidentiary requirement under Article 4(5) is met when 'the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case'. Article 8(2) APD (recast) sets out the COI standards applicable in the context of assessing the possibility of an internal protection alternative.

It is also possible to infer from Article 10(3)(a) APD (recast) that decision-makers are obliged to assess COI objectively and impartially. Applied to the subject matter of COI, compliance with

([363]) UNHCR Handbook, op. cit., fn. 28, para. 42.

this mandatory provision will depend, in a significant measure, on the way COI material relied upon has been selected and interpreted in relation to the specific issues raised by the case at hand. Reliance on partial, unbalanced, out-of-date and/or inaccurate sources constitutes a major obstacle to the achievement of the goals set forth in Article 10(3)(a) QD (recast). In this respect, due application of the other EU law standards governing use of COI criteria will enable courts or tribunals to rely on COI material allowing an individual, objective and impartial examination of the case. (It is worth noticing that similar requirements, albeit diversely formulated are reflected in the COI evaluation criteria of both the ECtHR and IARLJ (see Sections 4.8.3.2 and 4.8.3.3 below). The requirements of Article 10(3)(b) APD (recast) reflect awareness that certain kinds of evidence may not be available to the applicant. This provision ensures that relevant evidence on country conditions is not overlooked by the decision-maker.

With regard to courts and tribunals, Article 10(4) APD (recast) requires them to have access to precise and up-to-date information 'necessary for the fulfilment of their task'. Similarly, in order to fulfil their responsibilities under Article 46(3) APD (recast) to ensure an effective remedy including 'a full and *ex nunc* examination of both facts and points of law' ([364]), courts and tribunals of at least first instance need to take due account of possible changes in the situation in the country of origin that may affect the relevance of COI relied upon by the determining authority in its decision.

Table 19: CEAS norms relevant to the use of COI

Art. 4(3)(a) QD (recast)	The assessment of an application for international protection […] includes taking into account: (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;
Art. 8(2) QD (recast)	In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end, Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.
Article 10(3)(b) APD (recast)	Member States shall ensure that decisions by the determining authority on applications for international protection are taken after an appropriate examination. To that end, Member States shall ensure that: (b) precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;
Article 10(4) APD (recast)	The authorities referred to in Chapter V shall, through the determining authority or the applicant or otherwise, have access to the general information referred to in paragraph 3(b), necessary for the fulfilment of their task.
Article 37(3) APD (recast)	The assessment of whether a country is a safe country of origin in accordance with this Article shall be based on a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations.

([364]) See generally Section 3.1.1. above.

Article 45(2)(a) APD (recast)	[…] Member States shall ensure that […]: (a) the competent authority is able to obtain precise and up-to-date information from various sources, such as, where appropriate, from EASO and UNHCR, as to the general situation prevailing in the countries of origin of the persons concerned;
Article 46(3) APD (recast)	In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.
Article 4, 6(4)(e) and 11 EASO Regulation	(4) The Support Office shall organise, promote and coordinate activities relating to information on countries of origin, in particular: (a) the gathering of relevant, reliable, accurate and up-to-date information on countries of origin of persons applying for international protection in a transparent and impartial manner, making use of all relevant sources of information, including information gathered from governmental, non-governmental and international organisations and the institutions and bodies of the Union; (b) the drafting of reports on countries of origin, on the basis of information gathered in accordance with point (a); (c) the management and further development of a portal for gathering information on countries of origin and its maintenance with a view to ensuring transparency in accordance with the necessary rules for access to such information under Article 42; (d) the development of a common format and a common methodology for presenting, verifying and using information on countries of origin; (e) the analysis of information on countries of origin in a transparent manner with a view to fostering convergence of assessment criteria, and, where appropriate, making use of the results of meetings of one or more working parties. That analysis shall not purport to give instructions to Member States about the grant or refusal of applications for international protection. (6)(4)(e) issues relating to the production and use of information on countries of origin; (11)(1) The Support Office shall organise, coordinate and promote the exchange of information between the Member States' asylum authorities and between the Commission and the Member States' asylum authorities concerning the implementation of all relevant instruments of the asylum *acquis* of the Union. To that end, the Support Office may create factual, legal and case-law databases on national, Union and international asylum instruments making use, inter alia, of existing arrangements. Without prejudice to the activities of the Support Office pursuant to Article 15 and 16, no personal data shall be stored in such databases, unless such data has been obtained by the Support Office from documents that are publicly accessible. (2) In particular, the Support Office shall gather information on the following: (a) the processing of applications for international protection by national administrations and authorities; (b) national law and legal developments in the field of asylum, including case-law.

In addition, the requirement of impartiality and objectivity in the examination of the action or appeal before a court or tribunal implies that when information from various sources is available for courts and tribunals it is **necessary to take this diversity in account.** When these sources are potentially conflicting regarding the content of the information provided in relation to an important issue of the case, members of courts and tribunals should assess their respective relevance in accordance with the standards set out in the CEAS instruments. The decision to give more or less weight to a particular source should if possible, result from an objective appraisal of the quality and reliability of the information, such as can for example be seen in the appraisal of various sources of COI in the decision of the United Kingdom Upper Tribunal in *AA (Article 15(c)) Iraq* ([365]).

([365]) Upper Tribunal (United Kingdom), AA (Article 15(c)) Iraq CG, op. cit., fn. 157.

In addition to the legal standards governing use of COI laid down in the QD (recast) and the APD (recast), the EASO regulation obliges EASO to organise activities relating to the gathering, analysis and availability of information on the countries of origin of people applying for international protection (see recital (15), Articles 4, 6(e) and 11).

The requirement to consider COI in assessing a risk of treatment contrary to Article 3 ECHR is also affirmed in national case-law and the case-law of the ECtHR. In its *Mamatkulov and Askarov* judgment, the Court, referring to the *Soering* case, stated:

> It is the settled case-law of the Court that extradition by a contracting state may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention ([366]).

In its *NA* judgment, the ECtHR, dealing more generally with expulsion to the country of origin, held that 'the assessment whether there are substantial grounds for believing that the applicant faces such risk inevitably requires that the Court assess the conditions in the receiving country against the standards of Article 3 of the Convention' ([367]).

The requirement of referring to COI that is temporally relevant at the time of proceedings before the Court is also very clearly stated in several ECtHR judgments:

> A full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time. […] Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities ([368]).

4.8.2 Types of COI

COI can be general or can focus on certain events or subjects. It can be group specific (for example, reports from trials, minority profiles) and even case or issue specific (for example, embassy checks). The QD (recast) distinguishes between specific and general information relevant to the applicant's case (Article 4(5)(c)).

The explicit reference in the QD (recast) and APD (recast) to UNHCR and EASO, along with 'relevant international human rights organisations' requires the COI of these specified bodies to be taken into account, but the list is not exhaustive and does not preclude taking into account COI emanating from other bodies, e.g. national COI units ([369]) and consulting a variety

([366]) ECtHR, judgment of 4 February 2005, Grand Chamber, Mamatkulov and Askarov v Turkey, applications nos 46827/99 and 46951/99, para. 67. For more recent authorities, see ECtHR, judgment of 23 February 2012, Grand Chamber, Hirsi Jamaa and Others v Italy, application no 27765/09, paras. 114 and 115; and ECtHR, JK and Others v Sweden, op. cit., fn. 20, para. 79.
([367]) ECtHR, NA v United Kingdom, op. cit., fn. 192, para. 110.
([368]) ECtHR, Salah Sheekh v the Netherlands, op. cit., fn. 41, para. 136; ECtHR, Saadi v Italy, op. cit., fn. 199, para. 133; ECtHR, NA v United Kingdom, op. cit., fn. 192, para. 112; and ECtHR, JK and Others v Sweden, op. cit., fn. 20, paras. 83.
([369]) The COI emanating from such units must be clearly distinguished from policy guidance issued by these bodies.

of sources including reports from civil society/international and local NGOs/research institutions as well as the media, academia and where relevant, country experts ([370]).

Table 20 below provides illustrations of different types of COI. It does not, however, entail any hierarchy between these different types of COI.

Table 20: Types of COI

1	Maps, encyclopedias, yearbooks
2	Reports from international bodies (UNHCR and other UN-related bodies, European Union, Council of Europe, EASO)
3	Reports from international NGOs (Amnesty International, Human Rights Watch, International Crisis Group, etc.)
4	Reports from national bodies, think-tanks, analytical networks, (policy) country experts and local NGOs
5	Academic material, journals/press, media reports
6	Legal materials (laws and regulations, jurisprudence)
7	Answers to case-specific requests made public by specialised units of determining authorities or asylum-related institutions (including, for example, Lifos (Centre for Country of Origin Information and analysis) of the Swedish Migration Agency, the Irish Refugee Documentation Centre, Landinfo (the Norwegian Country of Origin Information Centre) of the Norwegian Immigration Authorities, the Canadian Immigration and Refugee Board, etc.)
8	Specific reports established after joint fact-finding missions in the countries of origin
9	Social media sources

Some databases, such as EASO COI Portal, UNHCR's Refworld, and ACCORD's ECOI.net offer easy access to these distinct types of COI.

The development of the use of fact-finding missions to countries of origin reflects the increasingly proactive role of determining authorities in the process of obtaining information relevant to the specific issues raised by applicants for international protection in their submissions. These missions can often gain access to primary sources, difficult to access from abroad. They can also verify and clarify available information which may otherwise be limited, anecdotal or conflicting. Fact-finding missions also bring additional benefits by enabling COI researchers to maintain and evaluate networks of local sources for future use and provide invaluable field experience. Sourced and public fact-finding mission reports also add credibility to the information provided by COI units through validation by sources in the field ([371]). However, such reports may be of limited value if they do not adopt and apply a sound methodology ([372]). The methodology set out in the *EASO country of origin information report methodology* ([373]) is equally applicable to fact-finding missions and is based both on the *Common EU guidelines for processing country of origin information (COI)* ([374]) as well as on the *EU common guidelines on (joint) fact finding missions* ([375]).

([370]) In addition, the role of country of origin analysts/consultants in country guidance cases is specifically addressed in Upper Tribunal (United Kingdom), AK (Article 15(c)) Afghanistan CG, op. cit., fn. 356.
([371]) EU, *EU Common guidelines on (joint) fact finding missions*, November 2010.
([372]) In Upper Tribunal (United Kingdom), judgment of 11 October 2016, MST and Others (national service-risk categories) Eritrea CG [2016] UKUT 443, paras. 192-201, the UKUT attached limited weight to a United Kingdom government Fact-Finding Mission to Eritrea in early 2016 because it had conducted interviews with members of civil society organisations with Eritrean government representatives present.
([373]) EASO, *country of origin information report methodology*, July 2012.
([374]) EU, *Common EU guidelines for processing country of origin information (COI)*, April 2008.
([375]) EU, *EU common guidelines on (joint) fact finding missions*, op. cit., fn. 371.

The evaluation of these fact-finding missions as useful sources of COI nevertheless requires particular attention from users. Some of the important criteria which need to be considered in this respect are not always elucidated in published mission reports: the Terms of Reference of the mission, range of interlocutors, actual background of the interviewers (for example, mix of state and non-state), whether or not the reports contain the full transcripts or just summaries, whether these have been signed off by the interlocutors, the presentation of the information collected, etc. When a fact-finding mission report lacks sufficient information on these criteria, the transparency of its methodology can be questioned. A cautious approach to the weight that can be attached to reports in such circumstances may thus be necessary ([376]).

4.8.3 Evaluation criteria

4.8.3.1 Evaluation criteria in EU law

According to Article 10(3)(b) APD (recast), Member States shall ensure that 'precise, up-to-date information is obtained from various sources'. Precision, temporal relevance, and a variety of sources are consequently the only explicit requirements.

4.8.3.2 Evaluation criteria in ECtHR jurisprudence

Criteria developed by the ECtHR serve to reinforce and complement EU secondary law. In assessing the weight to be attached to COI, the ECtHR has restated in its case-law that consideration must be given to the source of such material, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations undertaken, the consistency of their conclusions and their corroboration by other sources are all relevant considerations ([377]). These criteria, to which the Court regularly refers in an identical wording, are reproduced in Table 21 below.

Table 21: The ECtHR's criteria for assessing COI

1	Independence of the source
2	Reliability of the source
3	Objectivity of the source
4	Reputation of the author
5	Methodology of compilation
6	Consistency of conclusions
7	Corroboration by other sources

In addition to these criteria, general observations as to the weight the ECtHR attaches to COI are found in its jurisprudence. The Court attaches greater importance to human rights specific reports than to general reports because they 'directly address the grounds for the alleged real

([376]) See Asylum Research Consultancy/Dutch Council for Refugees, Comment on the EASO COI report methodology, November 2012.
([377]) ECtHR, Saadi v Italy, op. cit., fn. 199, para. 143; ECtHR, NA v United Kingdom, op. cit., fn. 192, para. 120; ECtHR, judgment of 28 June 2011, Sufi and Elmi v United Kingdom, application nos 8319/07 and 11449/07, para. 230; ECtHR, JK and Others v Sweden, op. cit., fn. 20, para. 88.

risk of ill-treatment in the case before the Court' ([378]). Where reports are focused on general socioeconomic and humanitarian conditions, the ECtHR has been inclined to accord them less weight, since such conditions do not necessarily have a bearing on the question of a real risk of ill-treatment, within the meaning of Article 3 ECHR, to an individual applicant ([379]).

The ECtHR further recognises:

> […] consideration must be given to the presence and reporting capacities of the author of the material in the country in question. In this respect, the court observes that states (whether the respondent state in a particular case or any other contracting or non-contracting state), through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it [and that the same consideration] must apply, *a fortiori*, in respect of agencies of the United Nations, particularly given their direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which states and non-governmental organisations may not be able to do ([380]).

It would appear that the Court's underlying concern is to ensure that particular importance is given to reports produced by agencies or bodies that have a presence on the ground in the country of origin.

However, the ECtHR has stressed that '[t]he Court appreciates the many difficulties faced by governments and NGOs gathering information in dangerous and volatile situations. It accepts that it will not always be possible for investigations to be carried out in the immediate vicinity of a conflict and, in such cases, information provided by sources with first-hand knowledge of the situation may have to be relied on' ([381]). Hence, the ECtHR would not 'disregard a report simply on account of the fact that its author did not visit the area in question and instead relied on information provided by sources' ([382]). In such cases, however, 'the authority and reputation of those sources and the extent of their presence in the relevant area will be relevant factors for the Court in assessing the weight to be attributed to their evidence' ([383]). There may be cases where there are legitimate security concerns and sources may wish to remain anonymous but 'in the absence of any information about the nature of the sources' operations in the relevant area, it will be virtually impossible for the Court to assess their reliability' ([384]).

Consequently, 'the approach taken by the Court will depend on the consistency of the sources' conclusions with the remainder of the available information' ([385]). When information emanating from an anonymous source is unsupported or contradictory, 'the Court is unable to attach substantial weight to it' ([386]).

The England and Wales Court of Appeal, after referring to *Sufi and Elmi*, commented on the use of anonymous material as follows:

([378]) ECtHR, NA v United Kingdom, op. cit., fn. 192, para. 122.
([379]) ECtHR, Judgment of 20 January 2009, FH v Sweden, application no 32621/06, para. 92; Court of Appeal (England and Wales), , op. cit., fn. 205; Supreme Administrative Court (Czech Republic), judgment of 4 February 2009, ÖS v Ministry of Interior, 1 Azs 105/2008-81 (EDAL English summary).
([380]) ECtHR, NA v United Kingdom, op. cit., fn. 192, para. 121; ECtHR, JK and Others v Sweden, op. cit., fn. 20, para. 88.
([381]) ECtHR, JK and Others v Sweden, op. cit., fn. 20, para. 89, referring to Sufi and Elmi v United Kingdom, op. cit., fn. 377, para. 232).
([382]) ECtHR, Sufi and Elmi v United Kingdom, op. cit., fn. 377, para. 232.
([383]) Ibid., para. 233.
([384]) Ibid.
([385]) Ibid.
([386]) Ibid., para. 234.

> There is no general rule at common law or inspired by the European Convention on Human Rights that uncorroborated anonymous material can never be relied on in a country guidance case or any other case. Sometimes that will be the position. Whether or not it is so will depend on all the circumstances. That is the approach taken by the Upper Tribunal in this case. Generally of course the effect of anonymity will go to the weight to be attached to the material in question and care must always be taken in assessing the weight of such material ([387]).

In its judgment in the case of *JK and Others* v *Sweden*, the ECtHR has restated its approach to information that it may obtain *proprio motu,* the need for which depends on the range of sources on which contracting states place reliance:

> In assessing the risk, the Court may obtain relevant materials *proprio motu.* This principle has been firmly established in the Court's case-law. In respect of materials obtained *proprio motu*, the Court considers that, given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the contracting state is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other contracting or non-contracting states, agencies of the United Nations and reputable non-governmental organisations. In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account materials made available by the domestic authorities of the contracting state concerned, without comparing these with materials from other reliable and objective sources ([388]).

The weighing of the evidence and the conclusions as to the relative weight to be placed on the items of evidence are matters for the court or tribunal hearing the appeal. Every decision of the ECtHR relates to a particular set of facts concerning a particular applicant and is not therefore automatically determinative of other cases for the simple reason that the facts of those cases are unlikely in all respects to be materially the same as those in subsequent cases ([389]). With regard to ECtHR judgments setting out general country conditions in asylum-related cases, the United Kingdom Upper Tribunal held that it was not bound to reach the same findings even if such judgment is recent and based on comprehensive COI ([390]).

4.8.3.3 The IARLJ judicial checklist

In 2006, building on efforts aimed at developing proper criteria for the assessment of COI undertaken by several national and international stakeholders ([391]), the IARLJ produced a judicial checklist which identifies a number of criteria reflecting best international judicial practice adopted when assessing how much weight can be attached to a particular COI source

([387]) Court of Appeal (England and Wales), , op. cit., fn. 205, para. 17.
([388]) ECtHR, JK and Others v Sweden, op. cit., fn. 20, para. 90 (citations omitted).
([389]) Upper Tribunal (United Kingdom), judgment of 25 November 2011, AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC), paras. 97-103.
([390]) See Upper Tribunal (United Kingdom), AK (Article 15(c)) Afghanistan CG, op. cit., fn. 356.
([391]) Among which the EU, UNHCR, the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), and Hungarian Helsinki Committee are mentioned.

or reference ([392]). The initial version of 2006 has since been updated and was last revised in 2017 ([393]). Whilst the prime importance of this checklist has since been overtaken by CEAS legislation and ECtHR jurisprudence, its elaboration in an accompanying explanatory memorandum remains a useful source of reference. It lists, in the form of questions, 11 relevant criteria in the evaluation of COI. Table 22 below reproduces this list of questions with short explanations extracted from the explanatory memorandum.

Table 22: IARLJ's checklist of judicial criteria for assessing COI

	Criterion	Explanation
1	**How relevant is the COI to the case in hand?**	The relevancy of COI depends primarily on the specificities of the case. COI is legally relevant when it helps to answer case-related questions.
2	**Does the COI have an established reputation?**	A source has an established reputation when it has earned respect from many quarters for having been shown to provide a relatively reliable picture of country conditions over a significant period of time. Reputation does not prevent criticism and it may be necessary to examine whether such criticism is valid in relation to a particular issue and, possibly, if the authors of the reports have not acted to improve the standards of their reports.
3	**Is the COI based on publicly available and accessible sources?**	Part of the thinking behind the requirement that material be public is that it should be clear to the asylum seeker what evidence is available and where it can be found and that he/she should be able to make use of it in support of the asylum application and/or appeal. This helps achieve an 'equality of arms' between the decision-maker and the applicant. Obviously there will from time to time be a need to consider confidential data, e.g. testimonies of human rights researchers in a country of origin who cannot disclose their identities directly without placing themselves at risk, and reports whose authors are bound by professional ethics not to disclose the identity of a particular source. But, subject to exceptions of this kind, COI may only be viewed as generally reliable if it is in the public domain and transparent as to its authorship.
4	**Is the COI source or report comprehensive?**	The COI source or report is comprehensive when it furnishes both a detailed overview of conditions in a particular country and particulars about relevant groups and categories (e.g. the position of different ethnic minorities or of vulnerable categories). This criterion is appropriate for reports purporting to give an overview of the general country situation or to deal fully with specific issues but not for those sources that only seek to deal with a specific incident or situation, such as a press cutting describing a particular event.
5	**How accurate and relevant is the COI to the case at hand?**	Accuracy of the COI crucially depends on its sourcing. If information is not multi-sourced, there is no proper basis of comparison for deciding whether it is accurate. Generally speaking, preference will be given to reports whose content relates to asylum-related issues.

([392]) By way of example of its use, the Administrative Court of Slovenia introduced in its case-law, for the first time, a scheme of basic criteria for the assessment of COI based on this checklist. See Administrative Court of Slovenia, judgment of 20 September 2006, *U 2073/2006-10*.

([393]) IARLJ, A Structured Approach to the Decision Making Process, op. cit., fn. 1, with IARLJ, 'Judicial Criteria for Assessing COI: a Checklist and Explanation' prepared by Mackey, A. and Treadwell, M., 2015/17, op. cit., fn. 134, p. 33.

	Criterion	Explanation
6	**How current or temporally relevant is the COI presented?**	The criterion of temporal relevance of the COI may be seen as an absolute requirement since the assessment of future risk made by courts and tribunals refers to the prevailing circumstances as at the date of the hearing. It is largely because of the importance of basing the decision on current information that particular value is often attached to reports which are produced on a regular or periodic basis. UNHCR publishes country-specific position papers on a periodic basis. The United States State Department reports are produced on an annual basis, as is the case for the annual global reports of Amnesty International and Human Rights Watch. The latter two NGOs also produce additional reports on specific countries or themes on a periodic basis. Sometimes it may be important to know about events from reliable media sources only a day or two old (e.g. if there has just been a coup).
7	**Is the COI material sourced and/or multi-sourced?**	Attribution where possible increases judicial confidence in a report. A report which simply sets out its account and conclusions without making clear from where or from whom it has obtained its own information can rarely be given credence. Judges may well regard such reports as being of uncertain or unknown provenance. On the other hand, judges have to be aware that sometimes sources are anxious not to be identified. In a world in which there are often vested interests in how a country's human rights performance is presented, judges are understandably wary of COI or reports which depend wholly or mainly on just one or two sources. For this reason they tend to place more reliance on reports which are multi-sourced and demonstrate cross-referencing or corroboration for what they describe. In certain cases, e.g. reports which purport to be definitive on a particular issue, it may be appropriate to expect them to annex all the background materials on which they have relied, so that readers can know precisely the data on which their principal conclusions were based.
8	**Has the COI been prepared on an empirical basis using sound methodology?**	Judges naturally attach more weight to sources that demonstrate in transparent fashion a sound empirical basis for their principal findings. There is a premium on objectively verifiable facts. One aspect here is to what extent a source is based on reports from persons 'on the ground' in a particular country. One of the reasons why UNHCR Position Papers are often accorded considerable weight is because it is known that in relation to many countries UNHCR relies for its evaluation, not only on background sources, but also on reports from UNHCR staff that are posted in the particular country concerned. Another aspect has to do with methodology. It may not be easy to place great reliance on a source which states, without giving any relevant background facts and figures, that there are 'reports' or 'incidents' or 'cases' of detainees being tortured in custody. Obvious questions arise in respect of such statements. How many cases? In which prisons (all or just some)? Involving what type of prisoners (political/ordinary)? If a report gives specific figures of persons reported to have suffered human rights abuses in detention, they will generally carry more weight if they include relevant comparators: e.g. what is the prison population in the relevant country? If a report refers to certain human rights abuses being widespread or routine or frequent, but elsewhere indicates small numbers of persons are affected, that will tend to detract from the weight such evidence may be given. Questions of scale and frequency can be vital in assessing risk.

	Criterion	Explanation
9	**Does the COI exhibit impartiality and independence?**	For credence to be placed on COI it is essential for the judicial decision-maker to be satisfied that it is not partisan or affected by bias. Although this is an elusive criterion to state with any precision, it is clearly a very important one. It is elusive because of the recognition that there is no such thing as 'value-free' assessment of country conditions. Arguably every report adopts a particular vantage point. As can be seen from their Preface, United States State Department reports are an example. However, it remains the case that perceptible bias or partisanship or having an 'axe to grind' may be seen as reducing the value of a particular report. In this regard it may add value to a report that it is known to emanate from an independent source, e.g. a report prepared by a reputable research body dedicated to compiling reliable data for use by international agencies. Nevertheless judges should be cautious of being too judgmental about such matters. For example, it may be that the only recognised country expert on a particular country is an *émigré* who has aligned himself/herself to a particular political group in exile. One of the reasons why he/she may have come to be regarded as an expert is that he/she has 'frontline', on-the-ground knowledge of recent events. If a report from such a person nevertheless exemplifies an objective and balanced treatment of relevant issues, it may be given as much (if not sometimes more) weight as if it came from an academic body or source with no apparent political colouring. In respect of reports from governmental agencies, or from joint government fact-finding missions, it may be necessary to consider whether there is any governmental bias.
10	**Is the COI balanced and not overly selective?**	Closely allied to the impartiality and independence criteria is that of non-selectivity. The judicial decision-maker expects a report to present a balanced account noting items of evidence that go one way and the other. COI which was found for example to consistently ignore or overlook reports of acts of impunity by police and security forces would be deeply suspect. Conversely, a report which highlighted human rights abuses exclusively, without noting evident and significant improvements in a government's human rights record, would be received with scepticism.
11	**Has there been judicial scrutiny by other national courts of the COI in question?**	Much of the skill of judicial decision-makers in dealing with COI consists in correlating what it says about risk and dangers for particular categories with the legal concepts arising under the QD (recast). For example, a country report or expert may state that the risk to a particular category is 'serious' or 'real', etc. But whether such assertions are accepted as demonstrating a 'well-founded fear of being persecuted' or substantial grounds for believing that there is a real risk of serious harm is a matter for judges to decide in particular cases. For this reason judicial decision-makers benefit from sight of decisions reached in different countries. They are aware that just as refugee law judges pursue a single universal or autonomous meaning of key concepts under the Refugee Convention, so they should strive to reach common views on the same or broadly similar country data.

This document, titled *Due process standards for the use of COI in administrative and judicial procedures* identifies 25 standards concerning COI-related issues at all stages of the overall examination process ([394]).

([394]) IARLJ, *Due process standards for the use of country of origin information (COI) in Administrative and Judicial Procedures*, 10th World Conference, 2014.

4.8.4 The use of COI by courts and tribunals ([395])

4.8.4.1 Obtaining COI and equality of arms

Article 10(4) APD (recast) foresees that courts and tribunals shall have access to the same information 'through the determining authority or the applicant or otherwise'. This wording implies that the COI relied upon by the determining authority is likely to be part of the materials before the judicial authority ([396]). This does not preclude the possibility for courts and tribunals to obtain further information through the parties and/or, where permitted by national procedural rules, to research and obtain COI *proprio motu*, provided that this information is made available to both parties.

In inquisitorial settings, the burden to obtain up-to-date and precise COI rests primarily with members of courts or tribunals and may vary depending on whether they are able to obtain assistance from support staff, for example, research units, COI units, etc.

In a typical adversarial setting, a court or tribunal will be primarily tasked with assessing the entirety of evidence — including COI — submitted by the parties.

When the court or tribunal decides to rely on country information that was not previously taken into account by the determining authority, it is essential to assess its public accessibility and its level of relevance to the particular circumstances of the case. These factors may entail different levels of obligation regarding the communication of such information to the parties.

The French Council of State has held that 'it is incumbent on the National Asylum Court to seek all information necessary in order to establish the facts on which its decision will be based' ([397]). It has further specified that whereas the National Asylum Court may rely on general information freely accessible to the public without prior notice to the parties, it can only base its decision on specific information likely to confirm or contradict circumstances personal to the applicant and his/her account so long as the parties have been afforded the opportunity to discuss it ([398]).

Accessibility of information on the basis of which the decision of the determining authority is or will be made is, however, not an absolute right for the applicant. Article 12(1)(d) in conjunction with Article 23(1) APD (recast) provides that applicants and their legal advisers shall have access to country information where the determining authority has taken that information into consideration for the purpose of taking a decision on their application, subject to the exception where disclosure of information on sources would jeopardise national security. The right of the applicant to submit observations on the relevance or reliability of such information, before the decision is taken, is not explicitly foreseen by the APD (recast) but could be linked to the right to be heard, a general principle of EU law (see also Section 4.2.6).

([395]) Gyulai, Country Information in Asylum Procedures, op. cit., fn. 135, is an international comparative study of judicial standards relating to the use of COI as evidence, which digests over 200 judgments from European jurisdictions and is available in eight languages.

([396]) On the judicial assessment as to whether the information relied upon by the determining authority was collected and interpreted according to a sound methodology, see High Administrative Court (Bulgaria), *Jasvineta* v *State Agency for Refugees,* case no 5226/15 (in Bulgarian).

([397]) Council of State (France), *M. C*, no 328265, op. cit, fn. 45 (unofficial translation). This procedural requirement is now codified in French law (Code on the entry and stay of foreigners and asylum law, Art. R.733-16).

([398]) Ibid.

The general requirement that courts and tribunals refer to precise and up-to-date COI — necessary for the fulfilment of their task according to Article 10(4) APD (recast) — could be understood as requiring courts and tribunals to ensure that COI accessed through the determining authority or the applicant or otherwise is precise and up to date at the time of their assessment of the application. The considerable expertise that may be acquired by asylum judges and the personnel of courts and tribunals in dealing with situations in countries of origin should furthermore facilitate such an approach (see also Section 4.8.3). In proceedings before courts and tribunals, it may be important, in certain cases where the court or tribunal has jurisdiction to do so, to take steps to ensure that up-to-date COI is made available either via the parties or *proprio motu* with notice to the parties. Alternatively, in such cases (where consistent with Article 46 APD (recast)), it may annul or set aside the decision and send it back to the original decision-making body or lower court for a fresh decision to be taken in adherence with the duty to include precise and up-to-date information, including COI.

Members of courts and tribunals will ordinarily give due consideration to the fact that certain information has previously been analysed by other courts or tribunals dealing with the same body of information. The court or tribunal may itself decide to elaborate general findings on conditions prevailing in a particular country in order to make a proper decision on an individual case. It is also possible depending on national procedural rules for a court or tribunal to provide guidance ([399]).

4.8.4.2 Assessment of COI and confirmation

It should be recalled that **conflicting COI on a particular issue, or even the complete absence of COI, is not in itself determinative in assessing international protection needs.**

The lack of objective COI confirming or supporting a material fact does not necessarily mean that the incident referred to by the applicant did not occur ([400]). This situation may arise through different factors such as a limited access to information in a particular country; the limited scale of an event such that it is not reported internationally; or through limited information being available regarding certain marginalised groups, such as women or LGBTI persons. In cases based on familial conflicts and other private issues, the asserted facts will generally remain unreported by any type of COI material.

The generalised accessibility of many COI sources, through the internet or other media, makes it necessary that members of courts and tribunals are aware of the possibility that certain applications for international protection may have been devised to be consistent with relevant COI. In such cases, the account of a well-documented event, by which the applicant claims to have been affected, may include elements appearing in COI reports for the purpose of strengthening the credibility of his/her statements.

In addition, it should be stressed that the relevance of COI in setting the country conditions against which a determined case is to be assessed may be undermined where situations are changing rapidly. COI material, because of the delay inherent in its compilation and publication, cannot always give account of the evolution of such situations in a timely manner.

([399]) See e.g. the UKUT system of country guidance judgments, listed most recently in , 26 June 2017.
([400]) See IARLJ, Assessment of Credibility, CREDO project, op. cit., fn. 2, Section III.A.14 'Use of COI'.

4.8.4.3 Reference to sources in the judgment ([401])

Sources of information used by the court or tribunal must always be transparent in the judgment. The only possible exceptions to this rule relate to the abovementioned security concerns (see Section 4.3.4).

The increasing requirement that the judgments of courts and tribunals on applications for international should be sufficiently reasoned entails that they should make explicit which source(s) of information have been relied upon in the assessment of the merits of the appeal.

This will be necessary insofar as the rationale of the judgment relies on the appreciation of conditions prevailing in the country of origin. This would not be the case in all situations. For example, it may well be unnecessary in respect of a negative credibility finding based on a blatant lack of internal consistency or on unsatisfactorily explained discrepancies and variations on the essential elements of a claim, nor *a fortiori* if an appeal is rejected on inadmissibility grounds.

4.9 Evaluation of past and future persecution or serious harm (Article 4(4) QD (recast))

The qualification directive attributes evidential value to the fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or serious harm ([402]). Article 4(4) QD (recast) reads:

Article 4(4) QD (recast)

The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

Because of its direct relevance for the evaluation of future risk, the assessment of whether an applicant has been subject to past persecution or serious harm or to direct threats of such ill-treatment plays a particular role in the wider context of the assessment of all the evidence relevant to an application for international protection.

Past persecution or serious harm or direct threats of such persecution or such harm are not, however, a prerequisite to qualify for international protection. The definitions of a refugee and of a person eligible for subsidiary protection (Articles 2(d) and (f) QD (recast)) both rely on a forward-looking evaluation of the risk to the person concerned in the future. Moreover, Article 5(1) QD (recast) expresses the firmly established *sur place* principle that a well-founded fear of being persecuted or a real risk of suffering serious harm 'may be based on events which have taken place since the applicant left the country of origin', underlining that the applicant does not have to already have been subject to persecution or serious harm or to direct threats

([401]) The term 'judgment' is used to describe judicial and quasi-judicial decisions.
([402]) CJEU, Abdulla and Others, op. cit., fn. 191, para. 94.

of such persecution or harm. For further information see the *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis* ([403]).

The evaluation of past persecution/serious harm and of threats of such is carried out within the wider frame of the assessment of facts and circumstances, at the initial stage of the examination of an application. The assessment of future risk — whether of persecution or serious harm — takes place in the following sequence and is necessarily based on the findings arising from the assessment of facts and circumstances, including possible findings concerning past experiences of persecution or serious harm.

Article 4(5) QD recast provides that, where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection, aspects of the applicant's statements which are not supported by documentary or other evidence shall not need confirmation if the conditions, defined in points (a) to (e), are met. It can reasonably be inferred from this wording that allegations of previous acts amounting to persecution or serious harm as well as threats of such acts fall within the scope of this alleviated evidentiary standard and should not therefore need confirmation through documentary or other evidence provided that the conditions of Article 4(5) reproduced in Section 4.3.7 above.

Of the many elements likely to substantiate an application for international protection, past persecution or serious harm and threats of such may be difficult to ascertain. Given the particular evidential value attributed to past persecution or serious harm or direct threats of such by Article 4(4) QD (recast), their evaluation requires a careful approach.

The assessment of the applicant's statements, based for instance on the evidence that other persons sharing the same political, racial, religious or social profile, have been subjected to persecution or serious harm, may possibly not suffice to justify a finding that the applicant has been subjected to such treatment. However, this would not preclude an assessment that there is a future risk of such treatment, as the infliction of past persecution or serious harm on persons similarly situated may be accepted as relevant evidence of a future risk ([404]). Being a family member of a refugee can, in particular, constitute a basis for such evidence as is clearly affirmed in recital (36) QD (recast): 'Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status'.

Article 4(4) QD (recast) expressly provides that the existence of past persecution or serious harm is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm 'unless there are good reasons to consider that such persecution or serious harm will not be repeated'. According to some national courts, in such a case, it will be for the court or tribunal to demonstrate that there exists no future risk of persecution or serious harm ([405]).

The archetypal example of past persecution that will not be repeated in the future is commonly found when there has been a change of circumstances prevailing in the country of origin. In this regard, the requirement of Articles 11(2) and 16(2) QD (recast) that the change of circumstances triggering the cessation clauses of Articles 11(1)(e) and (f) and 16(1) be of such

([403]) EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, op. cit., fn. 3, Sections 1.9.2 and 2.8.2.
([404]) Ibid.
([405]) See e.g. Migration Court (Sweden), judgment of 2 December 2010, UM 10296-10 (see EDAL English summary).

a significant and non-temporary nature that beneficiaries of international protection no longer face persecution or serious harm, offers relevant elements for the analysis. In its *Abdulla* ruling, the CJEU held that the requirement of Article 11(2) is met when 'the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated' ([406]).

It can be derived, *a fortiori*, the CJEU's judgment in the *Y and Z* case, that the possibility of avoiding future persecution by forfeiting or concealing activities, behaviours or practices which prompted previous persecution, is not relevant in the assessment of whether there are 'good reasons to consider that such persecution or such harm will be repeated' ([407]).

The CJEU has also held:

> The evidential value attached by Article 4(4) of the [QD] Directive to such earlier acts or threats will be taken into account by the competent authorities on the condition, stemming from Article 9(3) of the Directive, that those acts and threats are connected with the same reason for persecution relied on by the person applying for protection ([408]).

Such limitation does not apply to previous serious harm or to direct threats of serious harm since qualification for subsidiary protection pursuant to Article 15 QD (recast) presupposes that the risk of suffering serious harm is not connected to a reason for persecution. However, consideration of the reasons for the past previous harm or threat of harm remain relevant in that respect. By prescribing that the rule it provides does not apply where there are good reasons to consider that **such persecution or serious harm will not be repeated**, Article 4(4) QD (recast) limits the scope of this rule, implying that the future risk should be connected to the same cause.

It is interesting to note that the Grand Chamber of the ECtHR has now adopted a very similar position as regards the particular weight to be attached to past ill-treatment in its own assessment of future risks of treatment contrary to Article 3 ECHR:

> The Court considers that the fact of past ill-treatment provides a strong indication of a future, real risk of treatment contrary to Article 3, in cases in which an applicant has made a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country at issue. In such circumstances, it will be for the government to dispel any doubts about that risk ([409]).

The evaluation of future risk can only take place once the entirety of the evidence obtained has been assessed in accordance with the principles and standards set out in Section 4.3 and the decision-maker has determined the material facts which are accepted based on the appraisal of that evidence. In light of the material facts which are accepted, the decision-maker must then determine whether the substantive conditions laid down in Articles 9 and 10 or Article 15 QD (recast) are met. As the CJEU has ruled, such an assessment is 'solely the responsibility of the competent national authority; accordingly at that stage in the procedure, a requirement

([406]) CJEU, Abdulla and Others, op. cit., fn. 191, para. 73.
([407]) CJEU, Y and Z, op. cit., fn. 167, paras. 73-80.
([408]) CJEU, Abdulla and Others, op. cit., fn. 191, para. 94.
([409]) ECtHR, JK and Others v Sweden, op. cit., fn. 20, para. 102.

that the authority cooperate with the applicant — as laid down in the second sentence of Article 4(1) of Directive 2004/83 — is of no relevance' ([410]).

Evaluation of future risk can be broadly described as an assessment, based on the conclusions drawn from the evidence, of what may happen if the applicant were to be returned to his/her country of origin. It therefore differs essentially from the initial stage of the assessment of facts and circumstances, concerned with the establishment of the past and present circumstances of the applicant ([411]). This forward-looking evaluation is one of the most notable features of the determination of international protection applications ([412]).

([410]) CJEU, MM, op. cit., fn. 82, para. 70.
([411]) See ECtHR, Saadi v Italy, op. cit., fn. 199, concurring opinion of Judge Zupancic.
([412]) See EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, op. cit., fn. 3.

Part 5: Selected specific aspects relating to evidence and credibility assessment

Part 5 does not seek to address all the specific aspects of evidence and credibility assessment. Rather, it examines those aspects which most commonly arise in the practice of courts and tribunals and for which there is, therefore, case-law and background studies.

5.1 Assessment of evidence relating to disputed nationality or statelessness

Issues of evidence and credibility assessment can arise in the context of determining the applicant's country(ies) of nationality or his/her statelessness as a definitional element of qualification for international protection. As detailed in *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis* ([413]), determination of the applicant's nationality or lack thereof forms an essential part of the assessment of an application for international protection ([414]). By virtue of Article 2(d) QD (recast), a 'refugee' is a **third-country national** who owing to a well-founded fear of being persecuted is outside **the country of nationality** and is unable or unwilling to avail himself or herself of the protection of **that country** or **a stateless person** who owing to a well-founded fear of being persecuted is outside **the country of former habitual residence** and unable or unwilling to return to it. Pursuant to Article 2(f) QD (recast) a person eligible for subsidiary protection is a **third-country national** or **stateless person** who if returned to his/her **country of origin** or in the case of a stateless person, his/her **country of former habitual residence** would face a real risk of suffering serious harm. According to Article 2(n) QD (recast), 'country of origin' means 'the country or countries of nationality or, for stateless persons, of former habitual residence'. If the person has more than one nationality, the fear/risk must concern both (or all) countries of nationality.

The term 'nationality' denotes the legal tie between the individual and the state. It is important not to confuse this meaning with the wider meaning given in the same definition of a refugee to the term 'nationality' as one of the five reasons for persecution (see Articles 2(d) and 10(1)(c) QD (recast)) ([415]).

Because being either a third-country national or a stateless person is a prerequisite for an applicant to qualify for international protection under EU law, the decision-maker must for such purposes identify the applicant's nationality(ies) or lack thereof. Hence, even though courts or tribunals dealing with applications for international protection do not have specific jurisdiction to decide the nationality of an applicant, they are required to make an assessment of the country(ies) of which he/she is a national for the purposes of such an application.

([413]) EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, op. cit., fn. 3, Section 1.3.2.

([414]) See also, United Kingdom Immigration Appeal Tribunal, judgment of 9 June 2000, Smith v Secretary of State for the Home Department (Liberia) [2000] 00TH02130, para. 9.

([415]) As noted by Zimmermann and Mahler, the notion of nationality as a reason for persecution is broader than that related to the definitional element of being outside one's country of nationality which entails a legal bound between the applicant and his/her state, that of citizenship: Zimmermann, A. and Mahler, C., 'Article 1 A, para. 2 (Definition of the term 'Refugee'/Définition du terme 'réfugié')', in Zimmermann, A. (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP, 2011), p. 389, para. 387.

As explained in *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis* ([416]), assessment of nationality has accordingly to be done principally on the basis of the legislation regarding attribution of nationality of the country concerned. Such assessment is undertaken, not in order to apply that legislation, but to seek to establish from it what nationality the applicant has for international protection purposes.

In many cases the nationality (or lack of it) of an applicant will not be in dispute and hence no issue concerning it will arise for courts and tribunals to determine. In some cases, however, it will be in dispute or an issue concerning it will arise in the course of proceedings.

The CEAS instruments do not specify what decision-makers are to do in cases where someone is thought to be of indeterminate nationality.

The CJEU has yet to receive a preliminary reference raising the issue of whether assessment of an applicant's nationality as a requirement for qualification for international protection should be subject to the same standard of proof as is applied to other elements of his application (i.e. 'well-founded fear of being persecuted' for refugee protection; 'substantial grounds for believing there is a real risk' for subsidiary protection; see Section 4.3.9 above). In some Member States, the same standard is applied to all elements of the assessment.

Disputed nationality cases fall into at least three categories reproduced in Table 23 below.

Table 23: Examples of disputed nationality cases

1	Those where the applicant claims to be — or is considered by the determining authority to be — stateless;
2	Those where the applicant claims to have the nationality of country X, but the determining authority assesses that he/she does not have the nationality of country X; and
3	Those where the applicant claims to have one nationality, but the determining authority considers he/she has more than one nationality.

Concerning the first category, and as noted earlier, the definitions set out at Article 2(d) and (f) QD (recast) require that, if an applicant is a stateless person, assessment of whether he/she qualifies for international protection must be undertaken by reference to his/her country of former habitual residence. In broad terms, much the same types of evidence probative of nationality will be probative of habitual residence.

With regard to the second category, the applicant's nationality may be in dispute where the determining authority considers that the applicant has not substantiated his/her claim to be a national of country X in accordance with Article 4 QD (recast). In such a circumstance, the determining authority may not know the country of nationality of the applicant, or it may have obtained evidence to support the fact that the applicant has the nationality of another country. Where the determining authority does not accept the country of nationality claimed by the applicant, the application may be rejected with reasons in fact and law stated. Where, the applicant accepts that he/she presented false information regarding his/her nationality, he/she will only qualify as a refugee or beneficiary of subsidiary protection if able to substantiate his/her nationality of another country and that he/she has a well-founded fear of persecution or substantial grounds for believing he/she is at real risk of serious harm in that other country.

([416]) EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, op. cit., fn. 3, Section 1.3.1.

Finally, cases where the applicant claims to have one nationality but the determining authority considers he/she has more than one nationality belong in a distinct third category. If it is assessed that an applicant has two or more nationalities then they only qualify as a refugee or beneficiary of subsidiary protection if able to show they have a well-founded fear of persecution or substantial grounds for believing they would suffer a real risk of serious harm in **both** (or all) countries of nationality ([417]).

5.1.1 Substantiation of nationality by the applicant

Article 4(1) QD (recast) provides that in the context of an application for international protection, Member States may consider it the duty of the applicant to substantiate his/her nationality. In accordance with Article 4(2) QD (recast) the applicant must submit as soon as possible all the documentation at his/her disposal regarding, inter alia, his/her identity and nationality(ies). It is also clear from complementary provisions of the APD (recast) that (independently of whether Member States consider it the duty of the applicant to substantiate his/her application under Article 4(1) QD (recast)) Member States must impose upon applicants the obligation to cooperate with the competent authorities with a view to establishing their identity and nationality (Article 13(1) APD (recast)).

As noted earlier, in many cases the nationality (or lack of it) of an applicant will not be in dispute. That will usually be because they will have been able to substantiate it by way of their own testimony and/or production of documentary evidence such as a passport or identity card ([418]).

Of some importance in cases where an issue arises regarding documentary evidence in support of nationality is that the wording of Article 4(2) QD (recast) refers to documentation 'at the applicant's disposal', a term which appears to include documentation which is not in the applicant's present possession but which is within his/her power to obtain ([419]).

When, however, an applicant's efforts to substantiate his/her nationality leave the determining authority in doubt, Article 4(1) QD(recast) prescribes that the Member State has a duty to cooperate with the applicant to assess this relevant element ([420]). Article 4(3)(a) QD (recast) requires the assessment to take into account 'all relevant facts as they relate to the country of origin at the time of taking the decision on the application; including laws and regulations of the country of origin and the manner in which they are applied'.

Evidence relating to the way in which the country concerned applies its nationality laws in practice may be relevant ([421]). As the United Kingdom Upper Tribunal has noted:

([417]) See EASO, Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis, December 2016, op. cit., fn. 3, Section 1.3.1, pp. 23-25.

([418]) In AA v Switzerland (op. cit., fn. 317, para. 61) the ECtHR noted that: '[a]s previously held by the Court, the best way for an asylum seeker to prove his identity is by submitting an original passport. If this is not possible on account of the circumstances in which he finds himself, other documents might be used to prove his identity. A birth certificate could have value as evidence if other identity papers are missing [referring also to ECtHR, judgment of 18 December 2012, FN and Others v Sweden, application no 28774/09, para. 72]'.

([419]) Upper Tribunal (United Kingdom), MW (Nationality; Art 4 QD; duty to substantiate), op. cit., fn. 122, para. 9.

([420]) The United Kingdom Home Office considers that in such circumstances the burden will shift to the competent authority in case of doubt. See, United Kingdom Visas and Immigration, Nationality: Doubtful, Disputed and Other Cases, 26 October 2013, p. 5.

([421]) EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, op. cit., fn. 3, Section 1.3.2. According to the Supreme Court (United Kingdom), judgment of 25 March 2015, Pham v Secretary of State for the Home Department [2015] UKSC 19, para. 25, when seeking to establish whether an individual is not considered as a national under operation of the law of his/her State of nationality, the term 'law' should be interpreted broadly as encompassing other forms of quasi-legal process, such as ministerial decrees and 'customary practice'.

> The evidence, whether in the form of experts' reports or not, may deal with questions of practice and other issues, as well as questions of law. […] At a different level, it may be that clear evidence as to national practice may be of importance in determining the content of provisions of national law. On the other hand, evidence of practice, in order to be relevant in this context, is likely to need to be of generality comparable to that of legal rules. In particular, and bearing in mind the possibility of the manipulation or selection of evidence by a person who seeks to remain in a country where he is claiming asylum, it is, we think, very unlikely that the experience of one or a small number of individuals will be sufficient to show that the legal rules are not what they appear to be ([422]).

The United Kingdom Immigration Appeal Tribunal provided a useful (non-exhaustive) list of elements that may support a finding regarding the nationality of an applicant ([423]). As suitably adapted, these are listed in Table 24 below.

Table 24: Elements to substantiate an applicant's nationality

i.	Relevant documentation
ii.	Evidence from the applicant
iii.	Agreement between the parties
iv.	Expert evidence
v.	Letters from government departments (e.g. Foreign Office, Ministry of Foreign Affairs)
vi.	Text of relevant nationality law of country(ies) concerned

Relevant documentation includes passports and other travel documents which constitute a strong presumption of nationality ([424]), birth certificates (especially where the country of origin's nationality law confers nationality through *ius soli* or *ius sanguinis*), and letters from relevant authorities in or representing the country of origin ([425]). As laid down in Article 13(2)(b) APD (recast), 'Member States may provide that […] applicants have to hand over documents in their possession relevant to the examination of the application, such as their passports'. Any such documentation should, however, be reliable: they may not be reliable if forged or unauthentic ([426]). It is a mistake, however, to consider that a document such as a passport is to be accepted as reliable only if it has not been proven to be fraudulent (see Section 4.6 on assessing documentary evidence).

Evidence from the applicant, or from friends or relatives, is central in case of a lack of relevant documentation, but also when the documents submitted are not authentic or forged ([427]). In this regard, questioning during the personal interview may provide evidence of the applicant's nationality ([428]). If the determining authority when conducting a personal interview has not accepted the applicant's claimed nationality, the applicant should have been afforded the opportunity to comment and/or explain any elements which may be missing and/or any inconsistencies or contradictions in his/her statements (see Article 16 APD (recast)). The French

([422]) Upper Tribunal (United Kingdom), judgment of 21 February 2011, KK and Others (Nationality: North Korea) Korea CG [2011] UKUT 92 (IAC), para. 60.
([423]) United Kingdom Immigration Appeal Tribunal, Smith v SSHD (Liberia), op. cit., fn. 414 para. 45. Similar elements were identified in UKIAT, judgment of 17 April 2008, MA (Disputed Nationality) Ethiopia [2008] UKIAT 32, para. 85.
([424]) United Kingdom Immigration Appeal Tribunal, Smith v SSHD (Liberia), op. cit., fn. 414, para. 45. See also, UNHCR Handbook, op. cit., fn. 28, para. 93.
([425]) United Kingdom Immigration Appeal Tribunal, Smith v SSHD (Liberia), op. cit., fn. 414, para. 45.
([426]) United Kingdom Visas and Immigration, Nationality, op. cit., fn. 420, pp. 5 and 6.
([427]) See National Asylum Court (France), judgment of 6 May 2016, *M. P alias T*, no 09014084 C. In this case, the court assessed the applicant's statements and documents and established that he had obtained a Cambodian passport under a false identity by forgery and was in fact a Vietnamese national. His application was examined with respect to Vietnam and it was held that he had a well-founded fear of persecution for reason of being a member of, and activist in, the Khmer community. See also United Kingdom Immigration Appeal Tribunal, Smith v SSHD (Liberia), op. cit., fn. 414, para. 45.
([428]) United Kingdom Visas and Immigration, Nationality, op. cit., fn. 420, pp. 5 and 6.

Council of State has ruled that, when the applicant asserts that he/she has a nationality but the administrative authorities (the French Office for the Protection of Refugees and Stateless Persons) do not accept this, the judge cannot proceed to find that he/she has another nationality without giving the applicant the opportunity to make a submission on the issue ([429]).

The evidentiary value of **questioning regarding nationality** in an asylum interview context is to be treated with care. For example, whilst asking questions about knowledge of a particular country may be valid in many cases, nationality does not per se entail residency, and in certain cases a potential lack of knowledge on the part of the applicant regarding his/her country of nationality may not be fatal. Whilst knowledge of basic facts about one's country of nationality is often an important indicator for assessment of nationality, the status of national of a country is not the same as that of resident and there will be cases in which it is not necessarily an accurate indicator ([430]).

As previously noted (see above Section 4.7.4), **expert evidence** may include linguistic analysis reports in case of doubt as to the applicant's country of origin. Whilst such evidence may have a bearing on the issue of nationality, it would be wrong to suggest that where there is a doubt about a person's nationality, a linguistic analysis is in itself determinative. Not all nationals of country X will speak the language of country X. The results of any linguistic analysis should be assessed in the context of all the evidence gathered in the case ([431]). It is important to underline that a linguistic analysis may or may not support the fact that an applicant has resided in or socialised with persons from a particular country, but it cannot determine nationality.

Another important element can nowadays be added to the above list: **information databases including fingerprints systems.** In case of a match, it may well confirm or refute the nationality claimed by an applicant ([432]). In order to check the authenticity of the foreigner's document or identity, according to German law ([433]) biometric and other data stored electronically within the passport or other identity documents may be read and the necessary biometric data obtained from the applicant may be compared with the biometric data from the document. Biometric data in this context includes only fingerprints, photograph and iris scan.

5.1.2 Assessing evidence relating to nationality

To be consistent with Article 4(3) QD (recast) the assessment of the applicant's nationality should be based on all the evidence before the determining authority.

Albeit a question of foreign law, assessment of nationality does not entail a stricter evidential requirement, such as the existence of leading expert evidence to support translation of foreign laws ([434]).

([429]) Council of State (France) decision of 11 May 2016, *M. FE, Mme BC & Mme AD*, no 390351, ECLI:FR:CECHR:2016:390351.20160511. In this case, the French Office for the Protection of Refugees and Stateless Persons (OFPRA) had accepted the Russian nationality asserted by the applicants and made its determination accordingly. The National Court of Asylum had also accepted this but decided that the appellants were in addition entitled to Armenian nationality and thus expanded the scope of its assessment to Armenia, but without prior notice to the parties. The Council of State determined that this violated the requirement of Art. R.733-16 the Code on the Entry and Stay of Foreigners and Asylum Law.
([430]) Ibid., para. 18.
([431]) Refugee Board (Poland), RdU-246-1/S/13, op. cit., fn. 161. as per EDAL English summary.
([432]) United Kingdom Visas and Immigration, Nationality, op. cit., fn. 420, pp. 6 and 7.
([433]) German Asylum Law, Art. 16(1)(a); see also Bundesamt für Migration und Flüchtlinge, *Das deutsche Asylverfahren ausführlich erläutert*, 2014, pp. 8 and ff.
([434]) United Kingdom Immigration Appeal Tribunal, Smith v SSHD (Liberia), op. cit., fn. 414, paras. 46-49.

Given that the nationality law of some countries may provide, inter alia, for different modes of acquisition of nationality on the basis of birth (*ius soli*) or descent (*ius sanguinis*) ([435]), the identification of the relevant mode can be material for establishing the evidentiary value of a birth certificate ([436]). If the country concerned applies an *ius soli* approach, the birth certificate of the applicant (if considered reliable) is then to be considered evidence of nationality ([437]). A birth certificate or passport of a parent (if considered reliable) may also be considered as evidence where nationality is acquired by descent. However, where a person's possible acquisition of nationality in the future is at the discretion of the state whose nationality he/she could seek to acquire, he/she cannot be regarded without more as having that nationality. Evidence relating to discretionary modes of acquisition such as naturalisation which might be applied for by the applicant in the future will not be relevant because such modes do not confer nationality by operation of law ([438]).

5.2 Evidence and credibility assessment in cases involving minors

Beyond the general rules applicable to evidence and credibility assessment of applications for international protection, this section examines the additional specific guidance and rules applicable to the assessment of applications made by or on behalf of minor applicants.

When assessing evidence and credibility in the case of applicants who are minors ([439]), it is necessary to adopt a modified approach both in relation to their personal (subjective) evidence and to how it interrelates with background (objective) evidence, for example, about country conditions.

As a minor is a person below the age of 18 years, the term obviously applies to toddlers as well as adolescents, irrespective of any national definition of 'minors' ([440]). Nor should it be forgotten that in some applications made by (young) adults, their evidence may cover events said to have happened to them when they were a minor and, therefore, their memory of those events will initially have been formed when they were a minor and is likely to reflect the perceptions of a minor (see Section 6.1 on memory) ([441]).

While both the QD (recast) and APD (recast) cover applications made by or on behalf of minors by their relatives or an adult responsible for them ([442]), they give specific attention to unaccompanied minors who are defined as:

([435]) Ibid., paras. 51 and 52. See also UKAIT, MA (Disputed Nationality) Ethiopia, op. cit., fn. 423, para. 83.
([436]) EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, op. cit., fn. 3, Section 1.3.1.
([437]) United Kingdom Immigration Appeal Tribunal, Smith v SSHD (Liberia), op. cit., fn. 414, paras. 15 and 45.
([438]) See Upper Tribunal (United Kingdom), KK and Others (Nationality: North Korea) Korea CG, op. cit., fn. 422, paras. 79-82.
([439]) The term 'minor' is used here rather than 'child' because this is the terminology used in the APD (recast) and QD (recast). Both define a minor as 'a third-country national or stateless person below the age of 18 years' (Art. 2(k) QD (recast) and Art. 2(l) APD (recast)). 'Child' is used as a synonym for 'minor' only when referring to the best interests of the child (see Section 5.2.1).
([440]) The United Kingdom Supreme Court has approved a national jurisprudence which in certain cases, especially where applicants have risked forcible recruitment or sexual exploitation as minors, has treated persons just over 18 as minors, at least in some aspects, remarking in one of these cases that 'persecution is not respectful of birthdays', see notably: Supreme Court (United Kingdom), judgment of 24 June 2015, TA and MA (Afghanistan) v Secretary of State for the Home Department and AA (Afghanistan) v Secretary of State for the Home Department [2015] UKSC 40, para. 33. The Supreme Court thus confirmed the ruling of the Court of Appeal (England and Wales, United Kingdom), judgment of 25 July 2012, KA (Afghanistan) & Ors v Secretary of State for the Home Department [2012] EWCA Civ 1014, para. 18. See also Upper Tribunal (United Kingdom), judgment of 29 August 2013, JS (Former Unaccompanied Child — Durable Solution) Afghanistan [2013] UKUT 00568 (IAC), para. 35.
([441]) Upper Tribunal (United Kingdom), KS (benefit of the doubt), op. cit., fn. 241, paras. 88 and 89.
([442]) Art. 7(3) APD (recast).

> […] a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States ([443]).

According to the CJEU, unaccompanied minors 'form a category of particularly vulnerable persons' ([444]).

Section 5.2.1 below deals specifically with the best interests of the child; Section 5.2.2 with age assessment; and Section 5.2.3 with the substantiation of applications by minors.

5.2.1 The best interests of the child

The CJEU has stated that, as set out in Article 24(2) of the EU Charter, 'in all actions relating to children, whether taken by public authorities or private institutions, the **child's best interests** are to be a primary consideration' ([445]). This is also expressly recognised in the CEAS legislation. Recital (33) APD (recast) identifies:

Recital (33) APD (recast)

The best interests of the child should be a primary consideration of Member States when applying this directive, in accordance with the Charter of Fundamental Rights of the European Union […] and the 1989 United Nations Convention on the Rights of the Child. In assessing the best interest of the child, Member States should in particular take due account of the minor's well-being and social development, including his or her background.

This is confirmed in Article 25(6) APD (recast) on guarantees for unaccompanied minors which provides that '[t]he best interests of the child shall be a primary consideration for Member States when implementing this directive'.

Similar wording is used in recital (18) QD (recast), which refers, in addition, to 'the principle of family unity', 'safety and security considerations and the views of the minor in accordance with his or her age and maturity'.

5.2.2 Age assessment

Where there is a doubt as to whether an applicant for international protection is an adult or minor ([446]), the decision-maker will need to make a decision establishing his/her chronological age. The issue usually arises in the case of unaccompanied minors ([447]) and is a decision of

([443]) Art. 2(l) QD (recast). See also Art. 2(m) APD (recast) directly referring to the definition laid down in Article 2(l) QD (recast).
([444]) CJEU, judgment of 6 June 2013, case C-648/11, MA, BT and DA v Secretary of State for the Home Department, EU:C:2013:367, para. 55.
([445]) Ibid., para. 57 (emphasis added).
([446]) Art. 2(k) QD (recast) defines a minor as a third-country national or a stateless person below the age of 18 years (as does Art. 2(l) APD (recast)).
([447]) Defined in Art. 2(l) QD (recast) as meaning 'a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States'.

considerable importance, as Member States are obliged to grant special protection and procedural guarantees to minors, and in particular unaccompanied minors (see Section 5.2.3).

Being under or over the age of 18 will make a significant difference not only in the approach to the assessment of an application for international protection ([448]) but may also bring additional benefits ([449]). This may incentivise young adults to seek to pass themselves off as under 18 in order to obtain them. The risks arising from an inaccurate age assessment if a child is assessed to be over 18 is that he/she will be deprived of the additional protection they are entitled to. On the other hand, if an adult is wrongly assessed to be under 18 and is treated as a child, that raises child protection concerns particularly when it comes to providing care and accommodation.

In the light of these risks, the process of age assessment must be carried out with particular care and heed must be paid to the principles of assessment set out at Section 4.3. The difficulty of assessing chronological age is compounded by the fact that it is generally accepted that there is neither a single method nor a specific combination of methods to scientifically determine the exact age of an individual ([450]). Member States have relied on a number of different methods of carrying out the assessment.

Article 25(5) APD (recast) provides that Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is minor.

This indicates that consideration should first be given to general statements and other evidence readily available and then if there is doubt, resort may be had to medical tests. Thus, in a 2013 publication, EASO recommends that consideration should first be given to documentary and other available sources of evidence before resorting to a medical examination ([451]). Medical examinations, which impliedly may be by any method, are subject to the following safeguards set out in Article 25(5) APD (recast).

([448]) See e.g. the procedural guarantees in Art. 25 APD (recast).
([449]) See e.g. Arts. 27 and 31 QD (recast) relating to access to education, suitable placements and training and tracing obligations.
([450]) EASO, *Age assessment practice in Europe*, December 2013, pp. 24-44.
([451]) EASO, *Age assessment practice in Europe*, op. cit., fn. 450. See also Unicef & UNHCR report, Safe & sound: what states can do to ensure respect for the best Interests of unaccompanied and separated children in Europe, October 2014; Unicef, Age Assessment: A Technical Note, January 2013.

Article 25(5) APD (recast)

Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor.

Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result.

Where medical examinations are used, Member States shall ensure that:

(a) Unaccompanied minors are informed prior to the examination of their application for international protection, and in a language that they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the methods of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;

(b) Unaccompanied minors and/or their representatives consent to a medical examination being carried out to determine the age of the minors concerned; and

(c) The decision to reject an application for international protection by an unaccompanied minor who refused to undergo a medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo a medical examination shall not prevent the determining authority from taking a decision on the application for international protection.

An overview of the different age assessment methods currently in use is provided in EASO's report *Age Assessment Practice in Europe* ([452]). As illustrated in Table 25 below, the evidence falls into two categories: non-medical and medical evidence.

([452]) Ibid., pp. 24-42. See also, Unicef and UNHCR, Safe & Sound and Unicef, Age Assessment: A Technical Note, ibid.

Table 25: Types of evidence for age assessment

1. Non-medical sources of evidence	**1.1 Evidence obtained by interview** ([453]) An interview by appropriately qualified personnel to obtain evidence from the applicant including evidence about matters such as his/her background and personal history, his/her experiences and education so that as full a picture as possible can be obtained and this is then assessed in the light of the applicant's circumstances and the context of the country/countries from which the individual comes.
	1.2 Documentary evidence ([454]) The applicant may produce documents to support his/her claimed date of birth. These may come from a range of sources such as birth certificates, school reports and hospital records. Other documents may be available to the decision-maker such as applications for visas and any information on the Eurodac database.
	1.3 Estimation based on physical appearance and demeanour ([455])
2. Medical evidence ([456])	This includes dental observation, physical development assessed by a paediatrician, psychological interviews, assessment of sexual maturity and X-ray evidence which relies on estimating development stages from the fusion/maturation of specific bones ([457]). The same principles apply to the assessment of this evidence as to expert medical evidence set out in Section 4.7.2.

All these sources of evidence are considered to have their respective advantages and disadvantages. Even medical evidence has a large margin of error ([458]).

In summary, difficult though age assessment is, it remains a question of fact to be assessed in accordance with the principles already referred to in the light of the evidence as a whole in each individual case. As set out above, Article 25(5) APD (recast) provides that if doubt remains after any medical examination, Member States 'shall assume that the applicant is a minor'. It is also important to note in relation to credibility that the fact that a person, contrary to his/her own statements has been assessed and found to be above 18 years of age, should not necessarily be given weight in a credibility assessment of his/her statements in respect of the need for international protection.

The fact that the national authorities determine a person to be of an age different from the person's own statement can be for various reasons. These include uncertainty regarding the accuracy of the age assessment methods used, the fact that as previously mentioned young persons might give false information about their age (or be advised to do so) in order to obtain certain reception facilities, and that the applicant might not in fact be aware of his/her own age (as many cultures do not give birthdays the same significance as in Europe).

5.2.3 Substantiation of the application

Concerning the duty to substantiate an application for international protection, Article 4(1) QD (recast) does not make any distinction between adults and minors. Age is, however, identified in Article 4(3)(c) QD (recast) as one of the factors relating to an individual's position and personal circumstances that must be taken into account when assessing applications for international protection.

([453]) EASO, *Age Assessment Practice in Europe*, op. cit., fn. 450, pp. 25 and 26.
([454]) Ibid., p. 27.
([455]) Ibid., p. 28.
([456]) See Art. 25(5) APD (recast), cited above.
([457]) EASO, *Age Assessment Practice in Europe*, op. cit., fn. 450, p. 29.
([458]) Ibid., pp. 26-41.

The contextual nature of what the Article 4(1) QD (recast) duty of cooperation may entail is especially relevant in the case of minor applicants who might have more difficulties substantiating their application compared to adult applicants ([459]). It entails at least two things:

1. The Member State must ensure that relevant elements of a minor's application are identified and if necessary obtained; and

2. The Member State must positively facilitate the applicant in giving his/her account or having it made on his/her behalf.

This duty of cooperation in assessing the elements of an application for international protection in respect of a minor, is additionally secured through specific procedural guarantees provided for minor applicants in the APD (recast) ([460]). Table 26 below reproduces the most relevant provisions for the purpose of the present Section. While the general rules and standards on substantiation of the application remain applicable, the APD (recast) provides for more specific rules in cases involving minors.

Table 26: Selected procedural guarantees for minor applicants in APD (recast)461

Minors	**Art. 10(3)(d) APD (recast)**	Member States shall ensure that decisions by the determining authority on applications for international protection are taken after an appropriate examination. To that end, Member States shall ensure that: […] the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, **child-related** or gender **issues**. [Emphasis added]
	Art. 15(3)(e) APD (recast)	Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall: […] ensure that interviews with minors are conducted in a child-appropriate manner.
Unaccompanied minors	**Art. 25 APD (recast)**	1. With respect to all procedures provided for in this directive and without prejudice to the provisions of Articles 14 to 17, Member States shall: (a) take measures as soon as possible to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this directive. […] (b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself or herself for the personal interview. […] 3. Member States shall ensure that: (a) if an unaccompanied minor has a personal interview on his or her application for international protection […], that interview is conducted by a person who has the necessary knowledge of the special needs of minors; (b) an official with the necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor. 4. Unaccompanied minors and their representatives shall be provided, free of charge, with legal and procedural information […]. ([461])

([459]) See also UNHCR, The Heart of the Matter, op. cit., fn. 272, p. 91.
([460]) See further EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018, op. cit., fn. 3, Subsections 4.2.7 and 4.2.8.
([461]) Art. 25(5) is quoted in full early in Section 5.2.2 above.

These procedural safeguards are mutually reinforcing. For example, what is said in Article 15(3)(e) regarding the duty of Member States to ensure that 'interviews with minors are conducted in a child-appropriate manner' ([462]) echoes Article 25(3)(e) on unaccompanied minors which prescribes an obligation on Member States to ensure the personnel conducting the interview have the 'necessary knowledge of the special needs of minors'. Interview techniques and communication methods need to be tailored to minors and their special needs ([463]). This is important as, in the absence of documentary evidence produced by minor applicants, the interview provides the opportunity for them to substantiate their application. In a 2012 judgment, the Vrhovno sodišče Republike Slovenije (Supreme Court of Slovenia), for instance, found that the Ministry of Interior had failed to conduct the proceedings and ask questions in a manner compatible with the applicant's personality and age as he was 10-12 years old ([464]).

Whilst the above procedural rules are designed to regulate the application of a minor by a determining authority, some would appear to apply, *ceteris paribus*, to proceedings before a court or tribunal tasked with a fact-finding function — for example, if a minor is called to give oral testimony. National rules governing procedures in courts and tribunals may include specific practice directions requiring that minors be treated as vulnerable witnesses and that due allowance be made in approaching their evidence because of their age and lack of maturity ([465]). For courts or tribunals reviewing decisions of lower courts or tribunals it will be important to consider whether such standards have been adhered to.

The procedural safeguards set out in the APD (recast) focus on ensuring the applicant's personal position and circumstances are sufficiently identified. However, in order to give proper effect to the duty of cooperation, it is also incumbent on the Member State to identify and obtain background evidence relating, for example, to the general conditions in the minor's country of origin or more specific matters such as information regarding the minor's familial, tribal, and cultural connections ([466]). As noted in the *UNHCR Handbook*, '[w]here the minor has not reached a sufficient degree of maturity to make it possible to establish well-founded fear in the same way as for an adult, it may be necessary to have greater regard to certain objective factors' ([467]). This may entail, for example, attaching more weight to documentary evidence ([468]). Subsequent UNHCR uidelines make clear that such 'objective factors' include 'an up-to-date analysis and knowledge of child-specific circumstances in the country of origin, including of existing child protection services' and 'consideration of evidence from a wide array of sources, including child-specific country of origin information' (e.g. relating to child trafficking) ([469]). One implication of assessment placing greater weight on 'objective factors' is that shortcomings in the evidence relating to the minor's personal position and circumstances will not necessarily result in a negative assessment overall.

Where the applicant is a minor, decision-makers will need to proceed with particular caution in applying the provisions of Article 4(5) QD (recast) governing situations where aspects of

([462]) Emphasis added.
([463]) UNHCR, The Heart of the Matter, op. cit., fn. 272, pp. 105-110.
([464]) Supreme Court (Slovenia), I Up 471/2012, op. cit., fn. 58 (see EDAL English summary).
([465]) See in the United Kingdom, Joint Presidential Guidance Note No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance, op. cit., fn. 176.
([466]) Note, with regard to unaccompanied minors, that Art. 24(3) reception directive (recast) provides: 'Member States shall start tracing the members of the unaccompanied minor's family, where necessary with the assistance of international or other relevant organisations, as soon as possible after an application for international protection is made, whilst protecting his or her best interests. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.'
([467]) UNHCR Handbook, op. cit., fn. 28, para. 217.
([468]) Reflecting UNHCR guidelines, the United Kingdom Immigration Rules contain a rule (para. 351) where it is provided that '[…] in assessing the claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of his situation'.
([469]) UNHCR, *Guidelines on international protection no 8: Child asylum claims under Articles 1A(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees*, 22 December 2009, UN Doc HCR/GIP/09/08, paras. 11 and 12.

the applicant's statements are not supported by documentary or other evidence (see Section 4.3.7 above). On the one hand, if the minor is a mature adolescent, these provisions may be applied in much the same way as to an adult ([470]). On the other, if the minor is very young, there may be no statement by the minor or (if accompanied, for example) by any family member on his/her behalf and it would be absurd to expect that such a minor to make 'a genuine effort to substantiate his application' (Article 4(5)(a)). This illustrates that in the case of a child it may not always be appropriate to regard the burden of substantiation as a heavy one ([471]).

Concerning **expert evidence**, according to Article 10(3)(d) APD (recast), Member States shall ensure that the competent authorities may seek expert evidence on child-related issues ([472]).

5.2.4 Evidence and credibility assessment: specific factors to be taken into account in the case of minor applicants

Taking due consideration of the age of minor applicants is crucial for assessing the credibility of their statements and thus for the determination of whether they qualify for international protection ([473]). A number of factors specific to minor applicants should be taken into account.

One obvious factor is development. During his/her first 18 years a child undergoes numerous stages of development affecting inter alia their biological growth, cognition, understanding, memory, linguistic capacity, perception of the interaction between themselves and their family, social and cultural environment ([474]). Within the category of 'minor' there are markedly different stages of childhood. In the case of infants, it is impossible to assess their circumstances in terms of them personally having a 'well-founded fear' ([475]). Between a child aged five and an adolescent, there are marked differences in understanding and outlook. While peculiar to each specific individual, the period of adolescence, for example, is generally marked by specific types of changes in thinking ([476]), as well as more impulsive behaviours. UNHCR notes in this respect:

> The combination of partially developed impulse control, emotion regulation and increased sensitivity to reward during adolescence can increase the likelihood of acting impulsively before weighing up the consequences. Adolescents are more likely to take risks, as they are less able to pause and assess a situation before making a decision. This highlights the danger for decision-makers of judging adolescents' actions based on what they themselves would have done in any particular situation ([477]).

Adolescence is also a time of emerging identity, including gender identity and sexual orientation (for more on this, see Section 6.6 below).

([470]) UNHCR Handbook, op. cit., fn. 28, paras. 215 and 216.
([471]) See High Court (Ireland), judgment of 17 September 2015, GH (a minor) v Refugee Appeals Tribunal [2015] IEHC 583, para. 20: 'In minor applicant cases the tribunal must assume a greater share of the burden of proof as opposed to the requirement in adult asylum claims that the burden of proof remains with the Applicant at all times'.
([472]) In the United Kingdom, see e.g. Upper Tribunal (United Kingdom), judgment of 6 January 2012, AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC); and Upper Tribunal (United Kingdom), judgment of 31 May 2013, ST (Child asylum seekers) Sri Lanka [2013] UKUT 00292 (IAC).
([473]) See e.g. Asylum Court (Austria), judgment of 10 March 2011, A5 417.766-1/2011 (see EDAL English summary), where the court ruled that the Federal Asylum Agency did not sufficiently appreciate the applicant's minor status in its evidence and credibility assessment and had thus 'made a serious procedural error by not granting asylum, and had breached its obligation to carry out proper investigation and a comprehensive assessment of the individual arguments'.
([474]) The United Kingdom Home Office similarly lists the following factors to be taken into account in applications by minors: 'the child's age and maturity, the mental or emotional trauma experiences by the child, educational level, fear or mistrust of authorities, feelings of shame, painful memories, particularly those of a sexual nature' (United Kingdom Home Office, *Processing Children's asylum claims*, 12 July 2016, pp. 39 and 40).
([475]) UNHCR Handbook, op. cit., fn 28, paras. 217-219.
([476]) UNHCR, The Heart of the Matter, op. cit., fn. 272, p. 59.
([477]) Ibid., p. 60 [internal references omitted].

Another important factor concerns memory. In order to have realistic expectations of the ability of minor applicants to recall past events and respond to questions, it is important to have an understanding of the memory of minors. Memory is contingent on the minor's stage of development and his/her maturity. Given his/her age and maturity, a minor may thus have more difficulties concerning time perception and calculation of risk ([478]). It is further noteworthy that minors' memory can be influenced by others, as they are particularly prone to suggestibility (for more on memory, see Section 6.1).

A further factor concerns psychological and emotional well-being. The state of a minor's mental and emotional well-being can have a profound effect on memory and affect their ability to present a coherent account ([479]). Decision-makers should also be aware that some minors may have mental health problems, such as, post-traumatic stress disorder, depression and/or anxiety, arising from their experiences in the country of origin and/or during their displacement. As UNHCR notes:

> Having been forced to find ways of surviving without family protection, many displaced children and [sic] are very resilient. Nevertheless, they carry a heightened risk of developing mental health problems because of the stressors to which they have been exposed. These include experiences in their home country (such as war, disruption of community life, or the deaths of family members) as well as during their stay in countries of transit, where many had limited access to food, water, shelter and health care, or faced sexual exploitation and other abuses ([480]).

Apart from mental health conditions arising from past experiences, some minors may have pre-existing developmental difficulties such as learning difficulties, autistic spectrum disorder or attention deficit disorders.

As indicated in the above quotation, another factor (or set of factors) concerns a minor's experience of displacement or of being uprooted. Displacement may not always affect minors adversely, but the experiences to which minors may have been exposed in their country of origin or in transit might affect their trust in others, including the authorities determining their application for international protection. Family ties may have been disrupted as a result of separation from or loss of parents, siblings or other relatives, as in the case of unaccompanied minors ([481]). A lack of trust in the competent authorities may prevent a minor from giving a full and truthful account of their experiences. Furthermore, minors' confidence in state authorities or other figures of authority, such as adults, may be impaired as a result of abuses they may have experienced at the hands of the authorities in their country of origin or other adults encountered in transit, such as smugglers, traffickers and state officials ([482]).

The above factors are only illustrative of some of the specific elements that have to be taken into consideration when assessing a minor's application for international protection. A 2015 study by the Hungarian Helsinki Committee sought to summarise the main hazards in applying to minors ordinary standards used in assessing credibility as follows:

([478]) See e.g. Supreme Court (Slovenia), I Up 471/2012, op. cit., fn. 58, (see EDAL English summary); UNHCR, The Heart of the Matter, op. cit., fn. 272.
([479]) Further the United Kingdom Home Office notes that interviews might not be in the best interest of the minor applicant: 'For example, if the child has been through a particularly traumatic experience and adequate documentary information has already been provided it may not be in the child's best interests to be expected to recount experience.' See United Kingdom Home Office, *Children's asylum claims*, op. cit., fn. 474, p. 32.
([480]) UNHCR, The Heart of the Matter, op. cit., fn. 272, p. 61.
([481]) Ibid., p. 63.
([482]) Ibid., p. 64.

The child's individual and contextual circumstances, such as her/his developmental stage and personal capacity should be carefully considered when using 'common' credibility indicators.

✓ Sufficiency of detail and specificity: Children typically tell their stories with less detail than adults do. Although they may be able to give the detail, they will need more support to describe it. Children may also have a very different focus and different interests than adults, which will affect the elements on which they are able to provide the most details.

✓ Internal consistency is generally of limited value as a credibility indicator in children. In addition to all the general memory distortions that lead to natural inconsistencies, children are often specifically affected by interrogative suggestibility, by the distorting impact of the lack of trust and the developmental changes of memory (especially in adolescents).

✓ External consistency: A child's statements should be very carefully compared to country information or the testimony of adults. Children are often not aware of certain important information about their country, community, etc. due to limited education, lack of specific interest or developmental stage ([483]).

Some Member States apply the approach set out in the *UNHCR Handbook* which in assessing credibility states that 'if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt' ([484]). UNHCR also recognises that assessment of the credibility of a minor may 'call for a liberal application of the benefit of the doubt' ([485]). In all Member States, irrespective of whether such approach is adopted, assessment of the credibility of a minor must make due allowances for age and degrees of vulnerability.

5.3 Evidence assessment in the application of the concept of internal protection

Article 8(1) QD (recast) permits Member States to refuse international protection to an applicant if, in part of the country of origin, there is no well-founded fear of persecution or serious harm or protection is provided against persecution or serious harm and provided the applicant 'can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there'. While these material requirements are analysed in detail in *Qualification for International Protection (Directive 95/2011/EU) — A judicial analysis* ([486]), this Section examines more specifically issues related to evidence and credibility assessment which are particular to the application of the concept of internal protection.

Where Member States apply an internal protection test to refuse international protection, they must provide reasons for doing so based on the application of the internal protection concept. Member States must identify a specific part of the country of origin to which the

([483]) Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 2, op. cit., fn. 27, p. 114.
([484]) UNHCR Handbook, op. cit., fn. 28, para. 196.
([485]) UNHCR, *Refugee children: Guidelines on protection and care*, 1993, p. 101.
([486]) EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, op. cit., fn. 3, Section 1.8.

applicant is expected to relocate and support any finding that it is sufficiently safe to remove him/her in light of the criteria of Article 8(1) ([487]).

Concerning the burden and standard of proof, as Article 8(1) makes clear, Member States must demonstrate that the applicant 'has no well-founded fear of being persecuted or is not at real risk of suffering serious harm in that part of the country; or has access to protection against persecution or serious harm'. Hence the same standard of proof applies as detailed in Section 4.3.9 above.

By definition, substantiating the application of the internal protection concept relates to the situation in the country of origin and, more specifically, the relevant part thereof; but it also requires a case-by-case assessment in light of the applicant's individual circumstances ([488]). This is clearly laid down in Article 8(2), which requires Member States to 'have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4 [QD (recast)]'.

The **assessment as to the safety of part of the country of origin** must be made 'at the time of taking the decision on the application' ([489]) and requires the Member State to obtain information on the relevant part of the country of origin. Article 8(2) further provides that 'Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as [UNHCR] and [EASO]' ([490]). The scope of information Member States should obtain is also informed by the requirement of Article 8(1) that the applicant can safely and legally travel to and be admitted to the relevant part of his/her country of origin and can be reasonably expected to settle there. The United Kingdom Home Office notes in this respect:

> This means taking account of the means of travel and communication, cultural traditions, religious beliefs and customs, ethnic or linguistic differences, health facilities, employment opportunities, supporting family or other ties (including childcare responsibilities and the effect of relocation upon dependent children), and the presence and ability of civil society (e.g. non-governmental organisations) to provide practical support.
>
> In certain countries, financial, logistical, social, cultural and other factors may mean that women face particular difficulties. This may be the case for divorced women, unmarried women, widows or single/lone parents, especially in countries where women are expected to have male protection. If women face discrimination in a possible place of relocation and are unable to work or obtain assistance from the authorities, relocation would be unreasonable ([491]).

Section 4.8 above deals more specifically with the criteria for evaluating COI which have particular relevance for the application of internal protection.

([487]) Ibid. See e.g. Refugee Board (Poland), decision of 14 August 2015, RdU-326-1/S/2015, where the Refugee Board stated: 'The burden of proof that the personal circumstances of the applicant will not stand in the way of the refusal of international protection based on an internal protection alternative lies within the authority' (per EDAL English summary); Council of State (France), decision of 11 February 2015, *Mme CA*, application no 374167, ECLI:FR:CESJS:2015:374167.20150211, para. 3 (see EDAL English summary).

([488]) See e.g. Supreme Administrative Court (Czech Republic), judgment of 30 September 2013, IJ v Ministry of Interior, 4 Azs 24/2013-34 (see EDAL English summary).

([489]) As e.g. reaffirmed by the Federal Administrative Court (Germany), judgment of 19 January 2009, BVerwG 10 C 52.07, BVerwG: 2009:190109U10C52.07.0, para. 29, including in English.

([490]) This echoes Art. 4(3)(a) QD (recast) examined in Section 4.8 above. See e.g. Court of The Hague (Netherlands), judgment of 7 April 2016, NL16.6, ECLI:NL:RBDHA:2016:3710, para. 17 (see EDAL English summary).

([491]) Home Office (United Kingdom), *Asylum policy instructions: assessing credibility and refugee status*, 6 January 2015, p. 37.

As noted above, Article 8(2) QD (recast) also requires Member States to have regard to the applicant's personal circumstances. What this demands in terms of the assessment of evidence and credibility is examined above in Part 4 ([492]).

As it rests on the competent authority to determine the availability of internal protection, the applicant should have the opportunity to establish that he/she cannot benefit from such protection, given the significant consequences for him/her and with due respect to 'basic rules of procedural fairness' ([493]). As noted by the Irish High Court:

> As a matter of fair procedures the proposed safe area should be notified to and discussed with the applicant to establish whether he/she could reasonably be expected to stay there. The applicant is obliged to cooperate, to answer truthfully, to provide all relevant information available to him/her to determine the reasonableness of the relocation area and to provide information on any personal factors which would make it unreasonable or unduly harsh for him/her to relocate rather than being recognised as a refugee ([494]).

5.4 Family relationships and evidence assessment

The notion of family unity and issues related to family relationships are addressed in more detail in *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis* ([495]). This section focuses on those aspects bearing on evidence and credibility assessment in the context of applications for international protection.

Neither the QD (recast) nor the APD (recast) contain specific standards applicable to assessment of whether or not there is a family relationship.

Given the absence in the CEAS legislation of specific standards applicable to assessment of whether there is a family relationship, it may be of relevance to have regard to another EU law instrument that touches on this issue.

Albeit not forming part of the CEAS, the family reunification directive contains certain provisions relating to evidence of family relationship of possible relevance in the context of considering qualification for international protection when issues of family relationships are at stake. Aimed at establishing the right to family reunification, it applies to third-country nationals residing lawfully in the territory of the Member States, including refugees ([496]). It does not, however, apply to beneficiaries of subsidiary protection.

Article 5(2) of the family reunification directive requires that 'an application for family reunification shall be accompanied by documentary evidence of the family relationship'. The same provision foresees that in order to obtain evidence that a family relationship exists, Member States

([492]) See e.g. High Court (Ireland), AO v Refugee Applications Commissioner & Ors, op. cit., fn. 319, para. 40 where the court quashed the decision of the Refugee Appeals Tribunal because it failed to give due 'regard to the personal circumstances of the applicant, who was a teenager and did not have any family left in Nigeria apart from her parental uncle from whom she was fleeing.' See also, Council of State (Belgium), decision of 5 July 2013, no 224.276, para. 7.1 (see EDAL English summary).

([493]) See UNHCR, *Guidelines on international protection no 4: 'Internal flight or relocation alternative' within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees* (23 July 2003) UN Doc HCR/GIP/03/04, para. 35. See also, Council of State (France), *Mme CA*, no 374167 C, op. cit., fn. 487, in which the Council of State ruled that where the French National Asylum Court decides, on its own motion, to apply the concept of internal protection, it must notify this fact to the applicant and indicate the specific place (town, region, etc.) in the country of origin in which internal protection is considered available.

([494]) High Court (Ireland), judgment of 1 November 2013, KD (Nigeria) v Refugee Appeals Tribunal & ors, [2013] IEHC 481, para. 28, principle 11.

([495]) EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, op. cit., fn. 3, Sections 1.10.2 and 2.9.2.

([496]) Family reunification directive, op. cit., fn. 32.

may 'carry out interviews with the sponsor and his/her family members and conduct other investigations that are found to be necessary'. Concerning the unmarried partner of the sponsor, his/her relationship may be ascertained with regard to factors 'such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof'.

Of particular interest in an asylum context is the fact that the family reunification directive envisages, in its Chapter V, the specific situation of refugees ([497]). Recital (8) recalls that 'attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there' and recommends that 'more favourable standards should therefore be laid down for the exercise of their rights to family reunification'.

Regarding the question of evidentiary requirements, those 'more favourable standards' are found in Article 11(2) of the family reunification directive which provides that '[w]here a refugee cannot provide official documentary evidence of the family relationship, the Member states shall take into account other evidence, to be assessed in accordance with national law, of the existence of such relationship' ([498]). Consistent with this is the further requirement that '[a] decision rejecting an application (for family reunification) may not be based solely on the fact that documentary evidence is lacking'.

This provision creates an alleviated evidentiary standard for establishing the relationship between the refugee and his/her family members. As noted earlier, in many cases beneficiaries of international protection are in possession of limited, if any, documentary evidence regarding their family relationship and obtaining official documents may be difficult due to the rupture of relations with the authorities of the country of origin that the recognition of refugee status implies.

In a case where the embassy in the country of origin had refused to issue visas to the spouse and children of a refugee applying for family reunification, on the ground that documentary evidence establishing their identity and relationship with the refugee was not authentic, the French Council of State found that, with regard to the constant declarations of the refugee, since the outset of his asylum application, about his relationship with his wife and children, the burden of demonstrating the fraudulent character of the documentation submitted rested with the defendant administration ([499]).

5.5 Exclusion and the assessment of evidence

5.5.1 Definitions

The subject of exclusion is addressed in detail in E*xclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) — A judicial analysis* ([500]). This judicial analysis will concentrate on matters concerning evidence and credibility assessment in the context of cases concerning exclusion under Articles 12(2) and 17(1) QD (recast).

([497]) The directive does not, however, apply to beneficiaries of subsidiary protection (Art. 3(2)(c)).
([498]) Art. 5(2) of the Directive, permits the Member Status to seek to obtain other evidence by carrying out interviews and conducting 'other investigations that are found to be necessary', including to the extent permitted by national legislation, DNA analysis.
([499]) Council of State (France), decision of 24 November 2010, *Mme M*, application no 333913.
([500]) EASO, *Exclusion — A judicial analysis*, op. cit., fn. 3.

The terms under which an applicant may be excluded from international protection are defined in Articles 12 and 17 QD (recast). Article 12 sets out the grounds upon which a third-country national or a stateless person is excluded from being a refugee. It incorporates the exclusion clauses of Article 1D, 1E and 1F of the Refugee Convention. Article 17 foresees four grounds for exclusion from subsidiary protection: the first three are directly adapted from the aforementioned exclusion clauses of Article 1F of the Refugee Convention, whereas the fourth reflects public order and national security considerations set out in Articles 32-33 of the Refugee Convention. These provisions are mandatory.

Furthermore, Article 17(3) QD (recast) contains a non-mandatory provision allowing a Member State to exclude a person from subsidiary protection:

> if he or she, prior to his or her admission to the Member State concerned, has committed one or more crimes outside the scope of paragraph 1 [i.e. the four mandatory exclusion clauses from subsidiary protection] which would be punishable by imprisonment, had they been committed in the Member State concerned, and he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes.

It is noteworthy that the mandatory exclusion clauses of Articles 12 and 17 QD (recast) can also be applied after a person has been granted international protection, as a cause for withdrawal of the refugee or subsidiary protection status. According to Articles 14(3)(a) and 19(3)(a) QD (recast), Member States shall revoke, end or refuse to renew the international protection status of a person who should have been or is excluded in accordance with Articles 12 and 17 (see Section 5.6) ([501]).

5.5.2 Burden of proof and the duty of individual assessment

In the context of evidence and credibility assessment, a principle of prime importance is that the burden of proving that the exclusion criteria apply rests on the Member State. Article 12 must be interpreted narrowly and applied restrictively with caution because of the serious consequences of excluding a person with a well-founded fear of persecution from international protection. Although this principle is not set out in the CEAS legislation, its primacy has been affirmed by Advocate General Mengozzi in *B and D* when he stated:

> The grounds for exclusion deprive individuals whose need for international protection has been established of the guarantees laid down in the [Refugee Convention and QD], and, in that sense, constitute exceptions to or limitations upon the application of a provision of humanitarian law. Given the potential consequences of applying those grounds, a particularly cautious approach must be taken. The UNHCR has consistently reaffirmed the need to construe the grounds for exclusion laid down in the 1951 Geneva Convention narrowly, even in the context of combating terrorism ([502]).

This principle has also been universally accepted by the case-law of courts and tribunals when applying either Article 1F of the Refugee Convention or Article 12 QD (recast) ([503]), provisions

([501]) Ibid.
([502]) Opinion of Advocate General Mengozzi of 1 June 2010, joined cases C-57/09 and C-101/09, Federal Republic of Germany v B and D, EU:C:2010:302, para. 46.
([503]) See e.g. Supreme Court (United Kingdom), judgment of 21 November 2012, Al-Sirri and DD (Afghanistan) v Secretary of State for the Home Department [2012] UKSC 54, paras. 12 and 16, on appeal from [2009] EWCA Civ 222; [2010] EWCA Civ 1407.

which the CJEU in *B and D* has seen as analogous ([504]). It would be contrary to the purpose behind the establishment of a complementary scheme of subsidiary protection if its exclusion clause did not also adhere to the same principle.

Whilst the burden of proving that the exclusion criteria are fulfilled is on the state, it is possible for the burden to shift. For example, if the applicant claims to be a senior official of an oppressive regime or of an organisation which commits violent crimes, a presumption of exclusion may arise. In relation to individual responsibility for acts falling within the scope of Article 12(2) (b) and (c) QD (recast, the CJEU, in its *B and D* decision, focusing on the issue of membership of terrorist organisations, held that competent authorities of the Member States are entitled to presume that persons having occupied prominent positions in such organisations have individual responsibility for acts committed by the organisation during the relevant period, but underlines that it is nevertheless necessary to examine all the relevant circumstances before an exclusion decision can be adopted ([505]).

In its decision in the case of *Mostafa Lounani*, the CJEU stated:

> '[f]or the purposes of the individual assessment of the facts that may be grounds for a finding that there are serious reasons for considering that a person has been guilty of acts contrary to the purposes and principles of the United Nations, has instigated such acts or has otherwise participated in such acts, the fact that that person was convicted by the courts of a Member State on a charge of participation in the activities of a terrorist group is of particular importance, as is a finding that that person was a member of the leadership of that group, and there is no need to establish that that person himself or herself instigated a terrorist act or otherwise participated in it ([506]).

In *AB (Afghanistan)*, the Irish High Court has observed:

> [T]he rationale of the approach to the exclusion clause adopted by the Court of Justice is obvious. A finding that the exclusion applies to an individual is a finding that the individual was at least complicit in atrocities of the most serious kind which attract universal condemnation. A finding to that effect should only therefore be made where there are genuinely serious reasons based upon specific evidence for considering that the individual in question bears a degree of responsibility for the acts alleged and ought not therefore to be entitled to evade accountability for them as a refugee. Known terrorist organisations may be splintered into a variety of factions each pursuing different means of achieving one or more common aims. Thus, mere membership of an organisation does not create a presumption that a particular individual can be fixed with the necessary degree of involvement and responsibility which will exclude him from refugee status without an examination of the nature, extent, duration and level of responsibility of his involvement ([507]).

These decisions make clear that membership of an organisation of this kind is not in itself sufficient to attribute an individual responsibility. Such attribution remains conditional on an assessment of the specific facts concerning, inter alia, the true role played by the person

([504]) CJEU, judgment of 9 November 2010, Grand Chamber, joined cases C-57/09 and C-101/09, Bundesrepublik Deutschland v B and D, EU:C:2010:661, para. 102.
([505]) Ibid., para. 98.
([506]) CJEU, judgment of 31 January 2017, Grand Chamber, case C-573/14, Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani, ECLI:EU:C:2017:71, para. 79.
([507]) High Court (Ireland), judgment of 10 November 2011, AB (Afghanistan) v Refugee Appeals Tribunal & Ors [2011] IEHC 412, para. 13. The same principle was applied in High Court (Ireland), judgment of 12 January 2016, IH (Afghanistan) v Refugee Appeals Tribunal & Anor [2016] IEHC 14.

concerned in the perpetration of the excludable acts, his/her position within the organisation, the extent of knowledge he/she had, or was deemed to have, of its activities, the possible pressure to which he/she was exposed or other factors likely to have influenced his/her conduct ([508]).

A further principle, affirmed by the CJEU in *B and D* in relation to exclusion from refugee status but equally applicable to exclusion from subsidiary protection status, is that the determining authority must decide the issue of exclusion in the context of an assessment of facts which has to be carried out on an individual basis, as provided for by Article 4(3) QD (recast). As stated by the CJEU in this same case:

> It is clear from the wording of those provisions of Directive 2004/83 that the competent authority of the Member State concerned cannot apply them until it has undertaken, for each individual case, an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of those exclusion clauses ([509]).

The reference in this paragraph to a person who 'otherwise satisfies the conditions for refugee status' implies that such assessment cannot be done in isolation from the assessment of the overall claim.

With regard to an individual assessment, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) — A judicial analysis* notes:

> Examples of the types of evidence which may be taken into account include country of origin information (COI), statements of the applicant and among them confessions of involvement for instance, credible testimonies of witnesses, indictments or convictions by an international court or tribunal, convictions by national courts (assuming fair trial guarantees have been assured) or extradition requests. Whether or not such evidence can be relied upon in determining that the applicant has incurred individual responsibility for an excludable act needs to be assessed on a case-by-case basis, in light of the particular circumstances of the applicant ([510]).

5.5.3 Standard of proof

The exclusion clauses — as reflected in Articles 12(2) and 17(1) QD(recast) — are subject to the existence of 'serious reasons for considering' that a person:

(a) has committed the crimes referred to in Articles 12(2)(a) and (b) and 17(1)(a) and (b);

(b) has been guilty of the acts referred to in Articles 12(2)(c) and 17(1)(c);

(c) constitutes a danger to the community or to the security of the Member State in which he/she is present, as provided for by Article 17(1)(d).

([508]) CJEU, B and D, op. cit., fn. 504, para. 97.
([509]) Ibid., para. 87.
([510]) EASO, *Exclusion — A judicial analysis*, op. cit., fn. 3, Section 4.1.1, p. 41.

The CJEU has yet to give guidance on the meaning of the words 'serious reasons for considering' but it is again widely accepted that it imports a lower standard of proof than that applicable in actual criminal proceedings. The aim of the exclusion clauses is not an establishment of guilt within the meaning of criminal law standards: a criminal conviction is not necessary to establish the 'serious reasons for considering' which trigger their application.

In affirming this interpretation, the United Kingdom Supreme Court has, however, added this caveat:

> We are, it is clear, attempting to discern the autonomous meaning of the words 'serious reasons for considering'. We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions: (1) 'Serious reasons' is stronger than 'reasonable grounds'. (2) The evidence from which those reasons are derived must be 'clear and credible' or 'strong'. (3) 'Considering' is stronger than 'suspecting'. In our view it is also stronger than 'believing'. It requires the considered judgment of the decision-maker. (4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law. (5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has not committed the crimes in question or has not been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision maker is to apply the words of the Convention (and the irective) in the particular case ([511]).

In similar vein, the French Council of State has held on several occasions that such consideration as to whether an applicant should be excluded from the international protection he/she is requesting requires as a minimum that these reasons be 'serious' and rely on something more than mere suspicion or deduction from a context or a 'profile'. Hence the National Asylum Court was not justified in deciding to exclude by inferring solely from an applicant's profile or professional activity that there were serious reasons for considering him an author of, or an accomplice in, acts falling within the scope of Article 1F of the Refugee Convention ([512]).

With regard to the standard of proof, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) — A judicial analysis* notes:

> The United Kingdom Court of Appeal held that even where a decision-maker applies a balance of probabilities standard, this is unlikely to cause a legal error. Ultimately, national rules of procedure will play a role in making the determination as to the standard applicable, however, guided by the aforementioned authorities. UNHCR, drawing on Swiss case-law, considers that 'exclusion does not require a determination of guilt in the criminal justice sense' and that 'the balance of probabilities is too low a threshold' ([513]).

([511]) Supreme Court (United Kingdom), Al-Sirri and DD (Afghanistan) v Secretary of State for the Home Department, op. cit., fn. 503, para. 75.

([512]) Among others, see Council of State (France), judgment of 14 June 2010, *M. K.*, no 320630 A, in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2010, 2011, pp. 134 and 135; Council of State (France), judgment of 17 January 2011 *M. A.* no 316678 C, in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2011, p. 141; Council for Aliens Law Litigation (Belgium), decision of 13 July 2015, no 149555; as well as Council for Aliens Law Litigation (Belgium), decisions of 6 February 2015, no 138035; of 19 June 2012, no 83281; of 18 June 2013, no 105239.

([513]) EASO, *Exclusion — A judicial analysis*, op. cit., fn. 3, Section 4.1.1.

5.6 Withdrawal of protection and assessment of evidence

Withdrawal of international protection is defined in Article 2(o) APD (recast) as 'the decision by a competent authority to revoke, end or refuse to renew the refugee or subsidiary protection status of a person in accordance with [the QD (recast)]'. In accordance with the specific provisions of Article 14 and Article 19 QD (recast), Member States either shall or may 'revoke, end or refuse to renew' the refugee status or subsidiary protection status, respectively, of the person concerned in specified circumstances as outlined in Table 27 below.

Table 27: Summary of grounds for withdrawal of international protection

Grounds	Refugee status QD (recast) provision	Subsidiary protection status QD (recast) provision
Cessation	Article 14(1)	Article 19(1)
Exclusion	Article 14(3)(a)	Articles 19(2) and 19(3)(a)
Misrepresentation or omission of facts	Article 14(3)(b)	Article 19(3)(b)
Danger to security of Member State	Article 14(4)(a)	Article 19(3)(a) together with Article 17(1)(d)
Danger to community of Member State	Article 14(4)(b)	Article 19(3)(a) together with Article 17(1)(d)

These provisions are dealt with more fully in *Ending International Protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) — A judicial analysis* and, in relation to exclusion, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) — A judicial analysis*.

5.6.1 Burden of proof and the duty of individual assessment

The burden of proving that the criteria for revocation of, ending of or refusal to renew international protection status are met rests on the Member State. It is clear from the wording of the QD (recast) that, without prejudice to Article 4(1) QD (recast), it is the duty of Member States to demonstrate that the person concerned has ceased to be or has never been a refugee, or has ceased to be or is not eligible for subsidiary protection.

Article 14(2) QD (recast) provides:

Article 14(2) QD (recast)

Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his or her disposal, **the Member State which has granted refugee status shall,** on an individual basis, **demonstrate** that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article ([514]).

([514]) Emphasis added.

Article 14(2) relates specifically to withdrawal of refugee status on the ground of cessation. This mirrors the burden of proof in relation to the cessation clauses of the Refugee Convention ([515]). However, Article 14(3) also makes clear that it is for the Member State to establish the grounds for exclusion and misrepresentation or omission of facts:

Article 14(3) QD (recast)

Member States shall revoke, end, or refuse to renew the refugee status of a third-country national or a stateless person if, after he or she has been granted refugee status, **it is established by the Member State concerned** that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

(b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of refugee status ([516]).

Article 19(4) QD (recast) concerning subsidiary protection uses almost identical terms to Article 14(2) QD (recast) but applies to all the grounds for withdrawal of subsidiary protection status:

Article 19(4) QD (recast)

Without prejudice to the duty of the third-country national or stateless person in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his or her disposal, **the Member State which has granted the subsidiary protection status shall,** on an individual basis, **demonstrate** that the person concerned has ceased to be or is not eligible for subsidiary protection in accordance with paragraphs 1, 2 and 3 of this Article ([517]).

The reference to 'demonstrate' in both contexts was the result of the legislator's resolve to make clear that in relation to decisions to withdraw international protection status, the Member State must bear the burden of proving that the grounds for revocation of, ending of or refusal to renew international protection have been fulfilled or satisfied ([518]).

The reference to 'on an individual basis' in both articles confirms that the Article 4(3) requirement of individual assessment must apply in this context as well (see Section 4.3.1).

([515]) UNHCR, *Guidelines on international protection no 3: cessation of refugee status under Article 1C(5) and (6) of the 1951 Convention relating to the status of refugees (the 'ceased circumstances' clauses)*, 10 February 2003, UN Doc HCR/GIP/03/03.

([516]) Emphasis added.

([517]) Emphasis added.

([518]) Kraft, I., in Hailbronner and Thym, *EU Immigration and Asylum Law, A Commentary*, op. cit., fn. 85, pp. 1193 and 1228; National Asylum Court (France), judgment of 7 May 2013, OFPRA v A A, application no 12021083. Nevertheless, the beneficiary of international protection is expected to explain his/her behaviour as required by his/her duty of cooperation. In Asylum and Immigration Tribunal (United Kingdom), judgment of 28 June 2007, RD (Cessation — burden of proof — procedure) Algeria, [2007] UKAIT 66, para. 30, the tribunal noted the existence of a presumption of re-availment of the protection of the country of origin when the refugee obtains a passport or a passport renewal of the country of nationality. See also, UNHCR Handbook, op. cit., fn. 28, para. 121.

5.6.2 Obtaining the elements to demonstrate grounds for withdrawal of international protection

It is clear from the wording of Article 44 APD (recast) that an examination to withdraw international protection cannot begin unless new elements or findings have arisen to prompt reconsideration of the validity of the protection granted. Under this article:

Article 44 APD (recast)

Member States shall ensure that an examination to withdraw international protection from a particular person may commence when new elements or findings arise indicating that there are reasons to reconsider the validity of his or her international protection.

The withdrawal procedure differs from the international protection procedure in that it is commenced by — and at the initiative of — the national administrative authorities responsible and is directed against a person enjoying the benefit of international protection.

Article 45(1) APD (recast) details the principle laid down in recital (49) ([519]):

Article 45(1) APD (recast)

Member States shall ensure that, where the competent authority is considering withdrawing international protection from a third-country national or stateless person in accordance with Article 14 or 19 of [the QD (recast)], the person concerned enjoys the following guarantees:

(a) to be informed in writing that the competent authority is reconsidering his or her qualification as a beneficiary of international protection and the reasons for such a reconsideration; and

(b) to be given the opportunity to submit in a personal interview in accordance with Article 12(1)(b) and Articles 14 to 17 or in a written statement, reasons as to why his or her international protection should not be withdrawn.

As such, in accordance with Article 45(1)(b), Member States must give applicants the opportunity, either in a personal interview or in a written statement, to submit reasons as to why their international protection should not be withdrawn. When applicants are interviewed, they must receive the services of an interpreter when appropriate communication cannot be ensured without such services (Article 12(1)(b) APD (recast)). Moreover, the interview must be in compliance with the guarantees set out in Articles 14-17. This includes requiring Member States to 'take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner' (Article 15(3) APD (recast)). It also requires the determining authority to 'ensure that the applicant is given an adequate opportunity to present elements needed to substantiate

([519]) Recital (49) APD (recast) states: 'With respect to the withdrawal of refugee status or subsidiary protection status, Member States should ensure that persons benefiting from international protection are duly informed of a possible reconsideration of their status and have the opportunity to submit their point of view before the authorities can take a reasoned decision to withdraw their status.'

the application […] as completely as possible', including 'the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in the applicant's statements' (Article 16 APD (recast)).

Article 45(2) APD (recast) provides:

Article 45(2) APD (recast)

In addition, Member States shall ensure that within the framework of the procedure set out in paragraph 1:

(a) the competent authority is able to obtain precise and up-to-date information from various sources, such as, where appropriate, from EASO and UNHCR, as to the general situation prevailing in the countries of origin of the persons concerned; and

(b) where information on an individual case is collected for the purposes of reconsidering international protection, it is not obtained from the actor(s) of persecution or serious harm in a manner that would result in such actor(s) being directly informed of the fact that the person concerned is a beneficiary of international protection whose status is under reconsideration, or jeopardise the physical integrity of the person or his or her dependants, or the liberty and security of his or her family members still living in the country of origin.

5.6.3 Specific features affecting evidence and credibility assessment

5.6.3.1 Cessation clauses

A full analysis of the cessation clauses is to be found in *Ending International Protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) — A judicial analysis* ([520]). The cessation clauses are encompassed in Articles 11(1) and 16(1) QD (recast). The six cessation clauses in Article 11(1) cover two types of situations: those relating to changes in the personal situation of the refugee ((a)-(d)); and those relating to changes in the country of origin ((e) and (f)).

As far as Article 11(1)(a)-(d) is concerned, courts and tribunals will generally have to assess the material facts and circumstances which led to the cessation decision and withdrawal of refugee status by the national authorities, and then determine whether these facts and circumstances suffice to demonstrate that the person concerned no longer fears persecution in his/her country of nationality or former habitual residence.

In relation to Article 11(1)(a) and (d), the Member State must adduce evidence to demonstrate that three conditions have been met: voluntariness, intent, and obtaining of effective protection.

Although the assessment must be an objective one, the testimony of the applicant when ascertaining the voluntariness and intent of his/her actions will be of particular importance.

([520]) EASO, *Ending International Protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) — A judicial analysis*, December 2016.

As regards voluntary re-availment of national protection (Article 11(1)(a)), assessing the particular facts requires an objective consideration and not a subjective one based on the views of the person concerned. If a refugee applies for and obtains a national passport or its renewal from the country of origin, UNHCR and some national courts consider that there is a rebuttable presumption that he/she has voluntarily re-availed himself/herself of the protection of the country of nationality ([521]). In this context, the Austrian High Administrative Court held that the delivery of a passport from the refugee's country of nationality indicated a desire to reclaim protection from the country of origin ([522]).

As regards voluntary re-establishment in the country of origin (Article 11(1)(d)), this again, is to be objectively established on the evidence; it is not necessary to prove the subjective intention of the person and conclusions may be drawn from circumstantial evidence ([523]).

Courts and tribunals will be called upon to assess the relevance of acts on which cessation of refugee status is based in regard to the refugee's relationship to the authorities of the country of origin. Whilst bearing in mind that the burden of proof rests with Member States in matters of cessation, identification of certain situations, e.g. return to the country of origin or contact with official authorities of this country, may in turn constitute serious indications that a refugee has sought protection from his/her country of origin ([524]). The French Council of State has held that the National Asylum Court did not err in law nor reverse the burden of proof when it inferred that the applicant had voluntarily re-availed himself of the protection of the country of nationality when he returned to the country of origin ([525]). In another case, the French Council of State ruled that the National Asylum Court did not shift the burden of proof onto the individual concerned when it determined that the statements and testimonies submitted by him were not sufficient to outweigh an official document establishing his presence in his country of origin after his recognition as a refugee ([526]).

When application of Article 11(1)(e) and (f) and 16(1) QD (recast) is at stake, the individual assessment requirement is of particular significance and calls for extra caution. Articles 11(1)(e) and (f) and 16(1) QD (recast) require a change in the conditions prevailing in the country of origin such that the circumstances in connection with which the beneficiary was granted international protection have ceased to exist, or, as additionally provided by Article 16(1) with regards to beneficiaries of subsidiary protection, have changed to such a degree that protection is no longer required. This was highlighted in the United Kingdom House of Lords' judgment in the case of *Hoxha*. This states that a construction that would allow a change in circumstances to be construed too broadly would evince a lack of caution on the part of the decision-maker whose decision potentially poses grave consequences for the subject of the decision ([527]). The assessment must be carried out with vigilance and care. This normally necessitates a longer period of observation during which the situation can consolidate ([528]).

Accordingly, the change of circumstances in connection with which a person has been recognised as a refugee, or granted subsidiary protection, is understood as a change in the general conditions prevailing in the country of origin. Articles 11(2) and 16(2) QD (recast) thus demand

([521]) Council of State (France), decision of 13 January 1989, application no 78055, cited in Kraft, op. cit., fn. 518, p. 1194; Migration Court of Appeal (Sweden), judgment of 13 June 2011, UM 5495-10 (see EDAL English summary); Immigration Appeal Tribunal (United Kingdom), RD (Cessation — burden of proof — procedure) Algeria, op. cit., fn. 518, para. 30. See also, UNHCR Handbook, op. cit., fn. 28, para. 121.
([522]) High Administrative Court (Verwaltungsgerichtshof) (Austria), judgment of 15 May 2003, VWGH 2001/01/0499.
([523]) Kraft, op. cit., fn. 518, p. 1195.
([524]) See EASO, *Ending International Protection — A judicial analysis*, op. cit., fn. 3, Section 3.1.
([525]) Council of State (France), judgment of 31 March 1999, *M. X.,* no 177013.
([526]) Council of State (France), judgment of 11 October 1991, *M. X.,* no 96492 C.
([527]) House of Lords (United Kingdom), judgment of 10 March 2005, In re B, Regina v Special Adjudicator, ex parte Hoxha [2005] UKHL 19.
([528]) See EASO, *Ending International Protection — A judicial analysis*, op. cit., fn. 3, Section 4.

a particular assessment as to whether the change of circumstances is of such a significant and non-temporary nature that 'the refugee's fear of persecution can no longer be regarded as well founded' or that 'the person eligible for subsidiary protection no longer faces a real risk of serious harm'. This requirement is similarly formulated by UNHCR in its *Guidelines on international protection no 3* concerning cessation of refugee status under Articles 1C(5) and 1C(6) of the Refugee Convention ([529]).

In its *Abdulla* ruling, the CJEU provided useful guidance for the assessment of the change of circumstances:

> […] [T]he competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actors of protection referred to in Article 7(1) of the [QD] Directive have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status ([530]).

Article 14(2) QD (recast) furthermore requires Member States to verify, in addition to the change of circumstances analysed above, 'that person has no other reason to fear being "persecuted" within the meaning of Article 2(c) [QD]' ([531]). The assessment of these 'other reasons' is analogous to that carried out during the examination of an initial application and will be made according to the usual standard of proof/evidentiary test applicable in asylum applications (see Section 4.3.9) ([532]).

The CJEU specifies that Article 4(4) QD (recast) (which provides that the fact that an applicant has already been subject to persecution or serious harm or to direct threats of such ill-treatment is a serious indication of a well-founded fear) 'may be applicable where there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage. That may be the case, in particular, where the refugee relies on a reason for persecution other than that accepted at the time when refugee status was granted' ([533]).

This benchmark ruling of the CJEU gives a clear picture of the nature of the assessment expected from a court or tribunal when adjudicating an appeal against a cessation decision based on Article 11(1)(e) or (f) QD (recast). During the first phase of the assessment, the court or tribunal will have to determine if the change of circumstances negates the refugee's well-founded fear of persecution. If the fear which initially led to recognition as a refugee can no longer be regarded as well-founded, the second phase should assess whether other circumstances have arisen which establish a need for international protection on a different ground. Whereas the first phase is governed by the cessation-specific standards described above, the second follows by analogy the rules applicable to the assessment of applications for international protection taking into account the fact that the past persecution or threats that had

([529]) UNHCR, *Guidelines on International Protection No 3: Cessation of Refugee Status*, op. cit., fn. 515.
([530]) CJEU, Abdulla and Others, op. cit., fn. 191, para. 76.
([531]) Ibid. Art. 2(c) QD is now Art. 2(d) QD (recast).
([532]) See also EASO, *Ending International Protection — A judicial analysis*, op. cit., fn. 3, Section 4.1.8.
([533]) CJEU, Abdulla and Others, op. cit., fn. 191, paras. 96 and 97.

justified the granting of refugee status will no longer be regarded as a serious indication of the well-founded fear of persecution alleged at that stage ([534]).

In Article 11(3), the QD (recast) incorporates the exception to cessation provided for in Articles 1C(5) and 1C(6), second sentence, of the Refugee Convention for those refugees 'able to invoke compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of the country of nationality or […] former habitual residence'. Article 16(3) provides for an identical exception to the cessation of subsidiary protection. Notwithstanding a change of circumstances that allows a beneficiary of international protection to avail himself/herself of the protection of his/her country of nationality or former habitual residence, the impact and consequences of any past persecution or serious harm might be such that they constitute compelling reasons for the beneficiary refusing to avail himself/herself of that protection.

These provisions are of an exceptional character and necessitate a highly individualised assessment of the existence of compelling reasons arising out of previous persecution or serious harm ([535]). This specific ground is to be considered only if the circumstances which led to the granting of refugee status or subsidiary protection have ceased to exist and must be clearly distinguished from those situations in which an individual need for international protection is identified by a court or tribunal despite the withdrawal of the protected status by the determining authorities. Where a beneficiary of international protection alleges that such circumstances have not ceased to exist and that he/she still fears being persecuted/subjected to serious harm, the consideration that he/she is not able to invoke compelling reasons arising out of previous persecution or serious harm is irrelevant to the assessment of the question submitted ([536]).

5.6.3.2 Revocation, ending or refusal to renew international protection status as a result of exclusion, misrepresentation or omission

Article 14(3) provides that the duty on Member States to revoke, end or refuse to renew refugee status already granted also arises in relation to two further situations, where:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

(b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of refugee status.

([534]) Albeit the CJEU acknowledged that the level of difficulty encountered in gathering the relevant elements for the purposes of the assessment of the circumstances may, solely from the perspective of the relevance of the facts, prove to be higher or lower from one case to another. In this context the CJEU bore in mind that a person who, after having resided for a number of years as a refugee outside of his country of origin, relies on other circumstances to found a fear of persecution 'does not normally have the same opportunities to assess the risk to which he would be exposed in his country of origin as does an applicant who has recently left his country of origin'; ibid., paras. 81-99.

([535]) Refugee Appeals Board (Commission des recours des réfugiés, France), judgment of 18 October 1999, *M. M.C.,* no 336763: 'The applicant has been subjected, under the regime previously in place in his country of origin, to very serious persecution that has affected his physical and psychological integrity; one of his brothers died after having been tortured by servicemen during interrogation; thus, in view of the circumstances of the case, the consequences of the abovementioned persecution, which has affected both the applicant and his family, are of such a serious nature that they allow M. M.C. to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of his country of nationality, in the meaning of Article 1(C)(5) 2nd para. of the Geneva Convention' (unofficial translation). See also, High Court (Ireland), judgment of 4 December 2009, MST and JT v Minister for Justice, Equality and Law Reform, [2009] IEHC 529, para. 32; High Court (Ireland), judgment of 27 January 2017, BA & ors v International Protection Appeals Tribunal, [2017] IEHC 36, para. 36.

([536]) Council of State (France), decision of 2 March 1984, *M. MG*, application no 42961 C, a case in which the applicant alleged that the durable democratic changes in his country of origin were not relevant to his current fear of being persecuted on the basis of his membership of a movement struggling for the independence of the Basque region.

Article 19(3) makes the same provision in relation to subsidiary protection.

Articles 14(3)(a) and 19(2) and (3)(a) foresee the withdrawal of international protection as a result of post-recognition circumstances falling within the scope of the exclusion provisions of the QD (recast). These provisions being essentially related to the subject matter of exclusion, it is advised to refer to Section 5.5 of this judicial analysis.

With regard to Articles 14(3)(b) and 19(3)(b), the use of the term 'decisive' denotes that it is not necessary to prove that the grant of refugee or subsidiary protection status was exclusively caused by the misrepresentation or omission of facts; it is sufficient to show that, considered objectively, the decision to grant refugee or subsidiary protection status would not have been taken without such misrepresentations or omission ([537]). Accordingly minor misrepresentations or omissions should not be used as decisive factors to revoke refugee or subsidiary protection status ([538]). The incorrectness or falsity of information previously provided may be established, for example, by proving that the refugee was not present in the country of origin at the time asserted. The French National Asylum Court relied on evidence given by the French Consulate that the applicant had not been living in Chechnya since 2005, contrary to his statements in support of his application. The court decided that he was to be regarded as having knowingly attempted to mislead the court ([539]). The Irish High Court in *Gashi* v *Minister for Justice, Equality and Law Reform* held that concealing an asylum application in another country is capable of amounting to information which was false or misleading ([540]).

5.6.3.3 Danger to security or community of Member State

In contrast to Article 14(1)-(3), Article 14(4) gives Member States **discretion** to revoke, end or refuse to renew decisions where there are either 'reasonable grounds for regarding [the beneficiary of international protection] as a danger to the security of the Member State in which he or she is present'; or where 'he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State'.

According to the German Federal Administrative Court, 'reasonable grounds' referred to in Article 14(4) provide for a somewhat lower threshold than 'serious grounds' (see Section 4.3.9) but in assessing the facts the standard of evidence remains unaffected ([541]).

Article 14(4)(b) permits revocation, ending or refusal to renew where '(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State'. Whereas assessment of the conviction is purely one of historic fact, assessment of whether he/she constitutes a danger to the community requires a forward-looking assessment based on the correlation between the probability and the possible extent of the danger ([542]).

([537]) Kraft, op. cit., fn. 518, p. 1229; High Court (Ireland), 12 January 2010, Gashi v Minister for Justice, Equality and Law Reform [2010] IEHC 436.
([538]) UNHCR, Note on Burden and Standard of Proof, op. cit., fn. 20, para. 9.
([539]) National Asylum Court (France), judgment of 8 October 2009 T. no 701681/09007100; Council for Aliens Law Litigation (Belgium), decision of 19 November 2014, no 133.423.
([540]) High Court (Ireland), Gashi v Minister for Justice, Equality and Law Reform, op. cit., fn. 537, para. 11.
([541]) Federal Administrative Court (Germany), judgment of 22 May 2012, BVerwG 1 C 8.11, BVerwG:2012:220512U1C8.11.0, para. 27 (concerning equivalent Art. 21(3) and (2)), cited in Kraft, op. cit., fn. 518, p. 1231. For guidance on the meaning of the terms 'danger to the security' and 'danger to the community', see EASO, *Exclusion — A judicial analysis*, op. cit., fn. 3.
([542]) Kraft, op. cit., fn. 518, p. 1231.

With regards to subsidiary protection status, Article 19(3)(a) together with Article 17(1)(d) is a **mandatory** provision which requires revocation, ending of or refusal to renew subsidiary protection status if there are serious reasons for considering that a beneficiary constitutes a danger to the community or to the security of the Member State in which he or she is present. (See also Section 5.5.3 above, indicating that the CJEU has yet to give guidance on the meaning of the words 'serious reasons for considering' and that it is nonetheless widely accepted that it imports a lower standard of proof than applicable in actual criminal proceedings.)

5.7 Subsequent applications and assessment of new evidence

Subsequent applications are addressed in EASO, *Asylum procedures and the princip*le of non-refoulement - *Judicial analysis,* 2018 ([543]), but are analysed here to highlight aspects relevant to evidence and credibility assessment.

Subsequent applications are a significant phenomenon in most Member States' asylum determination systems. In accordance with Article 2(q) APD (recast):

Article 2(q) APD (recast)

'subsequent application' means a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1) [APD (recast)].

The inclusion of provisions on subsequent applications in the APD (recast) is acknowledgement that some applicants may, through no fault of their own, have been unable to assert relevant facts or evidence during the previous procedure and/or that new circumstances may have arisen. The assessment of these applications is primarily a procedural issue, which albeit addressed by the APD (recast), is largely governed by the domestic law and case-law of the Member States ([544]).

It is worth noting that the ECtHR, whilst considering legitimate the will of states to reduce repetitive and abusive asylum applications and to establish specific rules for assessing such claims, demands a careful and rigorous assessment of the risks alleged in a subsequent application in order to dispel any doubt, however legitimate, with regard to the ill-founded character of such application ([545]).

([543]) EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018, op. cit., fn. 3, Subsections 4.1.3 and 5.2.2.4.

([544]) Although procedural and substantial requirements of the APD have been transposed with identical wording into French legislation, the National Asylum Court has used slightly different language when ruling that 'a subsequent application is admissible on condition that the applicant presents new facts or evidence regarding his personal situation or the situation of his country […] likely, if probative, to modify the assessment of the well-founded character or of the credibility of his application in regard of the criteria that must be met to qualify for international protection': National Asylum Court (France), judgment of 7 January 2016, Mme M & MM, nos 15025487 and 15025488 R (unofficial translation).

([545]) See, among others, ECtHR, judgment of 6 June 2013, Mohammed v Austria, application no 2283/12, para. 80; ECtHR, Singh et autres c Belgique, op. cit., fn. 317, para. 103; ECtHR, judgment of 19 January 2016, MD et MA c Belgique, application no 58689/12, paras. 56 and 66.

5.7.1 Admissibility of a subsequent application: new elements or findings

Section IV APD (recast) sets out provisions, most of which are not mandatory ([546]), concerning subsequent applications ([547]). It is underpinned by the principle that someone making a subsequent application does not have an absolute right to a new full examination of his/her application, since he/she was not deemed to be in need of international protection at the time of the final decision on the previous application. Consequently, as recital (36) APD (recast) states:

Recital (36) APD (recast)

[W]here an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In that case, Member States should be able to dismiss an application as inadmissible in accordance with the *res judicata* principle.

This rationale underpins Article 40 APD (recast), which provides for 'a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies as a beneficiary of international protection', so as to determine the admissibility of the application (Article 40(2)).

If it is concluded that 'new elements or findings […] significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection', Article 40(3) requires the application to be 'further examined in conformity with Chapter II', thus benefiting from all the guarantees afforded to first applications. Member States may also provide 'for other reasons for a subsequent application to be further examined'.

In addition, Article 42(2) APD (recast) provides:

Article 42(2) APD (recast)

Member States may lay down in national law rules on the preliminary examination pursuant to Article 40. Those rules may, inter alia:

(a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;

(b) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview […].

Thus, applicants must present new elements or findings for their subsequent application to be admissible. Where the first application has already been examined and rejected by the determining authority, and possibly the competent court or tribunal, it is normally not possible to

([546]) The need for a preliminary examination of the subsequent application, which lies at the heart of the mechanism devised by the APD, supposes the implementation by Member States of Art. 33 APD (recast), a non-mandatory provision.

([547]) See Section 5.7 above for definition of a 'subsequent application' provided in Art. 2(q) APD (recast).

submit them again in a subsequent application. New elements or findings may nevertheless encompass new evidence related to facts and circumstances previously asserted ([548]).

Moreover, Article 40(4) APD (recast) provides:

Article 40(4) APD (recast)

Member States may provide that the application will only be further examined if the applicant concerned was, through no fault or his or her own, incapable of asserting the situations set forth in paragraphs 2 and 3 of this Article in the previous procedure, in particular by exercising his or her right to an effective remedy pursuant to Article 46.

This provision thus recognises that it may have been materially impossible for the applicant previously to present some elements or findings. The applicant's incapacity referred to in this article may be due to inherently new elements that arose since the first application or because these elements or findings were not previously accessible to the applicant to support his/her application for international protection ([549]). This latter scenario arose for instance in a 2011 decision of the Συμβούλιο της Επικρατείας (Greek Council of State) where the applicant acquired a copy of the *Turkish government gazette* promulgating withdrawal of his nationality and which was considered by the Council as new and crucial evidence ([550]).

It may also have been impossible for the applicant to have previously disclosed elements or findings in so-called *sur place* claims, where new elements supporting an application for international protection have arisen since the previous application ([551]). In a 2016 decision, the French Council of State, for instance, considered the disclosure of a confidential transcript of the applicant's interview by the police to the embassy of his country of origin, Sri Lanka, as a new circumstance that was likely to increase the risk of persecution to which he would be exposed in case of return to Sri Lanka and as justifying the examination of the subsequent application ([552]).

Conversely, Article 40(4) APD (recast) also permits Member States to consider a subsequent application inadmissible if the new elements or findings could have been raised by the applicant during the previous procedure but were not because of his/her own fault ([553]). The applicant's failure to disclose elements or findings in the previous procedure is intimately linked to his/her credibility as examined in Section 4.2.3 and 4.3.7.1 above. Such an assessment should, however, be undertaken with great caution to ensure that the application of the procedural bar under Article 40(4) does not breach the principle of *non-refoulement* ([554]).

The fact that an applicant has failed to disclose elements or findings during the first procedure may be due to his/her particular vulnerability. This is highlighted by the CJEU in its 2014 *A,*

([548]) In France, subsequent applications are officially named 'Applications for re-examination', reflecting the underlying idea that the subsequent application may lead to a fresh reassessment of the content of the previous application.

([549]) See e.g. National Asylum Court (France) judgment of 7 January 2016 Mme M & MM, op. cit., fn. 544, para. 21 (see EDAL English summary), where the court ruled that a subsequent application is admissible only if 'the applicant presents new facts or evidence regarding his personal situation or the situation of his country, which are posterior to the final decision made on the previous application or when it is established that the applicant could only have been aware of these *a posteriori* […]' (unofficial translation).

([550]) Council of State (Greece), decision of 25 October 2011, application no 3328/2011 per EDAL English summary.

([551]) See e.g. Regional Administrative Court (Poland), judgment of 13 June 2012, *SB* v *Rady do Spraw Uchodźców*, V SA/Wa 2332/11 (see EDAL English summary).

([552]) Council of State (France) judgment of 10 February 2016 M. A no 373529 (see EDAL English summary).

([553]) See e.g. Supreme Administrative Court (Czech Republic), judgment of 6 March 2012, JJ v Ministry of Interior, 3 Azs 6/2011-96 (see EDAL English summary).

([554]) IARLJ, *A Manual for Refugee Law Judges Relating to the European Council Qualification Directive 2004/84/EC and European Council Procedures Directive 2005/85/EC*, 2007, p. 75.

B and C judgment. Although the case concerns a late disclosure of elements to substantiate the application for international protection under Article 4(1) QD (and by extension of the QD (recast)), the CJEU's conclusions are also instructive in cases of subsequent applications. The Court ruled that an applicant's lack of credibility could not simply be based on his/her late disclosure of elements in light of 'the sensitive nature of questions relating to a person's personal identity' ([555]) — as, in the case at hand, the applicant's sexual orientation — and Article 13(3) APD and Article 4(3) QD (now Article 15(3)(a) APD (recast) and 4(3) QD (recast)) requiring the general and personal circumstances of the applicant, in particular, his/her vulnerability, to be taken into account ([556]).

Applied by analogy to the issue of subsequent applications, when elements or findings presented could have been submitted during the first procedure, this judgment may require, even during the preliminary examination, that the assessment of the credibility of the applicant's account take due account of his/her particular circumstances, including his/her vulnerability ([557]). Similarly, the EASO *Practical guide: Evidence assessment* notes:

> Persons whose applications are related to [sexual orientation and gender identity] which is not accepted in their country of origin often have to conceal their true identity, feelings and opinions in order to avoid shame, seclusion and stigmatisation, very often also the risk of violence. Stigma and feelings of shame may further inhibit the applicant from disclosing information within the asylum context. There are numerous cases where the applicant discloses him/herself as being lesbian, gay, bisexual, trans or intersex only in a subsequent application ([558]).

These issues are also relevant for applicants who disclose gender-based persecution at a later stage in their application. Since shame and trauma may make it difficult for women and men to disclose such harms, late disclosure may not indicate that it is not credible (see also Section 6.3).

5.7.2 Assessment of the subsequent application on the merits

Where a subsequent application is found to be admissible and is therefore examined on the merits as provided by Article 40(3) APD (recast), this assessment takes place 'in the framework of the examination of the previous application, insofar as the competent authorities can take into account and consider all the elements underlying the […] subsequent application within this framework' (Article 40(1) APD (recast)). This provision sheds light on the necessary connection between the assessment of the merits of a subsequent application and the grounds relied upon to reject the previous application ([559]).

In some instances, acceptance of new facts or findings will not run counter the previous negative determination because these facts or findings are not connected with the previous

([555]) CJEU, A, B and C, op. cit., fn. 13, para. 69.
([556]) Ibid., para. 70.
([557]) See e.g. National Asylum Court (France), Mme M & MM, op. cit., fn. 544, para. 21 (see EDAL English summary), noting that 'this preliminary admissibility examination does not constitute an obstacle to his presenting facts that predate the final decision as long as these facts relate to a real circumstance of vulnerability [of the applicant] that impeded him from presenting them in the previous application' (unofficial translation).
([558]) EASO, *Practical guide: Evidence assessment*, op. cit., fn. 316, p. 16.
([559]) Supreme Administrative Court (Poland), judgment of 25 November 2015, II OSK 769/14. The Court held that the analysis of the applicant's statement submitted during the previous proceedings, together with new elements underlying the subsequent application (becoming a follower of the Scientology Church) and other evidence (COI, psychologist's opinion) gave rise to inconsistencies and discrepancies in the applicant's statements relating inter alia to his faith and trips to the country of origin, thus undermining the overall credibility of applicant.

allegations. This may be the case, for example, when the subsequent application is based on a significant evolution of the situation in the country of origin, or previously concealed personal circumstances.

In other cases, a positive assessment of new facts and findings may imply and even impose a reconsideration of material facts that were rejected during the previous procedure. When the subsequent application is based on evidence of great probative value in regard to previously rejected facts, acceptance of such evidence implicitly requires these facts to be held as established. The possibility of derogating, under such circumstances, from the *res judicata* principle is not addressed in Chapter IV of the APD nor in other EU asylum instruments.

5.7.3 Remedy against a finding that a subsequent application is inadmissible

Pursuant to Article 46(1)(a)(ii) APD (recast), in conjunction with Article 33(2)(d) APD (recast), 'Member States shall ensure that applicants have the right to an effective remedy against […] a decision […] considering their subsequent application to be inadmissible' on the grounds that no new relevant elements or findings have arisen or have been presented by the applicant. The effective remedy must provide for 'a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to [the QD (recast)], at least in appeals procedures before a court or tribunal of first instance' (Article 46(3) APD (recast)) ([560]).

In case of subsequent applications, the requirement of a full and *ex nunc* examination will necessarily take into account the implications of the aforementioned *res judicata* principle which can act as a bar, also at the judicial level, to recognition of international protection.

The limitation of guarantees possibly resulting from the application of Chapter IV APD (recast) may be a matter of concern for courts and tribunals if an applicant challenges a decision based on inadmissibility on the basis that it has been taken without proper procedural safeguards. In a 2016 ruling, the French National Asylum Court found that the determining authority had wrongly regarded the elements supporting a subsequent application as not meeting the admissibility criteria of Article 40(3) APD (recast) as transposed into national law, and had thus deprived the applicant of his right to be heard in the course of a further examination. The court held that it was necessary, under those circumstances, to send the case back to the determining authority ([561]).

Depending on the scope of its remit, the competent court or tribunal may have to:

— Determine if the determining authority was right to consider the application inadmissible with a view, if need be, to sending the case back to that authority to be further examined in conformity with Chapter II of the APD (recast). The confirmation of the legality of the decision by the determining authority should not prevent the court from taking in account posterior elements or findings (having arisen or been made available to the applicant after

([560]) See Court of Appeal (Ireland), judgment of 14 July 2016, NM (DRC) v The Minister for Justice, Equality and Law Reform [2016] IECA 217.
([561]) National Asylum Court (France), judgment of 27 July 2016, MD, no 16011925 C. Art. 40(3) APD (recast) being transposed into national law in Art. L.723-16 of the Code on the entry and stay of foreigners and asylum law.

the administrative determination) and the oral statements of the applicant in order to make a full and *ex nunc* assessment of international protection needs ([562]).

— Examine directly the merits of the application in the light of all the material and evidence presented before the court or tribunal, including oral statements made during a hearing that may possibly explain inconsistencies or help to substantiate reasons and arguments submitted in written form during the preliminary examination carried out by the determining authority.

In any event, the responsibility for ensuring that the procedure for the assessment of subsequent applications has been fairly carried out and that the procedural constraints have been applied in light of the requirement laid down in the last sentence of Article 42(2) APD (recast) ([563]) rests with the member of the relevant court or tribunal.

Competent courts and tribunals may consider it necessary to adapt definitions and requirements laid down in Chapter IV APD (recast) to the specific requirements of the judicial assessment of subsequent applications ([564]).

5.8 Dublin III Regulation and the assessment of evidence

The Dublin III Regulation ([565]) establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. The analysis below is confined to specific issues arising under it affecting evidence and credibility assessment. A fuller analysis of the Regulation is provided in EASO, *Asylum procedures and the princip*le of non-refoulement - *Judicial analysis,* 2018 ([566]).

Under the Dublin III Regulation issues concerning the obtaining and assessment of evidence relate to:

(i) The application of the criteria for determining the Member State responsible for examining an application for international protection (Section 5.8.1); and

(ii) The application of Article 3(2), second paragraph, concerning the assessment of whether it is impossible to transfer an applicant to the Member State primarily designated as responsible on the grounds of Article 4 EU Charter (Section 5.8.2).

Since an applicant has the right to an effective remedy against a transfer decision (Article 27(1)), questions relating to evidence and credibility assessment may arise in respect of both these sets of issues.

([562]) ECtHR, MD et MA c Belgique, op. cit., fn. 545, para. 64.
([563]) 'Those rules shall not render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailing of such access'.
([564]) See National Asylum Court (France), Mme M & MM, op. cit., fn. 544.
([565]) Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III Regulation), op. cit., fn. 9.
([566]) EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018, op. cit., fn. 3, Part 3.

5.8.1 Obtaining and assessment of evidence relating to application of criteria for determining Member State responsible

In order to determine the Member State responsible for examining an application for international protection, the Dublin III Regulation requires Member States to exchange and share relevant information which they hold or which is held on the Visa Information or Eurodac systems. The subsections below outline the procedural safeguards for applicants under this process (Section 5.8.1.1), the evidentiary regime that applies (Section 5.8.1.2), and how the credibility of such information gathered is to be assessed (Section 5.8.1.3).

5.8.1.1 Procedural safeguards

The involvement of applicants for international protection in the procedures laid down by the Regulation is primarily reflected in Member States' obligation to inform them of the criteria for determining responsibility (Article 4) and provide them with an opportunity to submit information relevant to the correct interpretation of those criteria (Article 5). Both articles reflect the purpose expressed in recital (9) of the Regulation of improving protection granted to applicants under the Dublin system.

Article 4 of the Dublin III Regulation requires Member States to inform the applicant about various matters relating to the process of determining the Member State responsible under the Regulation. For further details see also, EASO, *Asylum procedures and the princip*le of non-refoulement - *Judicial analysis,* 2018, Section 3.3.

The applicant's right to information enshrined in Article 4(1) covers in particular the elements reproduced in Table 28 below.

Table 28: Right to information — elements listed in Article 4(1) of the Dublin III Regulation

(a)	'the objectives of this Regulation and the consequences of making another application in a different Member State as well as the consequences of moving from one Member State to another during the phases in which the Member State responsible under this Regulation is being determined and the application for international protection is being examined;'
(b)	'the criteria for determining the Member State responsible, the hierarchy of such criteria in the different steps of the procedure and their duration […];'
(c)	'the personal interview pursuant to Article 5 and the possibility of submitting information regarding the presence of family members, relatives or any other family relations in the Member States […];'
(d)	'the possibility to challenge a transfer decision and, where applicable, to apply for a suspension of the transfer;'
(e)	'the fact that the competent authorities of Member States can exchange data on him or her for the sole purpose of implementing their obligations arising under this Regulation;'
(f)	'the right of access to data relating to him or her and the right to request that such data be corrected if inaccurate or be deleted if unlawfully possessed, as well as the procedures for exercising those rights […].'

The duty to inform the applicant also facilitates the involvement of the applicant in the process of determining the Member State responsible for examining the application.

The process of obtaining and assessing evidence in the Dublin context is underpinned by the requirement to conduct a personal interview. Article 5(1)-(3) and (6) of the Dublin III Regulation states as follows:

Article 5 Dublin III Regulation

1. In order to facilitate the process of determining the Member State responsible, the determining Member State shall conduct a personal interview with the applicant. The interview shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 4.
2. The personal interview may be omitted if:

(a) the applicant has absconded; or

(b) after having received the information referred to in Article 4, the applicant has already provided the information relevant to determine the Member State responsible by other means. The Member State omitting the interview shall give the applicant the opportunity to present all further information which is relevant to correctly determine the Member State responsible before a decision is taken to transfer the applicant to the Member State responsible pursuant to Article 26(1).

3. The personal interview shall take place in a timely manner and, in any event, before any decision is taken to transfer the applicant to the Member State responsible pursuant to Article 26(1).

[...]

6. The Member State conducting the personal interview shall make a written summary thereof which shall contain at least the main information supplied by the applicant at the interview. This summary may either take the form of a report or a standard form. The Member State shall ensure that the applicant and/or the legal adviser or other counsellor who is representing the applicant have timely access to the summary.

The purpose of the personal interview from the perspective of the Member State is that it provides the opportunity to obtain information and evidence concerning the applicant's family members in other Member States, the travel route to the Member State, any visas or residence documents issued by other Member States, previous applications made in other Member States, travel documents and other proof in accordance with Article 22(3). It also provides the opportunity to obtain information and evidence regarding any facts which might be relevant to the application of the dependent persons and discretionary clauses (Articles 16 and 17) of the Dublin III Regulation. It should be noted, however, that Article 5 does not impose on Member States an absolute obligation to conduct a personal interview. Article 5(2) provides for its omission in two circumstances.

The personal interview requirement is a major innovation of the Dublin III Regulation regarding the involvement of applicants for international protection in the process of determining the Member State responsible for the examination of their application. In *Ghezelbash* the CJEU observed that these changes demonstrated that:

> It follows from the foregoing that the EU legislature did not confine itself, in [the Dublin III Regulation], to introducing organisational rules simply governing relations between Member States for the purpose of determining the Member State responsible, but decided to involve asylum-seekers in that process by obliging Member States to inform them of the criteria for determining responsibility and to provide them with an opportunity to submit information relevant to the correct interpretation of those criteria, and by conferring on asylum seekers the right to an effective remedy in respect of any transfer decision that may be taken at the conclusion of that process ([567]).

In *Ghezelbash* the CJEU also noted:

> [T]he requirements laid down in Article 5 of the regulation to give asylum-seekers the opportunity to provide information to facilitate the correct application of the criteria for determining responsibility laid down by the regulation and to ensure that such persons are given access to written summaries of interviews prepared for that purpose would be in danger of being deprived of any practical effect if it were not possible for an incorrect application of those criteria — failing, for example, to take account of the information provided by the asylum seeker — to be subject to judicial scrutiny ([568]).

The personal interview must take place before any decision to transfer the applicant to the Member State responsible is taken (Article 5(3)). Whilst Article 5 does not contain a specific right for an applicant who has a personal interview to respond to any doubts expressed by the competent authority conducting the interview, it would defeat the purpose of the right to information guaranteed by Article 4 if, for example, he/she were not told during the interview of doubts concerning the information he/she had submitted regarding the presence of family members, relatives or any other family relations in the Member States, including the means by which the applicant can submit such information (Article 4(1)(c)).

5.8.1.2 Evidentiary regime

Unlike the assessment of facts and circumstances needed to substantiate an application for international protection, which is carried out in the context of a cooperative process between the applicant and the national authorities in charge of assessing his/her application (see Section 4.2), the determination of the Member State responsible under the Dublin III Regulation is a task incumbent on the determining state. This determination may result in the designation of another Member State as responsible for examining the application and the transfer of the applicant to that state. The overall mechanism of the Regulation is primarily operated at an inter-state level.

Article 7(1) of the Dublin III Regulation stipulates that the eight criteria for determining responsibility to examine an application for international protection laid down in Chapter III of the Regulation are to be applied in the order in which they are set out in this instrument ([569]). Since responsibility — to take charge of or to take back an applicant — must be accepted by the designated Member State, Article 22 of the Regulation establishes a specific evidentiary regime governing the application of each criterion. Article 22(2) provides that '[i]n the procedure for

([567]) CJEU, judgment of 7 June 2016, Grand Chamber, case C-63/15, Mehrdad Ghezelbash v Staatssecretaris van Veiligheiden Justitie, EU:C:2016:409, para. 51.
([568]) Ibid., para. 53.
([569]) See EASO, *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, August 2016, op. cit., fn. 3, Section 2.2.1, p. 36; EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018, op. cit., fn. 3, Subsection 3.6.2.

determining the Member State responsible elements of proof and circumstantial evidence shall be used'. Article 21(3) provides:

Article 21(3) Dublin III Regulation

[…] the request that charge be taken by another Member State shall be made using a standard form and including proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) and/or relevant elements from the applicant's statement, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.

Under Article 22(3), it is the responsibility of the European Commission 'by means of implementing acts, [to] establish, and review periodically, two lists, indicating the relevant elements of proof and circumstantial evidence in accordance with the criteria set out in points (a) and (b) of this paragraph. […]' ([570]). This Article distinguishes between probative evidence and indicative evidence as follows:

Article 22(3) Dublin III Regulation

(a) Proof:

  (i) this refers to formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary;

  (ii) the Member States shall provide the Committee provided for in Article 44 with models of the different types of administrative documents, in accordance with the typology established in the list of formal proofs;

(b) Circumstantial evidence:

  (i) this refers to indicative elements which while being refutable may be sufficient, in certain cases, according to the evidentiary value attributed to them;

  (ii) their evidentiary value, in relation to the responsibility for examining the application for international protection shall be assessed on a case-by-case basis.

Annex II of the Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 contains the last updated lists of means of proof and of circumstantial evidence to be used for the purposes of determining the Member State responsible and of ascertaining the obligation — or absence of obligation — of the designated Member State to re-admit or take back an applicant for international protection ([571]).

([570]) Recital (33) Dublin III Regulation, op. cit., fn. 9, provides that 'in order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission' and that those powers 'should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.' Recital (34) stipulates that, adoption of the lists, among other tools necessary for the implementation of Regulation, should be made in accordance with the examination procedure. This procedure, in which a Committee of representatives of the Member States plays a major role, is described in Art. 5 of Regulation (EU) No 182/2011 [2011] OJ L 55/13.

([571]) Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodges in one of the Member States by a third-country national [2014] OJ L 39/1.

These lists attribute to each criterion, following their order of appearance in the Regulation, a specific set of means of proof and circumstantial evidence. As regards, for example, the first criterion defined in Article 8, which attributes responsibility to the Member State where a family member or a sibling of an unaccompanied minor is legally present, provided it is in the best interest of the minor, List A foresees the following means of proof or probative evidence:
— Written confirmation of the information by the other Member State;
— Extracts from registers;
— Residence permit issued to the family member;
— Evidence that the persons are related, if available;
— Failing this, and if necessary, a DNA or blood test.

List B enumerates the following circumstantial evidence or indicative evidence:
— Verifiable information from the applicant;
— Statements by the family members concerned;
— Reports/confirmation of the information by an international organisation, such as UNHCR.

In addition, it is important to recall the role played by two particular EU instruments in providing elements of proof in view of determining the Member State responsible pursuant to the Dublin III Regulation. These are listed in Table 29 below.

Table 29: EU relevant instruments in providing elements of proof in the framework of the Dublin III Regulation

1	The **Eurodac system,** resulting from Regulation (EU) No 603/2013, which is based on the collection, transmission and comparison of the fingerprints of every applicant for international protection in the EU ([572]).
2	The **Visa Information System (VIS)** established by Regulation (EC) No 767/2008, Articles 21 and 22 of which allow Member States to access information related to visa data recorded in the VIS for the purpose of determining the Member State responsible and examining the application for international protection ([573]).

Article 22(4) of the Dublin III Regulation recalls, however, that '[t]he requirement of proof should not exceed what is necessary for the proper application of this Regulation'.

In the absence of formal proof, a frequent situation when an applicant has entered EU territory illegally, Article 22(5) provides that 'the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility'.

5.8.1.3 Assessment of evidence

In order to make a decision determining which Member State is responsible for examining an application for international protection made on its territory, the examining Member State must be satisfied that it has based its decision on all information relevant to that decision. This includes data held by Member States and information specific to the applicant, for example, as gathered from the personal interview (see Article 5(1)-(6)) or regarding the presence of family members (Article 7(3)).

([572]) Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac', op. cit., fn. 123.
([573]) Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) [2008] OJ L 218/60.

While the Regulation does not specify how the credibility of such information gathered is to be assessed ([574]), it is difficult to imagine that, in the absence of any identification of different criteria, the same criteria as are applied to assessment of information in the context of the QD (recast) should not apply. At the same time, it remains necessary to consider specific procedural safeguards that structure the Dublin examination, in particular the right to information (Article 4) and access to a personal interview (Article 5), as outlined in Section 5.8.1.1 above.

5.8.2 Obtaining and assessment of evidence relating to Article 3(2) second paragraph

Under the Dublin mechanism the transfer of an applicant to the Member State primarily designated as responsible cannot take place if it would breach the requirements of Article 3(2), second paragraph, relating to conditions in that Member State. The type of assessment that is required as regards those conditions has been the subject of specific attention by the CJEU.

This provision of the Dublin III Regulation provides:

Article 3(2) (second paragraph) Dublin III Regulation

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the [EU Charter], the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

The burden of establishing the substantial grounds for believing that a transfer under the Dublin III Regulation would result in a violation of Article 4 of the EU Charter does not rest entirely on the applicant.

As the CJEU ruled in *NS, ME and Others*, Member States, including the national courts and tribunals, may not transfer an applicant to the Member State responsible 'where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment' ([575]).

The CJEU rejected submissions by some EU Member States in the case that they lacked the means necessary to assess compliance with fundamental rights by Member States responsible and the risks to which an applicant would be exposed if transferred. The Court stated that access to information such as that taken into account by the ECtHR in *MSS* ([576]) 'enables the

([574]) Indeed, Art. 2(d) of the Dublin III Regulation defines 'examination of an application for international protection' as meaning 'any examination of, or decision or ruling concerning, an application for international protection by the competent authorities in accordance with [the APD (recast) and QD (recast) respectively], except for procedures for determining the Member State responsible in accordance with the Regulation' (emphasis added).

([575]) CJEU, Judgment of 21 December 2011, Grand Chamber, joined cases C-411/10 and C-493/10, NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, EU:C:2011:865, para. 94.

([576]) ECtHR, MSS v Belgium and Greece, op. cit., fn. 50, notably paras. 347-349, referring inter alia to regular and unanimous reports of international NGOs, information from UNHCR, and Commission reports on the evaluation of the Dublin system, and para. 358.

Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks' ([577]). As such, it can be deduced that Member States have a duty to monitor such information and take it into account when necessary in the application of the Dublin III Regulation.

The Grand Chamber of the CJEU has further analysed the evidentiary assessment of conditions in another Member State, albeit in the different context of the European Arrest Warrant. Among the points made by the CJEU in *Pál Aranyosi and Robert Căldăraru* were that in assessing whether there is evidence that execution of a European arrest warrant would give rise to a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State:

> […] the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN ([578]).

Nonetheless, the CJEU also ruled that a finding by the judicial authority that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State:

> […] cannot lead, in itself, to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State. The mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State ([579]).

Finally, the Court determined that 'when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated' an executing judicial authority is obliged to consider whether surrender of the person to the issuing Member State would give rise to a real risk of inhuman or degrading treatment. To that end, the CJEU ruled that the judicial authority must:

> […] request the judicial authority of the issuing Member State that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State. That request may also relate to the existence, in the issuing Member State, of any national or international procedures and mechanisms for monitoring detention conditions, linked,

([577]) CJEU, NS, ME and Others, op. cit., fn. 568, paras. 90 and 91.
([578]) CJEU, judgment of 5 April 2016, Grand Chamber, joined cases C-404/15 and C-695/15 PPU, *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198, paras. 88 and 89.
([579]) Ibid., paras. 91-93.

> for example, to visits to prisons, which make it possible to assess the current state of detention conditions in those prisons ([580]).

The CJEU has yet to clarify whether it considers that the same criteria apply in the Dublin context, but in the meantime the above approach to assessment may be considered to shed some light on the various stages of evidence assessment involved in analysing conditions in the Member State primarily designated as responsible under Article 3(2).

Furthermore, the CJEU has ruled that Article 4 of the EU Charter must be interpreted as meaning that even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, 'the transfer of an asylum seeker within the framework of the Dublin III Regulation can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment within the meaning of that article' ([581]). Further, it determined that in circumstances in which 'the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in the state of health of the person concerned, that transfer would constitute inhuman and degrading treatment' within the meaning of Article 4 ([582]). With regards to the evidence of such a risk, the Court stated:

> Consequently, where an asylum seeker provides, particularly in the context of an effective remedy guaranteed to him by Article 27 of the Dublin III Regulation, objective evidence, such as medical certificates concerning his person, capable of showing the particular seriousness of his state of health and the significant and irreversible consequences to which his transfer might lead, the authorities of the Member State concerned, including its courts, cannot ignore that evidence. They are, on the contrary, under an obligation to assess the risk that such consequences could occur when they decide to transfer the person concerned or, in the case of a court, the legality of a decision to transfer, since the execution of that decision may lead to inhuman or degrading treatment of that person ([583]).

5.9 Evidence assessment in the application of safe country concepts

The APD (recast) provides that Member States may:

— provide that an examination procedure be accelerated and/or conducted at the border or in transit zones if the applicant is from a **safe country of origin** (Article 31(8)(b) APD (recast)); or

— consider an application for international protection as inadmissible if the applicant has been recognised as a refugee or enjoys sufficient protection in a **first country of asylum** to which he/she will be readmitted (Article 33(2) APD (recast)) or there is a **safe third country** with which the applicant has a connection and where various criteria are met, including that he/she would not be subject to ill-treatment and could request refugee status and if found to be a refugee, receive protection (Article 33(2)(c) in conjunction with Article 38 APD (recast)).

([580]) Ibid., paras. 95-96.
([581]) CJEU, judgment of 16 February 2017, case C-578/16 PPU, CK and Others v Republika Slovenija, EU:C:2017:127.
([582]) Ibid.
([583]) Ibid., para. 75.

While analysed in detail in the EASO, *Asylum procedures and the principle* of non-refoulement - *Judicial analysis*, 2018 ([584]), the application of these safe country concepts has significant consequences for applicants. Keeping that in mind, this section addresses evidence assessment when applying these different concepts.

5.9.1 Substantiation of the application of the safe country concepts

Member States must substantiate the application of the safe country concepts when they wish to apply them. In other words, they must substantiate any finding that the country concerned is sufficiently safe to remove the applicant ([585]). This is clear from the provisions of the APD (recast) on the safe country concepts.

Similarly to the general rules on substantiation of an application for international protection, substantiation of the application of the safe country concepts requires the necessary evidence to be obtained and this to be assessed against the requirements for a country of origin or third country to be considered as safe.

First, relevant evidence to be obtained by Member States for substantiating the application of the safe country concepts necessarily concerns the situation in the country of origin or third country. In this respect, Article 37(1) APD (recast) permits Member States to make national designations of safe countries of origin, that is, to draw up a list of safe countries of origin ([586]). Designations shall be regularly reviewed (Article 37(2)) and notified to the EU Commission. Similarly, for 'safe third countries', Article 38(2)(b) refers to 'national designation of countries considered to be generally safe' without, however, providing further specifications.

To make any 'safe country of origin' designation, Member States shall **obtain information on the country of origin.** Under Article 37(3) APD (recast), this covers 'a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations' (Article 37(3)). This echoes Article 10(3)(b) APD (recast) which requires Member States to ensure that 'precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited' (see Section 4.2.5 above on obtaining information on country of origin and countries of transit). This obligation also binds Member States when assessing the situation in first countries of asylum and safe third countries ([587]). Recital (46) APD (recast) further provides:

([584]) EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018, op. cit., fn. 3, Sections 5.2, 5.3, and 5.4.

([585]) Concerning the concept of 'safe country of origin', see EASO *Practical guide: Evidence assessment*, op. cit., fn. 316, p. 6. In a 2015 judgment, the United Kingdom Supreme Court ruled that the designation of Jamaica as a safe country of origin by the Home Secretary was unlawful. Discussing assessment of the general absence of serious risk of persecution in the country of origin, the court held that the term 'general' was 'intended to differentiate a state of affairs where persecution is endemic, i.e. it occurs in the ordinary course of things, from one where there may be isolated incidents of persecution'. In the case of the designation of Jamaica, however, the term was interpreted as not affecting the majority of the population, even though minority groups, in that case homosexuals, faced persecution. Supreme Court (United Kingdom), judgment of 4 March 2015, R (on the application of *Jamar Brown* (Jamaica) v *Secretary of State for the Home Department* [2015] UKSC 8, paras. 21-23.

([586]) A proposal to establish an EU list of safe countries of origin is currently under discussion. See European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU, COM/2015/0452 final — 2015/0211 (COD), 9 September 2015 and for an overview of the proposal, see: EU Commission, An EU 'Safe Countries of Origin' List.

([587]) This was e.g. recalled by the Court of The Hague (Netherlands), judgment of 13 June 2016, AWB 16/10406, paras. 6.2 and 7.2 (see EDAL English summary).

> Where Member States apply safe country concepts on a case-by-case basis or designate countries as safe by adopting lists to that effect, they should take into account, inter alia, the guidelines and operating manuals and the information on countries of origin and activities, including *EASO Country of origin information report methodology*, referred to in [the EASO Regulation], as well as relevant UNHCR guidelines.

In a 2014 decision, the French Council of State detailed its reasons for including Albania and Georgia in its national list of safe countries of origin and for excluding Kosovo[588] therefrom ([589]). While the Council did not specify the documentary evidence on which it based its assessment, its focus on the political, legal and social situation in these countries is telling of the weight placed on COI.

Second, such information needs to be assessed against the criteria determined by the relevant CEAS provisions to evaluate the safety of a country of origin or third country.

This is particularly important as the safe country concepts are applied with a view to accelerating examinations of applications or rule on their inadmissibility but not so as to preclude a case-by-case assessment ([590]). In a 2016 judgment, for instance, the District Court, The Hague overturned the decision of the State Secretary concerning Egypt as a safe third country. The court considered that it was not sufficient that Egypt was a party to the Refugee Convention and the International Covenant on Civil and Political Rights for it to be considered as a safe third country in this particular case as it was not a given that Egypt would act in accordance with these treaties or that the applicant would have the opportunity to apply for refugee status and, if recognised, to receive protection in accordance with the Refugee Convention and be protected from *refoulement* ([591]).

The principles for the assessment of evidence analysed in Section 4.3 above thus apply as well when applying the safe country concepts. See Section 4.8 above for more on the standards for evaluating COI.

5.9.2 Applicants' opportunity to rebut a presumption of safety in the country of origin or third country

The APD (recast) permits Member States to apply a presumption of safety in either the country of origin or a third country in three contexts. In each, it expressly provides that if the concept is applied, applicants shall have the opportunity to rebut the presumption that they would be safe in the designated safe country of origin or third country.

([588]) This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

([589]) Council of State (France), judgment of 10 October 2014, Associations Elena, Forum Réfugiés, Cosi, nos 375474 and 375920, paras. 14-16 (see EDAL English summary). The applications were brought by different NGOs contesting the addition of the Republic of Albania, Georgia and Kosovo in the national list of safe countries of origin.

([590]) Court of Appeal (England and Wales, United Kingdom), judgment of 17 February 2011, R on the application of MD (Gambia) v Secretary of State for the Home Department [2011] EWCA Civ 121. See especially para. 51 stating: '[…] [T]he fact that Gambia has been listed does not mean that the general evidence of human rights' abuses is thereafter immaterial. The background information may still, in the context of the facts of a particular claim, weigh against certifying the claim [because unfounded] even where it is not enough to demonstrate the degree of systemic human rights breaches necessary to preclude the country being listed [as safe]'.

([591]) Court of The Hague (Netherlands), AWB 16/10406, op. cit., fn. 587, para. 7.2 (see EDAL English summary). This is also affirmed by the ECtHR in its jurisprudence. See most notably: ECtHR, Saadi v Italy, op. cit., fn. 199, para. 147. See also Greek Council of State, judgments of 15 February 2017, nos 445/15.2.2017 and 446/15.2.2017 (Turkey-Safe Third Country Concept). The Chamber considered that the case should be referred to the Grand Chamber (Plenary of the Court).

Concerning the **safe country of origin** concept ([592]), recital (42) APD (recast) provides:

Recital (42) APD (recast)

The designation of a country as a safe country of origin cannot establish an absolute guarantee of safety for nationals of that country. […] By its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in that country. For this reason, it is important that, where an applicant shows that there are valid reasons to consider the country not to be safe in his or her particular circumstances, the designation of the country as safe can no longer be considered relevant for him or her.

The opportunity of the applicant to rebut the presumption of safety is enshrined in Article 36(1) APD (recast), which provides:

Article 36(1) APD (recast)

A third country […] may […] be considered as a safe country of origin for a particular applicant only if: […] he or she has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection in accordance with [the QD (recast)].

This is, for instance, illustrated in a 2009 judgment of the Slovenian Vrhovno sodišče (Supreme Court) where the court concluded that the applicant was not given an opportunity to rebut the presumption that Croatia — at the time not yet an EU member — was a safe third country for him ([593]). As noted by the French Council of State, the possibility to rebut the presumption of safety does not concern the mere listing of a particular country among the safe countries of origin; this can only be made by an applicant if the safe country of origin concept is applied in his/her own case ([594]).

With regard to the concept of **first country of asylum,** Article 35 APD (recast) provides: 'The applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances.'

([592]) See also EASO *Practical guide: Evidence assessment*, op. cit., fn. 316, p. 6.
([593]) Supreme Court (Slovenia), judgment of 16 December 2009, I Up 63/2011, per EDAL English summary.
([594]) Council of State (France), nos 375474 and 375920, op. cit., fn. 588, para. 10 (see EDAL English summary). The applications were brought by various NGOs contesting the addition of the Albania, Georgia and Kosovo in the national list of safe countries of origin.

Article 38(2)(c) APD (recast) concerning the **safe third country** concept states:

Article 38(2)(c) APD (recast)

(c) The application of the safe third country concept shall be subject to rules laid down in national law, including: […] rules in accordance with international law, allowing individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a) ([595]).

5.9.3 Standard of proof and the safe country concepts

As seen in Section 4.3.9 above, the standard of proof refers to the level of conviction required to determine whether an applicant qualifies for international protection. The manner in which this is formulated differs across the Member States, but importantly, these tests concur in holding that while the mere chance or remote possibility of being persecuted in the country of origin is insufficient risk to establish a well-founded fear, the applicant does not need to show that there is a more than a 50 % probability that he/she will be persecuted. The same standard of proof applies in determining whether applicants risk persecution or serious harm in a third country ([596]).

Determining the safety of a third country requires determination of more than the mere absence of persecution or serious harm. Both Article 35 APD (recast) on the concept of first country of asylum and Article 38 concerning the safe third country require that a particular applicant benefit from sufficient protection in the third country for it to be considered safe ([597]). Article 38 explicitly provides that 'Member States may apply the safe third country concept only where the competent authorities **are satisfied** that a person seeking international protection will be treated in accordance with the [enumerated] principles in the third country concerned […]' ([598]).

In a 2011 judgment, for instance, the Swedish Migration Court examined whether Saudi Arabia could be considered as a safe third country for the applicants, a woman and her two children all of Eritrean citizenship but who had been expelled from Saudi Arabia following the expiry of her husband's residence permit as a migrant worker. They could not return to Eritrea for risk of being persecuted. On the basis of the APD, the court underlined that it needed to be 'satisfied that a person seeking asylum will be treated in accordance with certain principles in the third country concerned' ([599]). In so doing, the court took into account the limited possibility to seek asylum in Saudi Arabia, the fact that refugees were refused entry thereto or returned to their country of origin and that migrant workers were to be considered as particularly vulnerable persons in the country. It thus concluded that Saudi Arabia could not be considered a safe third country for the applicants ([600]).

([595]) As reaffirmed, e.g. by the Constitutional Court (Slovenia), judgment of 18 December 2013, U-I-155/11 (see EDAL English summary).
([596]) Concerning the risk of indirect (chain) *refoulement* in third countries, see e.g. Migration Court (Sweden), judgment of 10 November 2011, UM 1796 as per EDAL English summary; and Upper Tribunal (United Kingdom), judgment of 5 January 2010, RR (Refugee — Safe Third Country) Syria [2010] UKUT 442 (IAC), para. 31.
([597]) In addition to the absence of persecution and serious harm, the sufficiency of protection is defined in Art. 38(1) APD (recast) on the basis of respect for the *non-refoulement* principle under Art. 33 of the Refugee Convention and international human rights law and 'the possibility to request refugee status and, if found to be a refugee, to receive protection in accordance with the [Refugee] Convention'.
([598]) Emphasis added.
([599]) Migration Court (Sweden), UM 1796, op. cit., fn. 595, as per EDAL English summary.
([600]) Ibid.

Part 6: Multidisciplinary approach to the assessment of evidence and credibility

Several provisions in the APD (recast) require decision-makers to have knowledge and competencies from external areas of expertise, as set out below. These may have significant influence on the assessment of credibility and the evaluation of evidence in a particular case. Although these provisions refer to decision-making at the administrative level, it is equally important for courts and tribunals hearing appeals or examining points of law only also to be aware of these other areas of expertise.

Recital (16) APD (recast)

It is essential that decisions on all applications for international protection be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge or has received the necessary training in the field of international protection.

Article 10(3)(d) APD (recast)

[…] Member States shall ensure that: […] (d) the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues.

Article 15(3)(a) APD (recast)

Member States shall take appropriate steps to ensure that personal interviews conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall: […]

(a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability […].

The value of a multidisciplinary approach has been highlighted in the CREDO project publications ([601]). The UNHCR study, *Beyond proof* observes that factors and circumstances relevant to individual claims:

([601]) IARLJ, Assessment of Credibility, CREDO project, op. cit., fn. 2. See e.g. in the general guidance on the 'Treatment of vulnerable claimants', pp. 46-47. For further information on the CREDO Project see fn. 2, other publications of the project being: UNHCR, *Beyond proof*, op. cit., fn. 14; Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 1, and Vol. 2, op cit., fn. 27.

> […] span many disciplinary fields, including neurobiology, psychology, gender and cultural studies, anthropology, and sociology. Consequently, it is necessary that the whole credibility assessment is duly informed by the substantial body of relevant empirical evidence that exists in these fields ([602]).

These disciplines provide resources for the decision-maker which help set the general principles for assessing credibility (such as objectivity and impartiality) in the context of the individual position and personal circumstances of the applicant as required by Article 4(3)(c) QD (recast). In practice, these principles and credibility indicators are subject to factors which, if not understood correctly, may distort the overall assessment. For example, cultural differences between the applicant and the decision-maker may significantly distort the decision-maker's understanding of the substance of the applicant's account concerning why international protection is being claimed, possibly leading to incorrect credibility assessments, either positive or negative.

Academic sources from various disciplines offer a resource to the decision-maker when considering applications for international protection. Identification of such sources should not be taken as support for one position or another in an assessment, which is solely the responsibility of the decision-maker. A multidisciplinary approach can nevertheless put the decision-maker in a better position to assess credibility. Sometimes implementation of this approach may lead the decision-maker to find an account credible where otherwise he/she would not; sometimes it may lead to the opposite conclusion ([603]).

Furthermore, it must be emphasised that the intention in this Section of the judicial analysis is not to endorse any particular academic approach but to create awareness of, and identify relevant sources of, knowledge which can assist the decision-maker in assessing the evidence and the credibility of an applicant's account. Where academic studies in a particular discipline are referenced in footnotes, this does not indicate any endorsement by IARLJ-Europe or EASO of their approaches or findings. They are simply an indication of resources that are available.

6.1 Memory: reliability and consistency of applicants' statements

Applicants are required to recall relevant past and present facts to substantiate their application. Expectations about the applicant's ability to provide such facts and reliance on credibility indicators such as sufficiency of detail, internal and external consistency are based on assumptions about human memory. It is therefore important in the assessment of evidence and credibility that decision-makers have realistic expectations of what an applicant should know and remember. Memory is very personal and varies from one person to another. Moreover, it may

([602]) UNHCR, *Beyond proof*, op. cit., fn. 14, p. 56.

([603]) The Hungarian Helsinki Committee's *Credibility assessment training manual* summarises the justification for a multidisciplinary assessment as follows: 'For a proper application of the credibility legal concepts, indicators and related guiding principles, the information presented by the applicant (which serves as a basis for credibility assessment) has to be recalled and presented; as well as received and understood by the decision-maker. Recalling and presenting may be seriously distorted by the inherent limits and characteristics of human memory, the impact of trauma, shame or other difficulties. Transmission is often distorted by linguistic and cultural barriers. Receiving and understanding may be distorted by the circumstantial, professional and personal characteristics of the decision-maker. Any of these distorting interferences can result in a subjective, biased or legally wrong credibility finding. The potential for errors can be successfully reduced through multidisciplinary learning, i.e. by obtaining at least basic background learning about relevant issues in psychology, neurobiology, cultural anthropology and linguistics.' (Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 1, op. cit., fn. 27, p. 61).

vary depending on factors, including age or any traumatic events they may have previously experienced ([604]).

Memory researchers have identified a number of **different types of memory.** There are **implicit** memories, including **procedural** memory (e.g. how to ride a bicycle) and **emotional** memory (a conditioned response, e.g. to hitting your thumb with a hammer). There are also **explicit** memories, which include **semantic** memory (facts and meanings, e.g. what is the capital of Nigeria; what do I believe about God) and **episodic** memory (of lived experiences, e.g. the sights and sounds on my last holiday). **Autobiographical memory** is the term used to describe the combination of semantic and episodic memories which come together when we describe something that happened in our personal past (e.g. the sun was hot and the sky blue when I went on holiday last July).

The most common types of memories asked about in the probing of credibility to establish consistency with country evidence are semantic memories (e.g. dates of events, members of organisations) and autobiographical memories of events allegedly experienced.

Peer-reviewed studies of memory for dates, the frequency, duration and sequence of events, for common objects (such as coins or notes) and for names indicates that memory for temporal information, the appearance of common objects and proper names is unreliable and may be difficult or impossible to recall ([605]). As a result, it might be difficult for an applicant to remember a specific date, time, frequency, duration or sequence of events ([606]).

Autobiographical memories are expressions of people's experiences of events; they are not a record, or recording of the events themselves ([607]). The retelling of a memory also involves the conscious and unconscious experience at the moment of retelling, so a memory can — and usually does — change at least slightly each time we retell it (to a different person, for a different reason) ([608]). Thus, whilst an inconsistency between accounts by an applicant might be indicative of a lack of credibility; it may instead be indicative of an applicant who is trying to remember what he/she experienced rather than what he/she stated on a previous occasion. Conversely, if an applicant with memory difficulties is conspicuously consistent in every detail that may be indicative of a rehearsed account.

Table 30 below illustrates different types of memory reconstruction with explanations and illustrations.

([604]) See also Supreme Court (Slovakia), judgment of 13 September 2011, SH v Ministry of Interior of the Slovak Republic, 1Sža/38/2011 (see EDAL English summary), concerning new details progressively submitted during the proceedings by the applicant. The Supreme Court considered that this 'was not out of the ordinary. On the contrary, it was only to be expected given the applicant's frame of mind and the position in which he found himself, particularly in his first contact with the state authorities when he was requesting international protection based on the experiences he had endured and his anxiety over returning to a place he feared'.

([605]) Cameron, H. E., 'Refugee status determinations and the limits of memory', *IJRL* (2010) 469-511.

([606]) See e.g. Szeged Administrative and Labour Court (Hungary), 7.K.27.145/2014/9, op. cit., fn. 286.

([607]) U. Neisser (2014), *Cognitive Psychology*, Classic Edition: Psychology Press & Routledge Classic Editions.

([608]) Conway, M. A. and Holmes, E. A. (2008), 'Guidelines on memory and the law: recommendations from the scientific study of human memory', Report from the Research Board, The British Psychological Society, p. 2. For an account specific to refugees, see Eastmond, M. (2007), 'Stories as Lived Experience: Narratives in Forced Migration Research', *Journal of Refugee Studies*, pp. 248-264 and Macklin, A., 'The truth about credibility', paper presented at the 10th IASFM Conference, Toronto, Canada, 21-24 June 2006.

Table 30: Why memories change

Memory process	Explanations	Illustrations
Forgetting and rehearsal	Following any event, memory naturally decays and details are forgotten ([608]). This can be changed by rehearsal, i.e. talking about the event, which can of course mean that some of the memories will be distorted by the circumstances each time they are retold.	In a study of rehearsal of memories, people watched a film containing graphic violence. Then one third of them talked about the factual events that happened in the film, one third talked about their emotional responses and one third did not talk about it (no rehearsal). Finally, everyone's memory was tested for details of the film. Compared to the no-rehearsal group, both talking groups had more memories for the events of the film. However, the people who had talked about their emotional responses had better memories for their emotions but made more major errors in their memories of the events of the film. The nature of the 'rehearsal', it seems, can skew the subsequent recalling of events. This means that an applicant's ability to recall the details of events may be affected by the extent to which and the manner in which he/she has talked about the events in the past.
Reminiscence	As well as forgetting, there are also ways in which we remember **more** about an event as time goes on ([609]). This is particularly true if memories are discussed with someone else.	Consider a memory of a holiday — by discussing it with a partner, more memories might come to mind. Similarly, an applicant for international protection, when asked to describe an event, might go away, think about it, and recall more details. This may explain why an applicant might offer further details following a personal interview or at appeal.
False memories	A very long-established literature has shown how it is possible to introduce changes and even new details into a memory at the time of recall. For example, studies show how asking 'how far was it' instead of 'how near was it' can cause people to give different estimates in their answers.	In a study looking at the powerful effects of marketing on memory, study participants were shown posters showing a cartoon character (Bugs Bunny) at Disney World in Florida. Despite Bugs Bunny not being a Disney character (so he would never have been part of the amusement park), 16 per cent of the people tested claimed to remember not just seeing but shaking hands with him at Disney World when they were younger ([610]). The person conducting the personal interview or an oral hearing on appeal should, therefore, be aware that the phrasing of a question may influence an applicant's ability to recall details.

([609]) Cameron, op. cit., fn. 604. See also case-law that recognises the effect of the passage of time on memory: International Criminal Tribunal for the former Yugoslavia, Trial Chamber, judgment of 22 February 2001, Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, cases IT-96-23-T and IT-96-23/1-T, para. 564 cited in Levrincova, P. (2010), 'Did it really happen? Testimonies before the international criminal tribunals and refugee status determination', dissertation, Charles University, p. 140.

([610]) Payne, D. G. (1987), 'Hypermnesia and Reminiscence in Recall: A Historical and Empirical Review', *Psychological Bulletin*, 5-27.

([611]) Braun, K. A., Ellis, R. and Loftus, E. F. (2002), 'Make my Memory: How Advertising Can Change our Memories of the Past', *Psychology and Marketing*, 1-23.

([612]) See Herlihy, J. and Turner, S. (2009), 'The Psychology of Seeking Protection', *IJRL*, pp. 180-181 for further explanation of suggestibility.

([613]) MacFarland, W. L. and Morris, S. J. (1998), 'Are Dysphoric Individuals More Suggestible or Less Suggestible than Nondysphoric Individuals?', *Journal of Counselling Psychology*, 225-229.

([614]) Baxter, J. S., Boon, J. C. W. and Marley, C., op. cit., fn. 616, pp. 87-98.

([615]) Sutherland, R. and Hayne, H. (2001), 'Age-Related Changes in the Misinformation Effect', *Journal of Experimental Child Psychology*, pp. 388-404.

([616]) Turner, S. W., Bowie, C., Shapo, L. and Yule, W. (2003), 'Mental Health of Kosovan Albanian Refugees in the United Kingdom', *British Journal of Psychiatry*, 444-448; Silove, D., Sinnerbrink, I., Field, A., Manicavasagar, V. and Steel, Z. (1997), 'Anxiety, Depression and PTSD in Asylum-Seekers: Associations with Pre-Migration Trauma and Post-Migration Stressors', *British Journal of Psychiatry*, pp. 351-357; Steel, Z., Frommer, N. and Silove, D. (2004), 'Part I — The Mental Health Impacts of Migration: The Law and its Effects Failing to Understand: Refugee Determination and the Traumatized Applicant', *International Journal of Law and Psychiatry*, pp. 511-528.

([617]) Baxter, J. S., Boon, J. C. W. and Marley, C. (2006), 'Interrogative Pressure and Responses to Minimally Leading Questions', *Personality and Individual Differences*, p. 89, fn. 31.

([618]) Ibid., pp. 87-98.

Memory process	Explanations	Illustrations
Suggestibility ([611])	A related area of psychological literature shows that some people are more prone than others to changing their answers to questions. In particular, people who have low mood ([612]), low self-esteem ([613]), are anxious, suicidal, or children ([614]) are all more likely to shift their answers to suit what they think is expected of them by the interviewer ([615]).	The attitude of the interviewer is important too. Scientists studying this effect have found that 'simply repeating questions applies a form of 'Interrogative Pressure' ([616]). The 'psychological distance' between interviewer and interviewee has an effect on the interviewee's likelihood to shift their answers, e.g. in one experiment, merely being 'firm' rather than 'friendly' was sufficient to make significant differences in responses given at interview ([617]). This distance is of course necessarily present between interviewers or decision-makers and applicants, and should always be borne in mind, especially with children and young people. Repeated questions may elicit differentiated responses.
Confusing different events	When similar events are repeated 'schematic' or 'script' memories are formed. These are generic descriptions. Only details that stand out as unusual will be retained.	For example, most people have a script for eating in a restaurant — arriving and sitting down, choosing from a menu, eating, paying the bill, leaving. Remembering paying the bill for every meal out is unlikely (except the time you ran out without paying). Similarly an individual who has been detained and tortured on several occasions may have a composite, or 'schematic' memory of the events, lacking in detail particular to any one occurrence.

Cultural differences are also evident in adult autobiographical memories. Those from individualistic cultures tend to provide more specific, unique, self-focused, lengthy and emotionally elaborate memories about individual experiences, roles and emotions. They also tend to think or talk about their memories more frequently and perceive their memories as more important than those from collectivist cultures. The latter tend to focus on collective activities, general routines, and emotionally neutral events. They tend to recall memories of social interactions, significant others, focus on the roles of other people and provide more elaborate relatedness (i.e. family, community, social interactions, etc.) memories than those from individualistic cultures ([619]).

Such differences may be present in applications for international protection. Whilst the asylum process is largely reliant on an individual account given in the style preferred by people used to an individualistic understanding of the world, the applicant may well have been brought up to remember events from a far more collectivist point of view. To someone in an individualist culture, such memories might sound vague and generic, compared to the expected unique individual account. It should, therefore, be borne in mind that, whilst a lack of specificity may be considered indicative of a lack of credibility, it may instead be indicative of the recall of an applicant from a collectivist culture. An inability on the part of an applicant from a collectivist culture to recall major communal events may nevertheless indicate that their account lacks credence.

([619]) See e.g. Wang, Q. and Conway, M. A. (2004), 'The stories we keep: Autobiographical memory in American and Chinese dults', *Journal of Personality and Social Psychology*, 911-938.

6.2 The impact of traumatic experiences

In order to meet the requirement in Article 15(3)(a) APD (recast) of taking into account the personal and general circumstances surrounding the application and where an applicant may be a victim of trauma, a basic understanding of the impact of traumatic events on individuals is essential ([620]).

A traumatic event is defined in the International Classification of Diseases (ICD-10) as exposure 'to a stressful event or situation (of either brief or long duration) of exceptionally threatening or catastrophic nature' ([621]). Not all reactions to potentially traumatic events are the same, including, in some people, extraordinary resilience, but there is a body of knowledge concerning common responses and their effects.

The Istanbul Protocol (IP) details many possible responses to torture, which can also apply to other forms of persecution or serious harm even though they do not legally qualify as torture, such as other inhuman or degrading treatment ([622]). IP also maps these responses onto the most common psychiatric diagnoses — PTSD and depression — and notes other possible diagnoses after torture (e.g. panic disorder, generalised anxiety), which may also apply following other forms of persecution.

An important insight for a decision-maker, also when interpreting individual reports containing psychiatric diagnoses, is the need to be aware of the possible effects that these diverse responses to traumatic experiences might have on an applicant's ability to present a credible claim for international protection. It is also important to bear in mind the multidisciplinary literature indicating that someone who does not meet all the criteria for a diagnosis may nonetheless have some of the symptoms, and these may affect the presentation of their claim.

Depression is very commonly present alongside PTSD. Indeed it has been said that this situation is 'the norm rather than the exception' ([623]). Thus, if PTSD is present, then there are very likely to be symptoms of depression as well. Depression ('Major Depressive Disorder') involves symptoms including feelings of worthlessness and guilt, being physically agitated or slowed down, difficulties concentrating or making decisions and inability to sleep or oversleeping ([624]). One small study in the United Kingdom has suggested that depression may be considered unimportant in applications for international protection ([625]). In any case, the symptoms of depression, if genuinely present (for whatever reason), can significantly affect the presentation of the claim. For example, difficulties in concentrating might be misinterpreted in an interview or court or tribunal setting and depression is strongly associated with 'overgeneral memory' ([626]).

One prominent theory of traumatic memory suggests that we create different kinds of memories for traumatic events. A normal (autobiographical) memory is a verbal narrative, with a clear sense of being in the past. It is voluntary, in that we can to some extent choose whether

([620]) See High Court (Ireland), JG (Ethiopia) v Refugee Appeals Tribunal & Ors, op. cit., fn. 215, paras. 25 and 26.
([621]) World Health Organisation, ICD-10, Version: 2016.
([622]) See e.g. Istanbul Protocol Manual, op. cit., fn. 337, paras. 239-248.
([623]) O'Donnell, M. L., Creamer, M. and Pattison, P. (2004), 'Post-traumatic Stress Disorder and Depression Following Trauma: Understanding Comorbidity', *American Journal of Psychiatry*, p. 1390.
([624]) American Psychiatric Association, *Diagnostic and statistical manual of mental disorders*, DSM-5, 5th edn, 2013.
([625]) See Wilson-Shaw, L., Pistrang, N. and Herlihy, J. (2012), 'Non-Clinicians' Judgments about Asylum Seekers' Mental Health: How Do Legal Representatives of Asylum-Seekers Decide when to Request Medico-Legal Reports', *European Journal of Psycho-Traumatology*.
([626]) Overgeneral memory is when an individual has difficulty retrieving specific memories of particular events. So in response to being asked to describe a 'happy' event they might say 'I used to be happy when I lived in Krakow', rather than 'I was happy walking the dog in Finsbury Park last Saturday'. See also Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 1, op. cit., fn. 27, pp. 67 and 68.

or not to think about it, and it is updateable, should new information become available. A traumatic memory, on the other hand is a vivid, sensory snapshot, experienced as if it is happening again in the present, and remains fixed. The extreme example of this is the 'dissociative flashback' when someone may lose awareness of the current moment and be seeing, hearing or even physically reacting as if in the original event. This may happen in an interview or hearing, particularly (but not exclusively) in the context of questioning about past events.

One of the indicators of a credible account is that it be '**internally consistent'** (see Section 4.5.1 above). When the memory is of a traumatic event, this is complicated, since the memory asked for by a decision-maker may be the fixed 'traumatic memory' described above, or may be a normal autobiographical memory of some other part of the event, which can vary over time. Furthermore, the literature on traumatic memories has distinguished between 'central' and 'peripheral' details of an event ([627]). Broadly, the notion is that attention is narrowed at the time of a life-threatening experience, to the most important 'gist' of the event — including emotionally central elements. The distinction is always particular to the event and personal to the person experiencing it. A study of this effect in the context of international protection claims showed that, when interviewed twice about a traumatic event, people were inconsistent in their recall of all types of details, but particularly of those which they had rated as peripheral ([628]).

A meta-analysis of 27 studies ([629]) found mild to moderate impairment of memory for general information in people with PTSD (compared to others exposed to trauma, but not meeting a diagnosis of PTSD) ([630]). Verbal memory is often what is required of an applicant giving an account of persecution or serious harm at interview or at a hearing. This should be taken into account when assessing memory for ordinary events in people diagnosed with PTSD ([631]).

6.3 Disclosure

Applicants are required to give accounts of their alleged experiences. These may include fearful, embarrassing or shaming experiences which people may find difficult to disclose. There are a number of factors to be taken into account which may affect individuals' abilities to disclose their experiences and/or result in their late disclosure (see Section 5.7.1). These must be understood if decision-makers are to meet their duty to cooperate with the applicant in the substantiation of the application and to assess the application taking into account the individual position and personal circumstances of the applicant in accordance with Article 4 QD (recast).

Shame: In order to meet the requirement that the assessment of an application be carried out on an individual basis (Article 4(3) QD (recast)), decision-makers need to have a nuanced understanding of the concept of shame. This is crucial to understanding late disclosure and lack of detail at the personal interview/oral hearing. Unlike guilt, which is a feeling of having done something wrong, and leads to the desire to put things right; shame is a powerful sense

([627]) Christianson, S.-A., 'Emotional Stress and Eyewitness Memory: A critical review', *Psychological Bulletin* (1992)284-309.
([628]) Herlihy, J., Scragg, P. and Turner, S. (2002), 'Discrepancies in Autobiographical Memories — Implications for the Assessment of Asylum-Seekers: Repeated Interviews Study', *British Medical Journal*, pp. 324-327.
([629]) Using statistical methods to combine the findings of more than one study.
([630]) Brewin, C. R., Kleiner, J. S., Vasterling, J. J. and Field, A. P. (2007), 'Memory for Emotionally Neutral Information in Posttraumatic Stress Disorder: A Meta-Analytic Investigation', *Journal of Abnormal Psychology*, 448-463.
([631]) For a review of memory research applied to the asylum process see Herlihy, J., Jobson, L. and Turner, S. (2012), 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum', *Applied Cognitive Psychology*, 661-676.

of being wrong or being a bad person, producing a strong urge to hide. In the context of an application for international protection, this may mean that the applicant does not disclose experiences felt to be shameful, or that he/she is vague and undetailed about such disclosures.

Avoidance: Vivid distressing memories can understandably mean that many people make conscious efforts not to talk about their past — even in situations when they know they should, such as in procedures to determine qualification for international protection. Some individuals are prone to less consciously controlled mechanisms, such as dissociation (cutting off from present awareness) or numbing of their emotional responses to the event.

It has been stated that, for example, 'individuals who were exposed to trauma at a young age avoid accessing specific memories (not just of the traumatic events), so as not to experience further distress' ([632]). This may result in a vague or seemingly generic account.

Dissociation: Extreme emotion can lead to dissociation. This is a 'disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment' ([633]). This disturbance of awareness is a common effect of past traumatic experiences, especially interpersonal trauma such as torture ([634]). It can range from feeling 'spacy' and disoriented to a full re-experiencing of a traumatic event, with a complete loss of awareness of the present moment. It is not always easy to identify — it may be that the applicant appears distracted or is finding it unusually difficult to follow the proceedings.

A study specifically designed to examine the interviewing process in applications for international protection showed that difficulty in disclosure was strongly associated with the avoidance symptoms of PTSD, feelings of shame, and dissociation ([635]). In this study 25 out of the 27 participants reported clinically significant levels of dissociation during their interview.

Fear: As a result of their experiences in the country of origin or transit, and/or a desire not to endanger the lives of relatives, friends or associates in the country of origin, an applicant may fear or lack trust in the personnel of the competent authorities and/or interpreters from their country of origin. Such fear may explain the non-disclosure of relevant material facts or evidence. Moreover, an applicant may fear reprisals by their family, community, smugglers or traffickers. This may explain his/her unwillingness to disclose relevant material facts or submit certain documentary or other evidence.

6.4 Cultural differences

The importance of taking into account cultural differences is explicitly recognised in the APD (recast). Article 10(3)(d) on the requirements for the examination of applications provides that the appropriate examination of applications for international protection is to be ensured by Member States inter alia by giving 'the personnel examining applications and taking decisions […] the possibility to seek advice, whenever necessary from experts on particular issues, such as […] cultural […] issues'. As regards the requirement for a personal interview, Article 15(3)(a) APD (recast) requires Member States 'to take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds of their

([632]) UNHCR, The Heart of the Matter, op. cit., fn. 272, p. 70.
([633]) American Psychiatric Association, *Diagnostic and statistical manual of mental disorders*, 1994.
([634]) Schauer, M. and Elbert, T. (2010), 'Dissociation following Traumatic Stress Etiology and Treatment', *Zeitschrift für Psychologie/Journal of Psychology*, 109-127.
([635]) Bögner et al., '*The Impact of Sexual Violence on Disclosure during Home Office Interviews*', op. cit., fn. 102.

applications in a comprehensive manner', including by 'ensur[ing] that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, **including the applicant's cultural origin** […]'.

It is important to bear in mind that within any 'culture' there may be different cultures. Moreover, culture evolves with time and changes. As such, decision-makers should be careful not to apply a stereotyped fixed notion of a culture (see Section 6.8 below). It is also important to be aware that some cultural differences are more obvious than others. Clothing and language are examples of easily observable differences. Social values, norms and rules such as eating etiquette, or what is considered rude/polite, can be verbalised, or explained. However, there are unconscious cultural rules and norms, which are less easily verbalised, but may nonetheless determine what we find funny, disgusting, shameful, etc. See also Section 6.1 on the differences in individualistic or collectivist ways of remembering personal events.

Anthropologists have identified the following common areas of differences between cultures (see Table 31 below).

Table 31: Common areas of differences between cultures ([636])

Communication styles	Verbal expression may be more direct or indirect, include more or less emotional expression and use more or fewer words to say the same thing. Cultures also differ on the meaning of silence in a conversation or interview.
High- and low-context communication	This refers to how much of the context is necessary to understand a statement, e.g. the difference between a detailed written contract (low context) and an oral agreement agreed with a handshake (high context) ([636]).
Non-verbal communication	Body language and demeanour vary greatly between cultures.
Physical space	Cultures differ on their comfort with personal space. It usually suggests intimacy, but the amount of space differs across cultures as well as between individuals and genders. Violating personal space can lead to anxiety, shame and/or discomfort.
Relationship to power	Cultures differ in the importance accorded to 'power difference' with large power differences requiring more deference to authority and less questioning than might be normal in a more egalitarian 'low power difference' culture.

Such differences should be borne in mind by decision-makers when assessing an applicant's statements and other evidence.

([636]) The Hungarian Helsinki Committee's *Credibility assessment training manual* states: '[I]t is in the best interest of all participants to strive towards interculturality, so that interaction is more effective and meaningful for everyone involved. In the asylum system and to carry out credibility assessments more specifically, this rule is probably more valid than in any other area of the asylum procedure. In addition, the duty of cooperation between the asylum seeker and the authority as stipulated by Article 4(1) of the Qualification Directive will in practice also require the two parties to overcome cultural barriers and work towards interculturality in the credibility assessment process' (Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 1, op. cit., fn. 27, p. 119). The decision-maker is referred to in ibid., Chapter VII where these concepts are explained more fully.

([637]) Early work by Hall (Hall, E. T. and Edward, T. (1976), *Beyond Culture*, Anchor Books, theorised that national cultures (i.e. countries) are on a continuum from high to low context in the construction of meaning in communication. In this categorisation, western European cultures, the US and Australia are more low context, and Asian, African, Arab and Latin American cultures are presumed to be more high context. A 2007 review of empirical studies suggests that this is an untested oversimplification, particularly where there are multiple cultures within a country (Kittler, M. G., Rygl, D. and Mackinnon, A. (2011), 'Beyond Culture or Beyond Control? Reviewing the Use of Hall's High-/Low-Context Concept', *International Journal of Cross Cultural Management*, pp. 63-82). However these same authors, whilst critiquing the application of the concept to whole countries, nonetheless acknowledge the usefulness of the concept in the understanding of intercultural communication. Thus, the concept of how much 'context' is being assumed by a speaker/listener may offer a pragmatic approach to understanding the cross-cultural communications required in international protection decision-making. For example, an account of crossing the border that does not mention changing buses might be deemed non-credible in that it suggests that the claimant does not mention this detail because they did not make such a journey. However, the decision-maker may consider that the claimant is employing 'high context' communication in which case he/she may be assuming that 'everyone knows' that it is necessary to change buses at a border.

6.5 Gender

The relevant legal principles regarding the obligation to take gender into account when assessing an applicant's individual position and personal circumstances have been set out in Section 4.3.1.

The CJEU judgment in *P* v *S and Cornwall County Council* ([638]) referred to in Section 4.3.1 demonstrates that gender is a concept that goes beyond biological determinations (male/female). This is aptly illustrated in UNHCR's *Guidelines on ecution* which emphasise that gender roles are socially constructed ([639]). UNHCR's *Beyond proof* report states:

> Gender defines identity, status, roles, responsibilities, and power relations among members of any society or culture. Gender roles are socially constructed and not determined by biological differences between males and females. They vary across and within societies and cultures, and evolve with time to respond to changes in the social, political, and cultural environment. They also vary according to other factors such as age, religion, ethnic and social origin. Gender roles influence the attitudes, behaviour, roles, and activities of males and females ([640]).

The obligation to take gender into account when assessing an applicant's individual position and personal circumstances means taking into consideration gender roles and expectations, and gender power relations in the country of origin, among other factors. Credibility assessment is particularly challenging in cases based on gender-related persecution as the evidentiary challenges are significant. Where there is a lack of documentary evidence, applicants with claims based on gender-based violence have to rely on personal testimony.

Gender should not only be considered in cases of gender-based persecution. Gender has a potential impact on access to documentary evidence and the application of credibility indicators in all cases ([641]).

In summary, UNHCR's *Beyond proof* report provides:

> The applicant's testimony has to be assessed in the context of his or her gender, linked also with other factors such as age, culture, religion, family, and socioeconomic status in the country of origin or place of habitual residence. Interviewers and decision-makers need to maintain an objective and impartial approach so that they do not reach conclusions based on stereotypical, superficial, erroneous or inappropriate perceptions of gender ([642]).

([638]) CJEU, P v S, op. cit., fn. 170.
([639]) UNHCR, *Guidelines on international protection no 1*, op. cit., fn. 169, para. 3.
([640]) UNHCR, *Beyond proof*, op. cit., fn. 14, p. 69. Internal references originally in this excerpt refer to: UNHCR (May 2003), *Sexual and gender-based violence against refugees: returnees and internally displaced persons, guidelines for prevention and response*, p. 11; UNHCR, *Guidelines No 1*, para. 3: 'Gender refers to the relationship between women and men on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination'; UNHCR (October 2005), *Ensuring gender sensitivity in the context of refugee status determination and resettlement*.
([641]) Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 2, op. cit., fn. 27, p. 40.
([642]) UNHCR, *Beyond proof*, op. cit., fn. 14, p. 70. An internal reference originally in this excerpt refers to Spijkerboer, T. (2005), 'Stereotyping and acceleration: gender procedural acceleration and marginalised judicial review in the Dutch asylum system', Chapter 5 in Noll, G., *Proof, evidentiary assessment and credibility in asylum procedures*, Martinus Nijhoff.

The *Beyond proof* report explains the importance of considering gender in the disclosure of information in support of an applicant's asylum claim:

> The gender, cultural, and educational background of an applicant may affect his or her ability to relate his or her account to the interviewer. A woman, for instance, may lack experience of and confidence in communicating with figures of authority. A woman, for instance, may be unaccustomed to communicating with strangers and/or persons in public positions due to a background of social seclusion and/or social mores dictating that, for example, a male relative speaks on her behalf in public situations. In addition, it may be common for a female applicant to be deferential in her country of origin or place of habitual residence. Male applicants may also find it difficult to discuss aspects of their past and present experiences that may be at variance with their expected gender roles in their society. Such factors may account for brief, vague or apparently inconsistent responses ([643]).

Experience of gender-based harm may affect the quality of an applicant's statements in terms of completeness, coherence and consistency. Any trauma caused can affect memory; and shame, stigma and fear may make disclosure difficult (see Sections 6.2 and 6.3 above) ([644]). Moreover, it should be borne in mind that it may be difficult for both male and female applicants to fully disclose information in the presence of family members. In this regard, Article 15 (1) APD (recast) provides that '[a] personal interview shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have other family members present.'

When it comes to **gender and external consistency** ([645]), the decision-maker should be aware that social constraints may restrict a female's access to information and/or her knowledge of certain events, activities and organisations ([646]).

Another UNHCR publication, *The Heart of the Matter,* which focuses on assessing credibility in the context of children's claims for international protection, gives examples where the constraints on girls in certain cultures did not seem to be taken into consideration:

> For instance, an adjudicator held it against a 17-year-old girl that she had not turned to the authorities in her country of origin for protection against honour-related crimes. In such a case the decision should be linked to an analysis both of the availability of effective protection in that country for victims of honour-related crimes […] and of the possibility for girls to access protection ([647]).

([643]) UNHCR, *Beyond proof*, op. cit., fn. 14, p. 70. Internal references originally in this excerpt refer to: Refugee, Asylum and International Operations Directorate (RAIO), United States Citizenship and Immigration Services (October 2012), *Asylum officer basic training Module: Gender related claims*, para. 7.1.3; UNHCR (January 2008), Handbook for the Protection of Women and Girls.

([644]) UNHCR, *Guidelines on International Protection No 1*, op. cit., fn. 169, para. 36 (viii) and (xi).

([645]) Concerning external consistency, see Section 4.4.3.2 above.

([646]) UNHCR, *Beyond proof*, op. cit., fn. 14, pp. 69 and 70. An internal reference originally in this excerpt refers to: RAIO, *Asylum officer basic training module: Gender related claims*, op. cit., fn. 642, para. 7.1.1. 'During interviews, the applicant's gender may affect the way a question is understood, how the answer is provided and the nature of the answer provided. Questioning that focuses on knowledge held or activities conducted customarily by males may fail to elicit material relevant facts from a female applicant.' See UNHCR, Regional Representation for Western Europe, Note du Haut Commissariat des Nations Unies pour les réfugiés relative à l'évaluation des demandes d'asile introduites par des femmes, 14 December 2012. See also UKBA, Asylum Instructions, Gender Issues in the Asylum Claim, September 2010; RAIO, *Asylum officer basic training module: Gender related claims*, op. cit., fn. 642, para. 7.1.1.

([647]) UNHCR, The Heart of the Matter, op. cit., fn. 272, p. 74. An internal reference originally in this excerpt refers to: 'D/122/RUS/F/17'.

6.6 Sexual orientation and gender identity

Article 15(3)(a) APD (recast) requires interviewers to take into account not just an applicant's gender but also his/her 'sexual orientation' and 'gender identity' ([648]).

The definitions of these terms as set out in the Yogyakarta Principles relating to sexual orientation and gender identity have already been set out in Section 4.3.1.

Volume 2 of the Hungarian Helsinki Committee *Credibility assessment training manual* states:

> Importantly, the Yogyakarta definition shows that **sexual orientation is not just sexual conduct or behaviour.** These terms relate to activities to find and attract partners for physical and emotional intimacy and actual sexual contact. Sexual orientation also involves emotions and affections. **Sexual behaviour is not always in line with sexual orientation.** For instance, a gay man or a lesbian may have engaged in heterosexual relations (e.g. prior to accepting her/his actual orientation/identity), and also, a heterosexual person may also have sexual contact with a person of the same sex.
>
> In addition, harassment of, or violence against, gay men and lesbians is often not solely because of their sexual behaviour, but also (or even more so) because of their *identity,* and/or non-conformity with prescribed gender roles or expected sexual morality. […]
>
> Another important principle emphasised by the Yogyakarta Principles is that **a gender identity not corresponding with the sex assigned at birth does not require surgical intervention in order to be 'genuine',** the latter remaining entirely a free choice of the person concerned. There is an **important connection between sexual orientation and gender identity.** They both relate to gender as well as non-conforming sexual behaviour, appearances or identities. For example, a 'heterosexual' trans person may still be perceived to be 'homosexual' even after gender realignment treatment if her/his 'new' sex/gender is not acknowledged. Another example is that a gay man perceived to be effeminate may experience violence where an otherwise 'gender role conforming' gay man might not ([649]).

With regard to credibility assessment, applications based on sexual orientation or gender identity may be particularly challenging because the grounds are linked to sensitive and intimate areas of private life. Applicants may have developed feelings of stigma, shame and/or self-denial; and they may have been rejected and/or ill-treated by their own family and/or community. Such factors may make it difficult for applicants to disclose the material facts in a clear and coherent manner and as a result their evidence may be characterised by late disclosure, lack of detail and inconsistencies ([650]).

([648]) The terminology used in this Section is not that of the IARLJ-Europe, but of the sources cited. Some of this terminology may be considered outdated, and alternative terminology may now be preferred. See: Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 2, op. cit., fn. 27, pp. 63-66.
([649]) Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 2, op. cit., fn. 27, p. 64 (original emphasis).
([650]) Ibid., p. 61 (original emphasis; internal reference omitted).

One model referred to in the literature, the 'Difference, Stigma, Shame, Harm' (DSSH) model 2 ([651]), is based on the notion that there are some basic characteristics or elements that are likely to be common to people acknowledging a gender or sexual identity that is contrary to the heteronormative societies in which they live (where identifying with one's biological sex and being heterosexual is the norm). The model suggests a structured methodology for the assessment of claims based on gender and sexual identity and is explained, with practical examples in Volume 2 of the Hungarian Helsinki Committee *Credibility assessment training manual*. The four key elements are briefly described in Table 32 below.

Table 32: Four key elements of the DSSH model

Difference	The first element is that the individual has identified at some point as being different. This realisation may have come early or later in life, may have nothing to do with sex or relationships and may be a series of acknowledgements of difference — there is rarely one 'turning point'.
Stigma	Stigma refers to the recognition and experience of social disapproval due to the individual not conforming to social, cultural and/or religious norms of the society.
Shame	Shame in this context can be seen as an internalisation of the stigma, or disapproval of others. It leads to the feeling that something is wrong and must be changed, or hidden, and may lead to explicit homophobia. It is likely to lead to a fear of suffering harm, thus giving rise to avoidance strategies such as keeping one's identity hidden, living a double life (e.g. marrying) and/or overemphasising 'conforming' gender roles.
Harm	The fear of suffering serious harm **because** of one's sexual orientation or gender identity is what may motivate a person to apply for international protection.

The notion of harm within this model also raises procedural considerations for individuals who may never have been able to talk about their identity openly to anyone, for whom their identity has been a source of stigma and potential harm, and who may not be aware of their rights regarding their sexual orientation and/or gender identity within an asylum claim ([652]). As the *Beyond proof* report indicates:

> The presence or absence of certain stereotypical behaviours or appearances should not be relied on to conclude that an applicant does or does not possess a given sexual orientation and/or gender identity. There are no universal characteristics or qualities that typify LGBTI [lesbian, gay, bisexual, transgender and intersex] individuals, any more than there are for heterosexual individuals. Their life experiences can vary greatly even if they are from the same country ([653]).

([651]) The DSSH model 2 was created in 2011 by United Kingdom barrister S. Chelvan. This model is referred to by the UNHCR in its *Guidelines on international protection no 9* (op. cit., fn. 171, para. 62), and endorsed by various governments around the world, including New Zealand, Sweden and Finland (see Adams, W. L., 'Gay asylum seekers forced to 'prove' their sexuality', *Newsweek Europe*, 25 September 2014; endorsed by the Independent Chief Inspector of Borders and Immigration (United Kingdom), An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation, March-June 2014, paras. 3.18-3.20, with this recommendation accepted by the Home Office in The Home Office Response to the Independent Chief Inspector's Report: 'An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation', March-June 2014, paras. 7.1-7.3. Following publication as Chapter XI of the *Credibility assessment training manual*, Vol. 2, op. cit., fn. 27, the United Kingdom Home Office have completely overhauled their training manual to apply DSSH as a tool to positively determine an LGBT asylum claim. The DSSH slides are now incorporated within the global training of both the UNHCR and the International Organization for Migration (see Module 2). The Swiss authorities also now use the DSSH model ('"A Step Forward" for Asylum Decision-Making in Switzerland', No 5 Chambers, 8 March 2016). Various NGOs around the world apply the DSSH model, including Australia (Kaleidoscope) and EIRE (Irish Refugee Council). EASO has applied DSSH to its training materials since 2015 for claims based on sexual orientation and gender identity.

([652]) See Hungarian Helsinki Committee, *Credibility assessment training manual*, Vol. 2, op. cit., fn. 27, p. 85.

([653]) UNHCR, *Beyond proof*, op. cit., fn. 14, p. 71. Internal references originally in this excerpt originally refer to: This issue has been addressed by a number of United States Courts: Shahinaj v Gonzales, 481 F.3d 1027, 1029, (8th Cir. 2007); Razkane v Holder, Attorney General, 562 F.3d 1283, 1288, (10th Cir. 2009); Todorovic v US Attorney General, 621 F.3d 1318, 1325-1327, (11th Cir. 2010). See also Jansen, S. and Spikerboer, T., *Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe*, 2011. United Kingdom policy guidance states; 'stereotypical ideas of people — such as an "effeminate" demeanour in gay men or a masculine appearance in lesbians (or the absence of such features) should not influence the assessment of credibility.' UKBA Asylum Instructions, *Guidelines on sexual orientation issues in the asylum claim*, October 2010; UNHCR, *Guidelines on International protection no 9*, op. cit., fn. 171, para. 60(ii).

6.7 Vulnerability

The legal standards and the need for special procedural guarantees for vulnerable applicants are set out in Section 4.3.1.

Further to the categories listed there, account should be taken of an applicant's general vulnerability, which can arise from his/her situation in the receiving country where, for example, accommodation or financial resources may be poor so that the applicant is living in poor conditions ([654]). This may further affect his/her ability to present well at an interview or hearing. For example, if applicants are housed in crowded and/or noisy conditions they may not be sleeping adequately, leaving them less able to concentrate or answer questions.

6.8 Stereotypes

The issue of the use of stereotyped notions and the risk that it does not allow for an objective assessment of an individual's personal circumstances has been considered in Sections 4.3.2 and 4.4.

Decision-makers must be careful to ensure that any stereotyped conception(s) they might have do not influence their evidence and credibility assessment of applications for international protection. A robust finding in social psychology and other relevant disciplines is that people hold, necessarily, visual stereotypes, for example, of the typical accountant, psychoanalyst, 'criminal type' or innocent victim, and that attractiveness, as well as gender, race and other aspects, are part of these. People need stereotypes to categorise and make sense of the world. This literature considers that the answer is not to deny stereotypes, but to be aware of them, to question them, and to aim to bring in multidisciplinary learning, and a structured approach to assessment ([655]).

([654]) See ECtHR, MSS v Belgium and Greece, op. cit., fn. 50, para. 251, where the Court acknowledged that asylum seekers were 'member[s] of a particularly underprivileged and vulnerable population group in need of special protection'. On the vulnerability of children, see e.g. ECtHR, Judgment of 12 October 2006, Mubilanzila Mayeka and Kaniki Mitunga v Belgium, application no 13178/03.

([655]) IARLJ, Assessment of Credibility, CREDO project, op. cit., fn. 2, Part II; and UNHCR, *Beyond proof*, op. cit., fn. 14, p. 77. The Administrative Court of Slovenia introduced the so-called 'interdisciplinary approach' in asylum disputes, which takes into account some of the issues discussed in Part 6 of this judicial analysis, in its judgment in *I U 411/2015-57*, op. cit., fn. 255, paras. 98-109.

Appendix A: Checklists

These checklists are intended to reflect the content of this judicial analysis and to be an aid and no more. Members of courts and tribunals may not have to address all the questions and steps outlined. In practice, only those issues that the parties dispute will have to be reviewed by the court or tribunal member. For example, he/she will not need to assess the authenticity and reliability of a particular document if its authenticity and reliability has already been established.

A. SUBSTANTIATION OF APPLICATION AND OBTAINING OF EVIDENCE

Duties of the applicant:

Duty	☑	Explanation	Action	☑	Elements	☑
Have all the elements needed to substantiate the application been submitted as soon as possible? (Art. 4(1) QD (recast)).	☐	The applicant must provide, as soon as practicably possible, statements and all documentary evidence or other evidence, which he/she may be reasonably expected to obtain, in support of his/her application. Pursuant to Art. 13 APD (recast) the applicant is obliged to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Art. 4(2) QD (recast). (*Evidence may include anything that asserts, confirms, supports or bears on relevant facts*).	• To provide statements.	☐	• Age	☐
Has the applicant made a genuine effort to provide statements and all documentation at his/her disposal? (Art. 4(5)(a) and (b) in conjunction with Art. 4(2) QD (recast)).	☐		• To submit statements of family members; experts; and witnesses, at the applicant's disposal.	☐	• Background	☐
					• Relevant relatives	☐
			• To submit all documentary evidence, including, for example, passport, birth certificate, medical records, travel documents, at the applicant's disposal.	☐	• Identity	☐
					• Nationality(ies)	☐
					• Country(ies) & place(s) of previous residence	☐
Has the applicant given a satisfactory explanation regarding any lack of relevant elements? (Art. 4(5)(b) QD (recast)).	☐		• To submit any other evidence at his/her disposal, relevant to the material facts, including objects, photographs, audio recordings, digital data, or physical elements including bodily scarring.	☐	• Previous asylum applications	☐
					• Travel routes	☐
					• Travel documents	☐
			• To provide a satisfactory explanation regarding any lack of other relevant elements.	☐	• Reasons for applying for international protection	☐

Duties of the determining authority:

Duty	☑	Explanation	Action	☑	Elements	☑
Did the determining authority inform the applicant about his/her duties with regards to substantiation? (Art. 12(1)(a) APD (recast)).	☐	The determining authority must ensure: that all applicants are informed of their duty to substantiate the application, the means at their disposal and time frame to fulfil this duty; that all applicants are given the opportunity to substantiate their application in a personal interview; and, must cooperate with the applicant at the stage of determining the relevant elements of the application. (*A Member State may be better placed to gain access to certain types of documents*).	• To inform the applicant in a language they understand, or are reasonably supposed to understand, of their duty to substantiate the application.	☐	• The report or transcript and/or audio or audiovisual recording of the personal interview.	☐
Did the determining authority give the applicant the opportunity of a personal interview? (Arts. 14-17 APD (recast)).	☐		• To conduct a personal interview with the applicant and ensure the applicant is given an adequate opportunity to substantiate the application as completely as possible.	☐	• Any expert evidence on particular issues such as medical, cultural, religious, child-related or gender issues.	☐
Did the determining authority give the applicant the opportunity to give an explanation regarding any missing elements and/or any inconsistencies or contradictions in the applicant's statements? (Art. 16 APD (recast) and EU law principle of the right of defence, including the right to be heard).	☐		• To cooperate actively with the applicant to assemble all the elements needed to substantiate the application. (*It cannot be assumed that the applicant will know what facts and evidence may be relevant and it is for the Member State to provide appropriate guidance and use appropriate questioning to elicit any relevant elements*).	☐	• Country of origin information. • Information on country(ies) of transit and travel route. • Any documents which the determining authority is better placed to gain.	☐ ☐ ☐
Did the determining authority obtain relevant country of origin and country information? (Art. 4(3)(a) QD (recast)).	☐		• To ensure precise and up-to-date information has been obtained from various sources on the general situation prevailing in the countries of origin and transit.	☐		
Did the determining authority seek advice, whenever necessary, from experts on particular issues? (Art. 10(3)(d) APD (recast)).	☐		• Where relevant, to inform the applicant about the possibility to undergo a medical examination and make the arrangements for such examination to take place, where required.	☐		
Did the determining authority deal properly with any special procedure needs? (Art. 24 APD (recast)).	☐					
Has the applicant fulfilled his/her duty to substantiate? (Art. 4(1) QD (recast)) ☐						
Has the determining authority's duty of investigation been duly fulfilled? ☐						

Where Member States consider it the duty of the applicant to substantiate the application, where aspects of their statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met pursuant to Article 4(5) QD (recast):

Conditions	☑	Explanation
Has the applicant made a genuine effort to substantiate his/her application (Art. 4(5)(a) QD (recast))?	☐	Where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the conditions of Art. 4(5) QD (recast) are met. There is no general requirement that all aspects of the applicant's statements must be supported by documentary or other evidence.
Has the applicant submitted all relevant elements at his/her disposal and provided a satisfactory explanation regarding any lack of other relevant elements (Art. 4(5)(b) QD (recast))?	☐	
Were the applicant's statements found to be coherent and plausible and did not run counter to available specific and general information relevant to their case (Art. 4(5)(c) QD (recast))?	☐	
Did the applicant apply for international protection at the earliest possible time, or have they demonstrated good reason for not having done so (Art. 4(5)(d) QD (recast))?	☐	
Has the general credibility of the applicant been established (Art. 4(5)(e) QD (recast))?	☐	
Where aspects of statements are not supported by documentary or other evidence, do they require confirmation?	☐	

B. EVIDENCE AND CREDIBILITY ASSESSMENT

Steps to be taken when conducting the assessment of evidence and credibility:

Steps	☑	Action	☑	Principles/standards/factors to be taken into account	☑
Identify the material facts.	☐			Has the assessment of the application for international protection been carried out on an individual basis? (Art. 4(3) QD (recast))	☐
Identify the statements, documents and other evidence relating to each material fact.				Were the individual position and personal circumstances of the applicant, including background, gender (including gender identity and sexual orientation), age, health issues and vulnerability, considered?	☐
				Did the decision-maker conduct an appropriate examination and ensure that decisions were taken individually, objectively and impartially? (Article 46 APD (recast))	☐

Assess the authenticity/ reliability of documentary evidence.		• Apply criteria applicable to documentary evidence:
		  • Relevance
		  • Existence
		  • Form
		  • Content
		  • Nature
		  • Author
			☐	Did the decision-maker conduct a rigorous examination of the application for international protection? (Recital (34) APD (recast))	☐

Assess the reliability of expert evidence.		• Apply criteria applicable to the duties of the expert:
		  • Established credentials (including qualifications, education and training, membership of professional bodies and experience)
		  • Independent
		  • Objective
		  • Unbiased
		  • Familiar with breadth of current practice/opinion
			☐		

Steps	☑	Action	☑	Principles/standards/factors to be taken into account	☑
Assess the reliability of COI evidence.		• Apply criteria applicable to the duties of the Member State: • Take account of all relevant facts as they relate to the country of origin • Obtain precise and up-to-date information from relevant sources such as UNHCR and EASO and relevant international human rights organisations • Have regard to the general circumstances prevailing in the country of origin • Independence of the source • Reliability of the source • Objectivity of the source • Reputation of the author • Methodology of compilation • Consistency of conclusions • Corroboration of other sources	☐		
Assess the credibility of each material fact applying the credibility indicators.	☐	• Internal consistency • External consistency • Sufficiency of detail • Plausibility (See table below for further detail).	☐		
Review the evidence as a whole and assess credibility in the light of all of the evidence.	☐	Take all relevant matters into account to ensure good administration, an effective remedy, and an assessment, which is individual, objective and impartial.	☐		
Accept/reject each material fact.	☐	Assess the applicant's statements, based on facts material to the core of the claim.	☐		

Credibility indicators:

Credibility indicators	☑	Explanation	Action	☑	Standards/factors to be taken into account	☑
Internal consistency	☐	Internal consistency concerns findings on consistencies, and any inconsistencies, discrepancies or omissions within the statements and other evidence presented by applicants.	To assess the impact of any contradictions or omissions on the credibility of the applicant's statements on the material facts.	☐	• Consistency is not necessarily an indication of credibility. • Be alert to situations where some applicants may tailor their claims to be consistent with relevant COI which they consider to assist their claim.	☐ ☐
External consistency	☐	External consistency relates to consistencies between the applicant's account and other evidence obtained by the competent authorities, including COI.	To assess whether the applicant's account is consistent with COI, any expert evidence obtained or the accounts of other family members or witnesses.	☐	• Factors personal to the applicant including memory, impact of trauma, fear, shame, gender, sexual orientation and gender identity, culture, and vulnerability. • Practical difficulties such as limited space on the application form.	☐ ☐
Sufficiency of detail	☐	It is reasonable to expect that a claim for international protection should be substantially presented and sufficiently detailed.	To conduct a balanced and objective assessment of whether the account presented by an applicant reflects what can be expected from someone in his/her particular circumstances.	☐	• Quality and atmosphere of the personal interview. • Finding of a lack of credibility should not be based on conjecture or speculation.	☐ ☐
Plausibility	☐	Plausibility relates to a fact being possible as well as **seeming** reasonable, likely or probable. It overlaps to some extent with not running counter to available specific and general information.	To assess plausibility of asserted relevant facts in the context of the conditions prevailing in the country of origin and the applicant's background, including gender, age, education and culture.	☐	• Consider the cumulative impact. • Care needs to be taken when placing reliance on plausibility.	☐ ☐

Multidisciplinary approach to the assessment of evidence and credibility:

Standards/factors to be taken into account	☑	Explanation	Action	☑
Take into account the limits and variations of human memory.	☐	Expectations are based on assumptions about human memory; however, memory is very personal and varies from one applicant to the other. Memory naturally decays and details are forgotten or can be changed by rehearsal. There are always ways in which, through discussion, memories are recovered as time goes on. It is possible to introduce changes and new details into a memory.	• To hold a realistic expectation of what an applicant should know and remember. • To consider the effect of any traumatic events. • To consider the impact of, for example, an applicant's gender, age, sexual identity and vulnerability.	☐ ☐ ☐
Take into account the possible shame, avoidance, dissociation or fear, which may affect the applicant's abilities to disclose their experiences.	☐	The applicant may find it difficult to disclose experiences felt to be shaming; or may have made a conscious effort to avoid specific memories; or they may fear or lack trust in the competent authorities following previous experiences.	• To be aware of the impact of shame, avoidance, dissociation and fear on disclosure.	☐
Ensure that any stereotypical conception(s) held, have not influenced their evidence and credibility assessment of the application for international protection.	☐	Some applicants will be more prone, to changing their answers; to suit what they think is expected of them. When similar events are repeated only details that stand out will be retained.	• To consider the impact of cultural differences.	☐

Appendix B: Primary sources

1 European Union law

1.1 EU primary law

Treaty on the Functioning of the European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)) [2012] OJ C 326/47.

Treaty on the European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)) [2012] OJ C 326/13.

Charter of Fundamental Rights of the European Union of 18 December 2000 [2012] OJ C 326/391 (entry into force: 1 December 2009).

1.2 EU secondary legislation

1.2.1 Regulations

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1.

Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) [2008] OJ L 218/60.

Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L 132/11.

Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L 55/13.

Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and emending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180/1, 29 June 2013.

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJL 180/31.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1, 4 May 2016.

Commission Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2014] OJ L 39/1.

1.2.2 Directives

Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers [2003] OJL 31/18.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L 304/12.

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1.

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJL 337/9.

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96.

2 International treaties of universal and regional scope

2.1 United Nations

Convention Relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954).

Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entry into force: 4 October 1967).

Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entry into force: 2 September 1990).

2.2 Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, ETS No 005, 4 November 1950 (entry into force: 3 September 1953).

3 Case-law

3.1 Court of Justice of the European Union

3.1.1 Judgments

Judgment of 27 October 1977, case 30/77, Regina v Pierre Bouchereau, EU:C1977:172.

Judgment of 6 October 1982, case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, EU:C:1982:335.

Judgment of 30 April 1996, case C-13/94, P v S and Cornwall County Council, EU:C:1996:170.

Judgment of 27 June 2006, Grand Chamber, case C-540/03, European Parliament v Council of the European Union, EU:C:2006:429.

Judgment of 13 July 2006, joined cases C-297/04, C-296/04, C-297/04 and C-298/04, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA, EU:C:2006:461.

Judgment of 18 December 2008, case C-349/07, Sopropé — Organizações de Calçado Lda v FazendaPública, EU:C:2008:746.

Judgment of 29 January 2009, case C-19/08, Migrationsverket v Petrosian, EU:C:2009:4.

Judgment of 17 February 2009, case C-465/07, Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie, EU:C:2009:94.

Judgment of 29 October 2009, case C-63/08, Virginie Pontin v T-Comalux SA, EU:C:2009:666.

Judgment of 2 March 2010, Grand Chamber, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland, EU:C:2010:105.

Judgment of 2 March 2010, Grand Chamber, case C-135/08, Janko Rottmann v Freistaat of Bayern, EU:C:2010:104.

Judgment of 9 November 2010, Grand Chamber, joined cases C-57/09 and C-101/09, Bundesrepublik Deutschland v B and D, EU:C:2010:661.

Judgment of 28 July 2011, case C-69/10, Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration, EU:C:2011:524.

Judgment of 21 December 2011, Grand Chamber, joined cases C-411/10 and C-493/10, NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, EU:C:2011:865.

Judgment of 5 September 2012, Grand Chamber, joined cases C-71/11 and C-99/11, Bundesrepublik Deutschland v Y and Z, EU:C:2012:518.

Judgment of 22 November 2012, case C-277/11, MM v Minister for Justice, Equality and Law Reform, Ireland*, Attorney General*, EU:C:2012:744.

Judgment of 4 June 2013, Grand Chamber, case C-300/11, ZZ v Secretary of State for the Home Department, EU:C:2013:363.

Judgment of 6 June 2013, case C-648/11, MA, BT and DA v Secretary of State for the Home Department, EU:C:2013:367.

Judgment of 10 December 2013, Grand Chamber, case C-394/12, Shamso Abdullahi v Bundesasylamt, EU:C:2013:813.

Judgment of 8 May 2014, case C-604/12, HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General, EU:C:2014:302.

Judgment of 13 May 2014, Grand Chamber, case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPS) and Mario Costeja González, EU:C:2014:317.

Judgment of 17 July 2014, joined cases C-141/12 and C-372/12, YS v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v M and S, EU:C:2014:2081.

Judgment of 2 December 2014, Grand Chamber, joined cases C-148/13, C-149/13 and 150/13, A, B and C v Staatssecretaris van Veiligheiden Justitie, EU:C:2014:2406.

Judgment of 26 February 2015, case C-472/13, Andre Lawrence Shepherd v Bundesrepublik Deutschland, EU:C:2015:117.

Judgment of 5 April 2016, Grand Chamber, joined cases C-404/15 and C-695/15 PPU, Pál Aranyosi and Robert Căldăraru, EU:C:2016:198.

Judgment of 7 June 2016, Grand Chamber, case C-63/15, Mehrdad Ghezelbash v Staatssecretaris van Veiligheiden Justitie, EU:C:2016:409.

Judgment of 7 June 2016, Grand Chamber, case C-155/15, George Karim v Migrationsverket, EU:C:2016:410.

CJEU, judgment of 31 January 2017, Grand Chamber, case C-573/14, Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani, ECLI:EU:C:2017:71, para. 79.

CJEU, judgment of 16 February 2017, case C-578/16 PPU, C.K. and Others v Republika Slovenija, EU:C:2017:127.

3.1.2 Opinions of advocates general

Opinion of Advocate General Maduro of 9 September 2008, case C-465/07, Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie, EU:C:2008:479.

Opinion of Advocate General Mazák of 15 September 2009, joined cases C-175/08-C-179/08, Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland, EU:C:2009:551.

Opinion of Advocate General Mengozzi of 1 June 2010, joined cases C-57/09 and C-101/09, Federal Republic of Germany v B and D, EU:C:2010:302.

Opinion of Advocate General Cruz Villalón of 1 March 2011, case C-69/10, Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration, EU:C:2011:102.

Opinion of Advocate General Trstjenjak of 22 September 2011, case C-411/10, NS v Secretary of State for the Home Department, EU:C:2011:611.

Opinion of Advocate General Bot of 19 April 2012, joined cases C-71/11 and C-99/11, Bundesrepublik Deutschland v Y and Z, EU:C:2012:224.

Opinion of Advocate General Bot of 26 April 2012, case C-277/11, MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General, EU:C:2012:253.

Opinion of Advocate General Sharpston of 11 July 2013, joined cases C-199/12 to C-201/12, Minister voorImmigratie en Asiel v X and Y, and Z v Minister voor Immigratie en Asiel, EU:C:2013:474.

Opinion of Advocate General Bot of 7 November 2013, case C-604/12, HN v Minister for Justice, Equality and Law Reform, EU:C:2013:714.

Opinion of Advocate General Sharpston of 12 December 2013, joined cases C-141/12 and C-372/12, YS v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v M and S, EU:C:2013:838.

Opinion of Advocate General Sharpston of 17 July 2014, joined cases C-148/13, C-149/13 and C-150/13, A, B and C v Staatssecretaris van Veiligheiden Justitie, EU:C:2014:2111.

Opinion of Advocate General Sharpston of 11 November 2014, case C-472/13, Andre Lawrence Shepherd v Bundesrepublik Deutschland, EU:C:2014:2360.

Opinion of Advocate General Mengozzi of 3 May 2016, case C-560/14, M v Minister of Justice and Equality Ireland, EU:C:2016:320.

Opinion of Advocate General Sharpston of 17 March 2016, case C-63/15, Mehrdad Ghezelbash v Staatssecretatis van Veiligheiden Justitie, EU:C:2016:186.

3.1.3 Pending references before the CJEU

Request for a preliminary ruling from the Administrativen sad Sofia-grad (Bulgaria) lodged on 18 November 2016 — Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite (Case C-585/16) (2017/C 046/17)

3.2 European Court of Human Rights

3.2.1 Admissibility decisions of the European Court of Human Rights

Admissibility decision of 1 October 2002, Tekdemir v the Netherlands, application nos 46860/99 and 49823/99.

Admissibility decision of 26 October 2004, B v Sweden, application no 16578/03.

Admissibility decision of 17 January 2006, Bello v Sweden, application no 32213/04.

Admissibility decision of 27 August 2013, VT c France, application no 3551/10.

Admissibility decision of 19 April 2016, DS v France, application no 18805/13.

Admissibility decision of 19 April 2016, AN c France, application no 12956/15.

Admissibility decision of 5 July 2016, JG v the Netherlands, application no 70602/14.

3.2.2 Judgments of the European Court of Human Rights

Judgment of 7 July 1989, Soering v United Kingdom, application no 14038/88.

Judgment of 20 March 1991, Cruz Varas v Sweden, application no 15576/89.

Judgment of 30 October 1991, Vilvarajah and Others v United Kingdom, application nos 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87.

Judgment of 15 November 1996, Grand Chamber, Chahal v United Kingdom, application no 22414/93.

Judgment of 5 October 2000, Grand Chamber, Maaouia v France, application no 39652/98.

Judgment of 11 July 2000, Jabari v Turkey, application no 40035/98.

Judgment of 6 March 2001, Hilal v United Kingdom, application no 45276/99.

Judgment of 3 June 2004, Bati and Others v Turkey, application nos 33097/96 and 57834/00.

Judgment of 4 February 2005, Grand Chamber, Mamatkulov and Askarov v Turkey, applications nos 46827/99 and 46951/99.

Judgment of 12 April 2005, Shamayev and Others v Georgia and Russia, application no 36378/02.

Judgment of 5 July 2005, Said v the Netherlands, application no 2345/02.

Judgment of 26 July 2005, N v Finland, application no 38885/02.

Judgment of 12 October 2006, Mubilanzila Mayeka and Kaniki Mitunga v Belgium, application no 13178/03.

Judgment of 11 January 2007, Salah Sheekh v the Netherlands, application no 1948/04.

Judgment of 28 February 2008, Grand Chamber, Saadi v Italy, application no 37201/06.

Judgment of 17 July 2008, NA v United Kingdom, application no 25904/07.

Judgment of 20 January 2009, FH v Sweden, application no 32621/06.

Judgment of 19 February 2009, Grand Chamber, A and Others v United Kingdom, application no 3455/05.

Judgment of 19 January 2010, Muskhadzhiyeva et autres c Belgique, application no 41442/07.

Judgment of 9 March 2010, RC v Sweden, application no 41827/07.

Judgment of 20 July 2010, N v Sweden, application no 23505/09.

Judgment of 21 January 2011, MSS v Belgium and Greece, application no 30696/09.

Judgment of 5 April 2011, Rahimi c Grèce, application no 8687/08.

Judgment of 28 June 2011, Sufi and Elmi v United Kingdom, applications nos 8319/07 and 11449/07.

Judgment of 23 February 2012, Hirsi Jamaa and Others v Italy, application no 27765/09.

Judgment of 15 May 2012, SF and Others v Sweden, application no 52077/10.

Judgment of 2 October 2012, Singh et autres c Belgique, application no 33210/11.

Judgment of 18 December 2012, FN and Others v Sweden, application no 28774/09.

Judgment of 6 June 2013, Mohammed v Austria, application no 2283/12.

Judgment of 5 September 2013, I v Sweden, application no 61204/09.

Judgment of 19 September 2013, RJ c France, application no 10466/11.

Judgment of 7 January 2014, AA v Switzerland, application no 58802/12.

Judgment of 26 June 2014, ME v Sweden, application no 71398/12.

Judgment of 18 November 2014, MA v Switzerland, application no 52589/13.

Judgment of 10 September 2015, RH v Sweden, application no 4601/14.

Judgment of 19 January 2016, MD and MA c Belgique, application no 58689/12.

Judgment of 23 March 2016, Grand Chamber, FG v Sweden, application no 43611/11.

Judgment of 16 June 2016, RD v France, application no 34648/14.

Judgment of 23 August 2016, Grand Chamber, JK and Others v Sweden, application no 59166/12.

3.3 International Criminal Tribunal for the former Yugoslavia

Judgment of 22 February 2001, Trial Chamber, Prosecutor v Dragoljub Kunarac, RadomirKovac and Zoran Vukovic, cases IT-96-23-T and IT-96-23/1-T.

3.4 Court or tribunals of EU Member States

3.4.1 Austria

Asylum Court (Asylgerichtshof), judgment of 10 March 2011, A5 417.766-1/2011 (see EDAL English summary).

Constitutional Court (Verfassungsgerichtshof), judgment of 27 June 2012, U98/12 (see EDAL English summary).

High Administrative Court (Verwaltungsgerichtshof), judgment of 15 May 2003, VWGH 2001/01/0499.

High Administrative Court, judgment of 9 September 2003, VwGH 2002/01/0497.

High Administrative Court, judgment of 17 April 2007, VwGH 2006/19/0675 (see EDAL English summary).

3.4.2 Belgium

Council for Aliens Law Litigation (Raad voor Vreemdelingenbetwistingen/Conseil du conentieux des étrangers), decision of 24 June 2010, no 45.396 (see EDAL English summary).

Council for Aliens Law Litigation, decision of 23 February 2011, no 56.584 (see EDAL English summary).

Council for Aliens Law Litigation, decision of 18 March 2011, no 58.073 (see EDAL English summary).

Council for Aliens Law Litigation, decision of 29 April 2011, no 60.622 (see EDAL English summary).

Council for Aliens Law Litigation, decision of 30 June 2011, no 64.233.

Council for Aliens Law Litigation, judgment of 19 June 2012, no 83281.

Council for Aliens Law Litigation, decision of 21 September 2012, no 87.989 (see EDAL English summary).

Council for Aliens Law Litigation, decision of 17 October 2012, no 89927 (see EDAL English summary).

Council for Aliens Law Litigation, decision of 26 February 2013, no 97865.

Council for Aliens Law Litigation, decision of 18 June 2013, no 105239.

Council for Aliens Law Litigation, decision of 2 July 2013, no 106216.

Council for Aliens Law Litigation, judgment of 5 January 2015, no 183047.

Council for Alien Law Litigation, decision of 6 February 2015, no 138035.

Council for Alien Law Litigation, decision of 13 July 2015, no 149555.

Council for Alien Law Litigation, judgment of 23 January 2017, no 181122.

Council for Alien Law Litigation, decision of 14 February 2017, no 182265.

Council of State (Raad van State/Conseil d'État), decision of 21 March 2013, no 99380 (see EDAL English summary).

Council of State, decision of 5 July 2013, no 224276 (see EDAL English summary).

3.4.3 Bulgaria

High Administrative Court, *Jasvineta* v *State Agency for Refugees,* case *no 5226/15*.

3.4.4 Czech Republic

Supreme Administrative Court, judgment of 24 February 2004, *YA* v *Ministry of Interior*, 6 Azs 50/2003-89 (see EDAL English summary).

Supreme Administrative Court, judgment of 20 June 2007, RK v Ministry of Interior, 6 Azs 142/2006-58.

Supreme Administrative Court, judgment of 6 February 2008, *ES* v *Ministry of Interior*, 1 Azs 18/2007-55.

Supreme Administrative Court, judgment of 30 September 2008, *SN* v *Ministry of Interior*, 5 Azs 66/2008-70 (see EDAL English summary).

Supreme Administrative Court, judgment of 4 February 2009, ÖS v Ministry of Interior, 1 Azs 105/2008-81 (EDAL English summary).

Supreme Administrative Court, judgment of 28 July 2009, LO v Ministry of Interior, 5 Azs 40/2009 (see EDAL Czech summary and EDAL English summary).

Supreme Administrative Court, judgment of 30 June 2010, AN v Ministry of Interior, 9 Azs 17/2010-182.

Supreme Administrative Court, judgment of 6 March 2012, JJ v Ministry of Interior, 3 Azs 6/2011-96 (see EDAL English summary).

Supreme Administrative Court, judgment of 30 September 2013, *IJ* v *Minister of Interior*, 4 Azs 24/2013-34 (see EDAL English summary).

Supreme Administrative Court, judgment of 25 June 2015, *AR* v *Ministry of Interior*, 4 Azs 71/2015-54.

Supreme Administrative Court, judgment of 29 July 2015, *KB* v *Ministry of Interior*, 4 Azs 114/2015-27

3.4.5 Finland

Supreme Administrative Court, judgment of 18 March 2011, KHO:2011:25 (see EDAL English summary).

Supreme Administrative Court, judgment of 4 February 2013, KHO:2013:23 (see EDAL English summary).

Supreme Administrative Court, judgment of 18 February 2014, KHO:2014:35 (see EDAL English summary).

3.4.6 France

Council of State (Conseil d'État), decision of 2 March 1984, *M MG*, application no 42961 C.

Council of State, decision of 13 January 1989, application no 78055.

Council of State, decision of 11 October 1991, *M X*, application no 96492 C.

Council of State, decision of 31 July 1992, *M. Duvalier*, application no 81963 B.

Council of State, decision of 2 December 1994, *Mrs X*, application no 112842 A.

Council of State, decision of 31 March 1999, *M. X*, application no 177013 B.

Council of State, decision of 20 October 1999, *MA*, application no 187530.

Council of State, decision of 28 April 2000, *M T*, application no 192701.

Council of State, decision of 18 January 2006, *OFPRA* v *Mr T*, application no 255091 B.

Council of State, decision of 8 February 2006, A, application no 277258 A in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Commission des recours des réfugiés, Année 2006, 2007, pp. 132-134.

Council of State, decision of 18 December 2008, *OFPRA* c *Mme A*, application no 283245 B, in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2008, 2009, pp. 73 and 74.

Council of State, decision of 24 November 2010, *Mme M*, application no 333913, ECLI:FR:CESJS:2010:333913.20101124.

Council of State, decision of 17 January 2011, *M. A*, application no 316678 C, in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2011, 2012, p. 141.

Council of State, decision of 4 May 2011, *OFPRA* c *M H*, application no 320910 B, in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2011, 2012, p. 137.

Council of State, decision of 14 June 2010, *Mr K*, application no 320630 A, in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2010, 2011, pp. 134 and 135.

Council of State, decision of 24 March 2011, *M A*, application no 329909 A, in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2011, 2012, pp. 160 and 161.

Council of State, decision of 7 May 2012, *OFPRA* c *MM*, application no 336378 C, in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2012, 2013, p. 108.

Council of State, decision of 22 October 2012, *M. C*, application no 328265, ECLI:FR:CESSR:2012:328265.20121022.

Council of State, decision of 6 November 2012, *Minister of Interior* c *Mme A*, application no 363511, ECLI:FR:CEORD:2012:363511.20121106.

Council of State, decision of 10 October 2014, application nos 375474 and 375920 (see EDAL English summary).

Council of State, decision of 11 February 2015, application no 374167 (see EDAL English summary).

Council of State, decision of 4 March 2015, *M D*, application *no 388180* A.

Council of State, decision of 10 April 2015, *M B*, application *no 372864* B.

Council of State, decision of 24 June 2015, *OFPRA* v *M CK*, application *no 370417* C.

Council of State, decision of 2 December 2015, OFPRA c M O, application no 387162 C.

Council of State, decision of 10 February 2016, M A, application no 373529 (see EDAL English summary).

Council of State, decision of 11 May 2016, *M. FE, Mme BC & Mme AD*, no 390351, ECLI:FR:CECHR:2016:390351.20160511

Council of State, decision of 28 November 2016, *OFPRA* c *M B*, application no 389733 B.

National Asylum Court (Cour nationale du droit d'asile), judgment of 27 June 2008, *M M*, application no 611731 R, in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2008, 2009, pp. 87-89.

National Asylum Court, judgment of 8 October 2009, T, application no 701681/09007100.

National Asylum Court, judgment of 7 May 2013, OFPRA v A A, application no 12021083.

National Asylum Court, judgment of 24 July 2013, *Miss L M*, application no 12002308 C+ in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2013, 2014, pp. 121 and 122.

National Asylum Court, judgment of 15 July 2014, *M S*, application no 11016153 C+, in Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile, Année 2014, 2015, pp. 91-94 and 140-143.

National Asylum Court, judgment of 27 February 2015, M. B, application no 14017954 C+.

National Asylum Court, judgment of 27 February 2015, *M. BA*, no 11015942.

National Asylum Court, judgment of 5 October 2015, M. Z, application no 14033523 C+.

National Asylum Court, judgment of 7 January 2016, M & Ms M, applications nos 15025487 and 15025488 R.

National Asylum Court, judgment of 6 May 2016, *M. P alias T*, no 09014084 C.

National Asylum Court, judgment of 27 July 2016, M. D, no 16011925 C.

National Asylum Court, judgment of 27 September 2016, *M. AB*, no 11022527.

National Asylum Court, judgment of 25 January 2017, *M. T*, no 15037987.

Refugee Appeals Board (Commission des recours des réfugiés), decision of 18 October 1999, *M. MC*, application no 336763.

3.4.7 Germany

Administrative Court of Giessen (Verwaltungsgericht Gießen), judgment of 25 Feb 2014, no 1 K 2449/11.GI.A.

Federal Administrative Court (Bundesverwaltungsgericht), judgment of 16 April 1985, BVerwG 9 C 109.84, BVerwGE 71, 180.

Federal Administrative Court, judgment of 2 December 1991, BVerwG 9 C 126.90.

Federal Administrative Court, judgment of 10 May 1994, BverwG 9 C 434.93, in *Neue Zeitschrift für Verwaltungsrecht*, 1994, 1123.

Federal Administrative Court, judgment of 30 March 1999, BVerwG 9 C 31.98.

Federal Administrative Court, judgment of 26 June 1999, BVerwG 9 C 36.98.

Federal Administrative Court, judgment of 16 November 2000, BVerwG *9 C 6/00*.

Federal Administrative Court, judgment of 11 September 2007, BverwG 10 C 8.07, in *Neue Zeitschrift für Verwaltungsrecht*, 2008, 142.

Federal Administrative Court, judgment of 7 February 2008, *BVerwG 10 C 33.07*, BVerwG:2008:070208B10C33.07.0, available in English at www.bverwg.de.

Federal Administrative Court, judgment of 29 May 2008, BVerwG 10 C 11.07, BVerwG:2008:290508U10C11.07.0.

Federal Administrative Court, judgment of 19 January 2009, BVerwG 10 C 52.07, BVerwG: 2009:190109U10C52.07.0, available in English at: www.bverwg.de.

Federal Administrative Court, judgment of 26 February 2009, BVerwG 10 C 50.07, BVerwG:2009:260209U10C50.07.0, available in English at: www.bverwg.de.

Federal Administrative Court, judgment of 1 June 2011, BVerwG 10 C 25.10, BVerwG:2011:010611U10C25.10.0, available in English at www.bverwg.de.

Federal Administrative Court, judgment of 7 July 2011, BVerwG 10 C 26.10, BVerwG:2011:070711U10C26.10.0.

Federal Administrative Court, judgment of 14 July 2011, BVerwG 10 B 7.10, BVerwG:2010:140710B10B7.10.0.

Federal Administrative Court, judgment of 22 May 2012, BVerwG 1 C 8.11, BVerwG:2012:220512U1C8.11.0.

Federal Administrative Court, judgment of 19 July 2012, BVerwG 10 C 2.12, *Neue Juristische Wochenschrift* 2012, 3461.

Federal Administrative Court, judgment of 13 February 2013, BVerwG 10 C 6.13, BVerwG:2014:130214U10C6.13.0.

Federal Administrative Court, judgment of 5 September 2013, BVerwG 10 C 1.13, BverwG:2013:050913U10C1.13.0, available in English at www.bverwg.de.

Federal Administrative Court, judgment of 17 June 2014, BVerwG 10 C 7.13, BVerwG:2014:170614U10C7.13.0, available in English at www.bverwg.de.

Federal Constitutional Court (Bundesverfassungsgericht), judgment of 14 May 1996, 2 BvR 1516/93, BVerfGE 94, 166 (no 138).

Higher Administrative Court Baden-Württemberg (Verwaltungsgerichtshof Baden-Württemberg), decision of 24 February 2017, A 11 S 368/17.

3.4.8 Greece

Council of State (Συμβούλιο της Επικρατείας), decision of 29 August 2011, application no 2512/2011 (see EDAL English summary).

Council of State, decision of 25 October 2011, application no 3328/2011 (see EDAL English summary).

Council of State, judgments of 15 February 2017, nos 445/15.2.2017 and 446/15.2.2017 (Turkey-Safe Third Country Concept).

3.4.9 Hungary

Administrative and Labour Court of Budapest, judgment of 4 July 2012, SN v Office of Immigration and Nationality, 3.K.31192/2012/6 (see EDAL English summary).

Győr Administrative and Labour Court, judgment of 1 June 2016, 13.K.27.101/2016/7 (see EDAL English summary).

Győr Administrative and Labour Court, judgment of 24 June 2016, 17.K.27.132/2016/6 (see EDAL English summary).

Metropolitan Court, judgment of 4 February 2011, SMR v Office of Immigration and Nationality, 17.K.30.302/2010/18-II (see EDAL English summary).

Szeged Administrative and Labour Court (Hungary), judgment of 27 May 2014, 7.K.27.145/2014/9 (see EDAL English summary).

3.4.10 Ireland

Court of Appeal, judgment of 14 July 2016, NM (DRC) v The Minister for Justice, Equality and Law Reform [2016] IECA 217.

Court of Appeal, judgment of 27 February 2017, AO v Refugee Appeals Tribunal & ors, [2017] IECA 51.

High Court, judgment of 17 June 2009, OA v The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform [2009] IEHC 269.

High Court, judgment of 24 July 2009, IR v Minister for Justice, Equality and Law Reform [2009] IEHC 353.

High Court, judgment of 4 December 2009, MST and JT v Minister for Justice, Equality and Law Reform, [2009] IEHC 529.

High Court, judgment of 28 September 2010, RMK v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform [2010] IEHC 367.

High Court, judgment of 1 December 2010, Gashi v Minister for Justice, Equality and Law Reform [2010] IEHC 436.

High Court, judgment of 8 April 2011, MAMA v Refugee Appeals Tribunal & Ors [2011] IEHC 147.

High Court, judgment of 15 April 2011, HR v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform [2011] IEHC 151.

High Court, judgment of 10 November 2011, AB (Afghanistan) v Refugee Appeals Tribunal & Ors [2011] IEHC 412.

High Court, judgment of 11 September 2012, Barua v Minister for Justice and Equality [2012] IEHC 456.

High Court, judgment of 20 November 2012, JNA v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform [2012] IEHC 480.

High Court, judgment of 16 September 2013, NM (Togo) v Refugee Appeals Tribunal & anor [2013] IEHC 436.

High Court, judgment of 1 November 2013, KD (Nigeria) v Refugee Appeals Tribunal & ors, [2013] IEHC 481.

High Court, judgment of 2 April 2015, JG (Ethiopia) v Refugee Appeals Tribunal & Ors [2015] IEHC 49.

High Court, judgment of 21 March 2014, ME v Refugee Appeals Tribunal & ors

High Court, judgment of 17 April 2015, AO v Refugee Applications Commissioner and Others [2015] IEHC 253.

High Court, judgment of 17 September 2015, GH (a minor) v Refugee Appeals Tribunal [2015] IEHC 583.

High Court, judgment of 16 June 2015, AO v Refugee Appeals Tribunal [2015] IEHC 382.

High Court, judgment of 22 September 2015, IFO v Refugee Appeals Tribunal & ors [2015] IEHC 586.

High Court, judgment of 3 October 2015, MM v Refugee Appeals Tribunal & Anor [2015] IEHC 158.

High Court, judgment of 12 January 2016, IH (Afghanistan) v Refugee Appeals Tribunal & Anor [2016] IEHC 14.

High Court (Ireland), judgment of 15 August 2016, HRA v Minister for Justice Equality & Law Reform & anor [2016] IEHC 528.

High Court, judgment of 24 November 2016, OO v Refugee Appeals Tribunal & ors, [2016] IEHC 734.

High Court, judgment of 1 December 2016, MA (Nigeria) v Refugee Appeals Tribunal & Ors [2016] IEHC 16.

High Court, judgment of 17 January 2017, ON v Refugee Appeals Tribunal & ors [2017] IEHC 13.

High Court, judgment of 27 January 2017, BA & ors v International Protection Appeals Tribunal, [2017] IEHC 36.

Supreme Court, judgment of 1 March 2002, Z v Minister for Justice Equality and Law Reform & ors [2002] IESC 14, 2002, 1 March 2002.

3.4.11 Italy

Court of Cassation, judgment of 2 December 2014, No 7333 (see EDAL English summary).

Court of Cassation, Civil Division VI, judgment of 5 March 2015, No 4522 (see EDAL English summary).

Turin Appeals Court, judgment of 30 May 2011, RG 717/2011 (see EDAL English summary).

3.4.12 Netherlands

Council of State (Raad van State), decision of 29 May 2012, ABR v S, 201108872/1/V1 (see EDAL English summary).

Council of State (Netherlands), decision of 13 April 2016, 201506502/1/V2 (see unofficial English summary).

Court of The Hague, judgment of 7 April 2016, NL16.6, ECLI:NL:RBDHA:2016:3710 (see EDAL English summary).

Court of The Hague, judgment of 13 June 2016, AWB 16/10406 (see EDAL English summary).

Council of State, judgment of 21 September 2016, ECLI:NL:RVS:2016:2589.

3.4.13 Norway

Borgarting Court of Appeal, judgment of 23 September 2011, *Abid Hassan Jama* v *Utlendingsnemnda*, 10-142363ASD-BORG/01 (see UNHCR case translation).

Supreme Court, judgment of 21 December 2012, A, B, C, D and Norwegian Organisation for Asylum Seekers v The Immigration Appeals Board, HR-2012-02399-P, case no 2012/1042 (unofficial English summary).

3.4.14 Poland

Regional Administrative Court, judgment of 13 June 2012, *S B* v *Rady do Spraw Uchodźców*, V SA/Wa 2332/11 (see EDAL English summary).

Regional Administrative Court in Warsaw, judgment of 28 June 2012, V SA/Wa 2460/11 (see EDAL English summary).

Refugee Board, decision of 29 August 2013, RdU-246-1/S/13 (see EDAL English summary).

Refugee Board, decision of 14 August 2015, RdU-326-1/S/2015 (EDAL English summary).

Supreme Administrative Court, judgment of 20 April 2011, II OSK 903/10.

Supreme Administrative Court, judgment of 20 April 2014, II OSK 1067/13.

Supreme Administrative Court, judgment of 25 November 2015, II OSK 769/14

3.4.15 Slovakia

Supreme Court, judgment of 13 September 2011, SH v Ministry of Interior of the Slovak Republic, 1Sža/38/2011 (see EDAL English summary).

3.4.16 Slovenia

Administrative Court, judgment of 19 August 2009, *I U 979/2009-9*.

Administrative Court, judgment of 29 August 2012, *I U 787/2012-4*.

Administrative Court, judgment of 24 April 2015, I U 411/2015.

Constitutional Court, judgment of 18 December 2013, U-I-155/11 (see EDAL English summary).

Supreme Court, judgment of 16 December 2009, I Up 63/2011, per EDAL English summary.

Supreme Court, judgment of 3 April 2012, I Up 163/2012 (see EDAL English summary).

Supreme Court, judgment of 18 October 2012, I UP 471/2012 (see EDAL English summary).

3.4.17 Spain

Supreme Court, judgment of 24 February 2012, appeal no 2476/2011, STS 1197/2012, p. 8 (see EDAL English summary).

Supreme Court, judgment of 23 February 2015, appeal no 2944/2014 (see EDAL English summary).

Supreme Court, judgment of 9 December 2015, appeal no 1699/2015, ECLI:ES:TS:2015:5211, p. 9 (see EDAL English summary).

Supreme Court (Tribunal Supremo), Cassation Appeal of 23 February 2015, appeal no 2944/2014.

3.4.18 Sweden

Migration Court of Appeal, judgment of 14 January 2009, MIG 2009:4, UM 4118-07 (see EDAL English summary).

Migration Court of Appeal, judgment of 2 December 2010, UM 10296-10 (see EDAL English summary).

Migration Court of Appeal, judgment of 13 June 2011, UM 5495-10 (see EDAL English summary).

Migration Court of Appeal, judgment of 10 November 2011, UM 1796 (see EDAL English summary).

3.4.19 United Kingdom

Court of Appeal of England and Wales, judgment of 16 December 2004, Gheisari v Secretary of State for the Home Department [2004] EWCA Civ 1854.

Court of Appeal of England and Wales, judgment of 17 March 2005, François Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367.

Court of Appeal of England and Wales, judgment of 20 July 2006, HK v Secretary of State for the Home Department [2006] EWCA Civ 1037.

Court of Appeal of England and Wales, judgment of 26 July 2006, Y v Secretary of State for the Home Department [2006] EWCA Civ 1223.

Court of Appeal of England and Wales, judgment of 10 October 2006, SA (Somalia) v Secretary of State for the Home Department [2006] EWCA Civ 1032.

Court of Appeal of England and Wales, judgment of 17 July 2007, GM (Eritrea), YT (Eritrea) and MY (Eritrea) v Secretary of State for the Home Department [2008] EWCA Civ 833.

Court of Appeal of England and Wales, judgment of 31 July 2007, EB (Ethiopia) v Secretary of State for the Home Department [2007] EWCA Civ 809.

Court of Appeal of England and Wales, judgment 22 May 2008, AA (Uganda) v Secretary of State for the Home Department [2008] EWCA Civ 579.

Court of Appeal of England and Wales, judgment of 2 April 2009, MA (Ethiopia) v Secretary of State for the Home Department [2009] EWCA Civ 289.

Court of Appeal of England and Wales, judgment of 17 February 2011, R on the application of MD (Gambia) v Secretary of State for the Home Department [2011] EWCA Civ 121.

Court of Appeal of England and Wales, judgment of 26 April 2012, AM v Secretary of State for the Home Department [2013] EWCA Civ 521.

Court of Appeal of England and Wales, judgment of 25 July 2012, KA (Afghanistan) & Ors v Secretary of State for the Home Department [2012] EWCA Civ 1014.

Court of Appeal of England and Wales, judgment of 30 July 2013, CM (Zimbabwe) v Secretary of State for the Home Department [2013] EWCA Civ 1303.

Court of Appeal of England and Wales, judgment of 9 April 2014, JA (Afghanistan) v Secretary of State for the Home Department [2014] EWCA Civ 450.

Court of Appeal of England and Wales, judgment of 2 July 2014, MF (Albania) v Secretary of State for the Home Department, [2014] EWCA Civ 902.

Court of Appeal of England and Wales, judgment of 18 July 2014, PJ (Sri Lanka) v Secretary of State for the Home Department [2014] EWCA Civ 1011.

Court of Appeal of England and Wales, judgment of 16 December 2014, MA (Eritrea) [2014] EWCA Civ 1608.

Court of Appeal of England and Wales, judgment of 22 March 2016, MA (Bangladesh) v Secretary of State for the Home Department [2016] EWCA Civ 173.

Court of Appeal of England and Wales, judgment of 16 June 2016, S1, T1, U1 & V1 v Secretary of State for the Home Department [2016] EWCA 560.

Court of Appeal of England and Wales, judgment of 12 July 2016, Secretary of State for the Home Department v MSM (Somalia) & Anor [2016] EWCA Civ 715.

Court of Appeal of England and Wales, judgment of 7 March 2017, KV (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 119.

House of Lords, judgment of 16 December 1987, R v Secretary of State for the Home Department, Ex parte Sivakumaran [1988] AC 958.

House of Lords, judgment of 10 March 2005, In re B, Regina v Special Adjudicator, ex parte Hoxha [2005] UKHL 19.

House of Lords, judgment of 26 May 2005, R v Secretary of State ex parte Bagdanavicius [2005] UKHL 38.

House of Lords, judgment of 11 June 2008, In Re B (Children) (FC) [2008] UKHL 35.

House of Lords, judgment of 18 February 2009, RB (Algeria) and Another v Secretary of State for the Home Department and OO (Jordan) v Secretary of State for the Home Department [2009] UKHL 10.

Immigration Appeal Tribunal, judgment of 9 June 2000, Smith v Secretary of State for the Home Department *(Liberia)* [2000] 00TH02130.

Immigration Appeal Tribunal, judgment of 17 January 2001, Kacaj (Article 3 — Standard of Proof — Non-State Actors) Albania [2001] UKIAT 00018.

Immigration Appeal Tribunal, judgment of 19 February 2002, Tanveer Ahmed v Secretary of State for the Home Department [2002] UKIAT 00439.

Immigration Appeal Tribunal, judgment of 12 June 2003, JB (Democratic Republic of the Congo) [2003] UKIAT 00012.

Immigration Appeal Tribunal, judgment of 27 January 2005, MM (DRC — plausibility) Democratic Republic of the Congo [2005] UKIAT 00019.

Immigration Appeal Tribunal, judgment of 5 July 2005, SM (Section 8: Judge's process) Iran [2005] UKAIT 00116.

Immigration Appeal Tribunal, judgment of 28 June 2007, RD (Cessation — burden of proof — procedure) Algeria, [2007] UKAIT 66.

Immigration Appeal Tribunal, judgment of 17 April 2008, MA (Disputed Nationality) Ethiopia [2008] UKIAT 32.

Scottish Court of Session, Inner House, judgment of 11 December 2001, Asif v Secretary of State for the Home Department [2001] Scot CS 283.

Scottish Court of Session, Inner House, judgment of 12 July 2013, MABN and KASY v Advocate General for Scotland [2013] CSIH 68.

Scottish Court of Session, Outer House, judgment of 8 June 2005, *Joyce Wani, Anna Awala en Kefa Awala v Secretary of State for the Home Department* [2005] CSOH 73.

Scottish Court of Session, Outer House, judgment of 12 June 2007, SD v Secretary of State for the Home Department, [2007] CSOH 97.

Scottish Court of Session, Outer House, judgment of 13 May 2010, RY v Secretary of State for the Home Department, [2010] CSOH 65.

Supreme Court, judgment of 17 March 2010, JS (Sri Lanka) v Secretary of State for the Home Department [2010] UKSC 15.

Supreme Court, judgment of 7 July 2010, HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31.

Supreme Court, judgment of 24 November 2010, MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49.

Supreme Court, judgment of 21 November 2012, Al-Sirri v Secretary of State for the Home Department [2012] UKSC 54.

Supreme Court, judgment of 21 May 2014, Secretary of State for the Home Department v MN and KY [2014] UKSC 30.

Supreme Court, judgment of 4 March 2015, R (on the application of Jamar Brown (Jamaica) v Secretary of State for the Home Department [2015] UKSC 8.

Supreme Court, judgment of 25 March 2015, Pham v Secretary of State for the Home Department [2015] UKSC 19.

Supreme Court, judgment of 24 June 2015, TA and MA (Afghanistan) v Secretary of State for the Home Department and AA (Afghanistan) v Secretary of State for the Home Department [2015] UKSC 40.

Supreme Court, judgment of 16 November 2016, Makhlouf v Secretary of State for the Home Department (Northern Ireland) [2016] UKSC 59.

Upper Tribunal, Immigration and Asylum Chamber, judgment of 5 January 2010, RR (Refugee — Safe Third Country) Syria [2010] UKUT 442 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 18 March 2010, AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 24 January 2011, AW (sufficiency of protection) Pakistan [2011] UKUT 31 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 21 February 2011, KK and Others (Nationality: North Korea) Korea CG [2011] UKUT 92 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 25 November 2011, AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 6 January 2012, AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 18 May 2012, AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 28 January 2013, JL (medical reports-credibility) [2013] UKUT 145 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 31 January 2013, CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 26 April 2013, MJ (Singh v Belgium: Tanveer Ahmed Unaffected) Afghanistan [2013] UKUT 00253 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 31 May 2013, ST (Child asylum seekers) Sri Lanka [2013] UKUT 00292 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 29 August 2013, JS (Former Unaccompanied Child — Durable Solution) Afghanistan [2013] UKUT 00568 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 31 October 2013, NA (UT Rule 45: Singh v Belgium) Iran [2014] UKUT 00205 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 23 April 2014, KV (Scarring — medical evidence) Sri Lanka [2014] UKUT 230 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 3 October 2014, MOJ and others (return to Mogadishu) Somalia CG [2014] UKUT 442 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 10 December 2014, KS (benefit of the doubt) [2014] UKUT 552 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 2 June 2015, BM and Others (returnees — criminal and non-criminal) DRC CG [2015] UKUT 293 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, MSM (journalists; political opinion; risk) [2015] UKUT 413 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 1 October 2015, AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 5 November 2015, AAW (expert evidence — weight) Somalia [2015] UKUT 00673 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 4 February 2016, OO (Gay Men) Algeria CG [2016] UKUT 00065 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 3 October 2016, MW (Nationality; Art 4 QD; duty to substantiate) [2016] UKUT 453 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 11 October 2016, MST and Others (national service-risk categories) Eritrea CG [2016] UKUT 443 (IAC).

Upper Tribunal, Immigration and Asylum Chamber, judgment of 24 November 2016, JA (child and risk of persecution) Nigeria [2016] UKUT 560 (IAC).

3.5 Court or tribunals of non-EU member states

Federal Court (Canada), judgment of 22 February 2007, Lozano Pulido v Canada [2007] FC 209.

Inter-American Commission on Human Rights, judgment of 5 March 2001, case 11.015, Hugo Juárez Cruzat et al. v Peru, report no 43/01.

African Commission on Human and Peoples' Rights, judgment of 2 May 2012, Gabriel Shumba v Republic of Zimbabwe, communication no 288/2004.

Appendix C: Methodology

Although seeking to work as far as possible within the framework of the EASO methodology for the professional development series as a whole, the development of this analysis as one of the four subjects being dealt with under the contract between IARLJ-Europe and EASO to produce core judicial training materials, required a modified approach. It has already been observed in the section on contributors that the drafting process had two main components: drafting undertaken by a team of experts; review and overall supervision of that team's drafting work by an editorial team composed exclusively of judges.

Preparatory phase

During the preparatory phase, the drafting team considered the scope, structure and content of analysis, in conjunction with the editorial team (ET), and prepared:

1. A provisional bibliography of relevant resources and materials available on the subject;
2. An interim compilation of relevant jurisprudence on the subject;
3. A sample of work in progress;
4. A preparatory background report which included a provisional structure for the analysis and a report on progress.

These materials were shared with the ET which provided both general guidance and more specific feedback in the form of instructions to the drafting team regarding the further development of the analysis and compilation of jurisprudence.

Drafting phase

The drafting team developed a draft of the analysis and compilation of jurisprudence, in accordance with the EASO style guide, using desk-based documentary research and analysis of legislation, case-law, training materials and any other relevant literature, such as books, reports, commentaries, guidelines, and articles from reliable sources. Sections of the analysis and the compilation of jurisprudence were allocated to team members for drafting. These initial drafts were then considered by other members of the team with a full exchange of views followed by redrafting in the light of those discussions.

The first draft, completed by the drafting team, was shared with the ET which was charged with reviewing the draft with a view to assisting the drafting team to enhance quality. Accordingly, the ET provided further instructions to the drafting team concerning the structure, format and content. Pursuant to these instructions, the drafting team made further amendments and submitted a second draft to the ET. The process above was repeated until a text ready for external consultation was prepared. At each stage, drafts were shared with EASO.

External consultation

The draft judicial analysis and compilation of jurisprudence was shared by EASO with the EASO network of members of courts and tribunals, UNHCR and members of EASO's Consultative Forum who were invited to review the material and provide feedback with a view to assisting the ET in further enhancing quality.

Feedback received was taken into consideration by the ET which reached conclusions on the resultant changes that needed to be made. Final revisions were made by the ET.

Appendix D: Select bibliography

1 Official documents

1.1 European Union

Common EU guidelines for processing country of origin information (COI), April 2008.

EU *Common EU guidelines on (joint) fact finding missions*, November 2010.

EASO, *Age assessment practice in Europe,* December 2013.

EASO, Article 15(c) Qualification Directive (2011/95/EU): A judicial analysis, December 2014.

EASO, *Practical guide: evidence assessment*, March 2015, EASO practical guide series.

EASO, *The implementation of Article 15(c) QD in EU Member States,* (July 2015).

EASO*, Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) — A judicial analysis*, January 2016.

EASO, *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, August 2016.

EASO, Ending of International Protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) — A judicial analysis, December 2016.

EASO, *Qualification for International Protection (Directive 2011/95/EU) — A judicial analysis*, December 2016.

EASO, *Asylum procedures and the principle of* non-refoulement *— Judicial analysis*, 2018.

European Commission, Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, 10 February 2016, COM(2016) 85 final.

European Commission, Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, 13 July 2016, COM(2016) 466 final.

European Commission, Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection, 13 July 2016, COM(2016) 465.

European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, 13 July 2016, COM(2016) 467.

European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 4 May 2016, COM(2016) 270.

European Council, *The Stockholm Programme: An open and secure Europe serving and protecting the citizens*, 2 December 2009, in: [2010] OJ C 115/1.

1.2 United Nations

Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons ,25 July 1951, A/CONF.2/108/Rev.1.

Committee on the Rights of the Child, *General Comment No 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, para. 1), UN Doc CRC/C/GC/14,* 29 May 2013.

General Assembly, Universal Declaration of Human Rights, 10 December 1948, General Assembly Resolution 217 A.

General Assembly, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 22 February 2001, UN Doc A/RES/55/89.

Office of the UN High Commissioner for Human Rights*, Istanbul Protocol, Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment*, 2004, Professional Training Series No 8/Rev. 1.

1.3 Council of Europe

Consultative Council of European Judges*,* Opinion No 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, 2001.

Consultative Council of European Judges, Opinion No 3 on the Principles and Rules Governing Judges' Professional Conduct, in Particular Ethics, Incompatible Behaviour and Impartiality, 2002.

Consultative Council of European Judges, Opinion No 6 on Fair Trial within a Reasonable Time and Judges' Role in Trials Taking into Account Alternative Means of Dispute Settlement, 2004.

Consultative Council of European Judges, Opinion No 11 on the Quality of Judicial Decisions, 2008.

Consultative Council of European Judges, Opinion No 15 on the Specialisation of Judges, 2012.

2 Publications

2.1 Reference materials

Goodwin-Gill, G. S. and McAdam, J. *The Refugee in International Law,* 2007, 3rd edn, OUP.

Hailbronner, K. and Thym, D. (eds.) , *EU Immigration and Asylum Law, A Commentary*, 2016, 2nd edn, Beck, C. H.

Hathaway, J. C., *The rights of refugees under international law*, ,2005, CUP.

Hathaway, J. C. and Foster, M., *The law of refugee status,* 2014, 2nd edn, CUP.

Zimmermann, A. *The 1951 Convention relating to the Status of Refugees — A commentary*, 2011, OUP.

2.2 UNHCR publications

UNHCR, *Guidelines on policies and procedures in dealing with unaccompanied children seeking asylum*, February 1997.

UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 1 December 1998.

UNHCR, *Guidelines on international protection no 1: Gender-related persecution within the context of Article 1(A) 2 of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees*, 7 May 2002, UN Doc HCR/GIP/02/01.

UNHCR, *Guidelines on international protection no 3: cessation of refugee status under Article 1C(5) and (6) of the 1951 Convention relating to the status of refugees (the 'ceased circumstances' clauses*), 10 February 2003, UN Doc HCR/GIP/03/03.

UNHCR, *Guidelines on international protection: 'Internal flight or relocation alternative' within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees*, 23 July 2003, UN Doc HCR/GIP/03/04.

UNHCR, *Guidelines on international protection 5: Application of the exclusion clauses: Article 1F of the 1951 Convention relating to the status of refugees*, 4 September 2003, UN Doc HCR/GIP/03/05.

UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003.

UNHCR, Provisional comments on the proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005.

UNHCR, Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information, 31 March 2005.

UNHCR, *Guidelines on international protection no 8: Child asylum claims under Articles 1A(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees*, 22 December 2009, UN Doc HCR/GIP/09/08.

UNHCR, *Improving asylum procedures: comparative analysis and recommendations for law and practice — Key findings and recommendations*, March 2010.

UNHCR, *Guidelines on the sharing of information on individual cases*, August 2011.

UNHCR, *Handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees*, 1979, reissued December 2011.

UNHCR, *Guidelines on international protection no 9: Claims to refugee status based on sexual orientation and/or gender identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees*, 23 October 2012, UN Doc HCR/GIP/12/09.

UNHCR, *Beyond proof, Credibility assessment in EU asylum systems*, May 2013.

UNHCR, The Heart of the Matter: Assessing Credibility when Children Apply for Asylum in the European Union, December 2014, CREDO report.

UNHCR, *Guidelines on International protection no 12: claims for refugee status related to situations of armed conflict and violence under article 1a(2) of the 1951 convention and/or 1967 protocol relating to the status of refugees and the regional refugee definitions,* 2 December 2016, HCR/GIP/16/12.

2.3 IARLJ publications

Baragwanath, D., 'Can the Judiciary Maintain its Independence? A Comment on the Address of Sir Stephen Sedley', 2002, in IARLJ, Stemming the Tide or Keeping the Balance — The Role of the Judiciary (5th Conference, IARLJ) 341-345.

IARLJ, Judicial criteria for assessing country of origin information (COI): A Checklist, 2006, (7th Biennial IARLJ World Conference).

IARLJ, *A manual for refugee law judges relating to the European Council Qualification Directive 2004/84/EC and European Council Procedures Directive 2005/85/EC,* 2007.

IARLJ, *Guidelines on the judicial approach to expert medical evidence*, June 2010.

IARLJ, Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity, 10 September 2011, held in Bled, Slovenia.

IARLJ, Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards, 2013, CREDO project.

IARLJ, *Due process standards for the use of country of origin information (COI) in administrative and judicial procedures*, 2014, 10th World Conference.

IARLJ, *A structured approach to the decision making process in refugee and other international protection claims including: a flowchart using established judicial criteria and guidance,* June 2016, *The IARLJ international judicial guidance for the assessment of credibility*, The IARLJ, Judicial Checklist for COI.

Macklin, A., 'Truth and Consequences: Credibility Determination in the Refugee Context', in IARLJ, The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary, ,1998, 3rd Conference, IARLJ, 134-140.

Reinhardt, S. , 'Judicial Independence and Asylum Law', in IARLJ, Stemming the Tide or Keeping the Balance — The Role of the Judiciary, 2002, 5th Conference, IARLJ, 327-340.

Schmidt, P. W. and Clark, M. K., 'Credibility of Asylum Applicants — The Approach of the Board of Immigration Appeals', in IARLJ, The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary, 1998, 3rd Conference, IARLJ, 126-133.

Sedley, S., 'Asylum: Can the Judiciary Maintain its Independence?', in IARLJ, Stemming the Tide or Keeping the Balance — The Role of the Judiciary, 2002, 5th Conference, IARLJ, 319-326.

Storey, H. and Mackey, A., *In search of judicial criteria for assessing country of origin information,* 2006.

Zalar, B., 'Remarks on the Judgment of the CJEU in the Case of A B C (C-148/13 to C-150/13, 2.12.2014', prepared for IARLJ Expert Roundtable on 'Credibility Assessment in Asylum Procedures, Budapest, 14-15 January 2015.

2.4 Other publications

American Psychiatric Association, *Diagnostic and statistical manual of mental disorders*, 1994.

American Psychiatric Association, *Diagnostic and statistical manual of mental disorders, DSM-5*, 2013, 5th edn.

Austrian Red Cross, Austrian Centre for Country of Origin & Asylum Research and Documentation, 2013, *Researching country of origin information — Training manual*.

Asylum Access, *Disclosure of evidence in UNHCR'S refugee status determination procedures, critique and recommendations for reform*, 20 June 2008.

Asylum Advocacy Group and All Party Parliamentary Group for International Freedom of Religion or Believe, Fleeing Persecution: Asylum Claims in the United Kingdom and Religious Freedom Grounds, 2016.

Asylum Information Database (AIDA), 'Safe Countries of Origin': A Safe Concept?, September 2015, AIDA Legal Briefing No 3.

AIDA, Detriment of the Doubt: Age Assessment of Unaccompanied Asylum-Seeking Children, December 2015, AIDA Legal Briefing No 5.

Centre for the Study of Emotion and Law (CSEL), Evidence in Practice: CSEL Research Dissemination Project for Women Toolkit, September 2012.

European Council on Refugees and Exiles, The Impact of the EU Qualification Directive on International Protection, October 2008.

European Council on Refugees and Exiles, Asylum Aid, Fluchtelingen Werk Nederland and Hungarian Helsinki Committee, Actors of Protection and the Application of the Internal Protection Alternative, 2014.

Hungarian Helsinki Committee, Credibility Assessment in Asylum Procedure, A Multidisciplinary Training Manual, 2013, Vol. 1.

Hungarian Helsinki Committee, Credibility Assessment in Asylum Procedure, A Multidisciplinary Training Manual, 2015, Vol. 2.

Hungarian Helsinki Committee, *Country Information in asylum procedures — Quality as a legal requirement in the EU*, updated version 2011, Gábor Gyulai.

Independent Chief Inspector of Borders and Immigration, An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation, March-June 2014.

United Kingdom Home Office, The Home Office Response to the Independent Chief Inspector's Report: 'An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation', March-June 2014.

United Kingdom Home Office, *Asylum policy instruction: assessing credibility and refugee status*, 6 January 2015.

United Kingdom Home Office, *Children's asylum claims*, 12 July 2016.

United Kingdom Tribunals Judiciary, Joint Presidential Guidance Note No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance, 2010.

Visas and Immigration, Nationality: Doubtful, Disputed and Other Cases, 26 October 2013.

Unicef, Age Assessment: A Technical Note, January 2013.

Unicef & UNHCR report, Safe & Sound: What States Can Do to Ensure Respect for the Best Interests of Unaccompanied and Separated Children in Europe, October 2014.

World Health Organisation, ICD-10, Version: 2016, 2016.

2.5 Academic literature

Baillot, H., Cowan, S. and Munro, V. E., '"Hearing the Right Gaps": Enabling and Responding to Disclosures of Sexual Violence within the United Kingdom Asylum Process', 2012, *Social and Legal Studies*, 269-296.

Bhabha, J. and Young, W., 'Not adults in miniature: Unaccompanied child asylum seekers and the new US guidelines', 1999, *IJRL*, 84-125.

Baldinger, D., *Rigorous scrutiny versus marginal review, standards on judicial scrutiny and evidence in international and european asylum law*, 2013, Wolf Legal Publishers.

Baxter, J. S., Boon, J. C. W. and Marley, C., 'Interrogative pressure and responses to minimally leading questions', 2006, *Personality and Individual Differences*, 87-98.

Bender, R., Nack A. and Treuer, W.-D., *Tatsachenfeststellung vor Gericht: Glaubhaftigkeits- und Beweislehre Vernehmungslehre*, Beck, 2014, 4th edition.

Berlit, U., Dörig, H. and Storey, H., 'Credibility assessment in claims based on persecution for reasons of religious conversion and homosexuality: A practitioners approach', 2015, *IJRL*, 649-666.

Bögner, D., Brewin, C. and Herlihy, J., 'Refugees' experiences of home office interviews: A qualitative study on the disclosure of sensitive personal information', 2009, *Journal of Ethnic and Migration Studies*, 1-17.

Bögner, D., Herlihy, J. and Brewin, C., 'The Impact of Sexual Violence on Disclosure during Home Office Interviews', 2007, *British Journal of Psychiatry*, 75-81.

Braun, K. A., Ellis, R. and Loftus, E. F., 'Make my Memory: How Advertising Can Change our Memories of the Past', 2002, *Psychology and Marketing*, 1-23.

Brewer, W. and Treyens, J., 'Role of Schemata in Memory for Places', 1981, *Cognitive Psychology*, 207-230.

Brewin, C., 'A Cognitive Neuroscience Account of Posttraumatic Stress Disorder and its Treatment', 2001, *Behaviour, Research and Therapy*, 373-393.

Brewin, C., Dalgleish, T. and Joseph, S., 'A Dual Representation Theory of Posttraumatic Stress Disorder', 1996, *Psychological Review*, 670-686.

Brewin, C., Gregory, J. D., Lipton, M. and Burgess, N., 'Intrusive Images in Psychological Disorders: Characteristics, Neural Mechanisms and Treatment Implications', 2010, *Psychological Review*, 210-232.

Brewin, C. R., Kleiner, J. S., Vasterling, J. J. and Field, A. P., 'Memory for Emotionally Neutral Information in Posttraumatic Stress Disorder: A Meta-Analytic Investigation', 2007, *Journal of Abnormal Psychology*, 448-463.

Bryant, R. A., O'Donnell, M. L., Creamer, M., McFarlane, A. C., Clark, C. R. and Silove, D., 'The Psychiatric Sequelae of Traumatic Injury', 2010, *American Journal of Psychiatry*, 312-320.

Cameron, H., 'Refugee status determinations and the limits of memory', 2010, *IJRL*, 469-511.

Christianson, S.-A., 'Emotional stress and eyewitness memory: A critical review', 1992, *Psychological Bulletin*, 284-309.

Ciorciari, J. D. and Heindel, A., 'Trauma in the courtroom', in van Schaak, B., Reicherter, D. and Youk, C. (eds.), *Cambodia's Hidden Scars: Trauma Psychology in the Wake of the Khmer Rouge*, 2011, Documentation Center of Cambodia.

Colin, J. and Mottis, R., *Interpreters and the Legal Process*, 1996, Waterside Press.

Conway, M.A. and Holmes, E.A., 'Guidelines on memory and the law: Recommendations from the scientific study of human memory', 2008, Report from the Research Board, The British Psychological Society.

Conway, M. A. and Pleydell-Pearce, C. W., 'The construction of autobiographical memories in the self-memory system', 2000, *Psychological Review*, 261-288.

Deffenbacher, K. A., Bornstein, B. H., Penrod, S. D. and McGorty, K., 'A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory', 2004, *Law and Human Behavior*, 687-706.

Dörig, H., 'Asylum Qualification Directive 2011/95/EU (Articles 1-10)', in Hailbronner, K. and Thym, D. (eds.), *EU Immigration and Asylum Law, A Commentary*, 2016, 2nd edn, C.H. Beck, p. 1106.

Eastmond, M., 'Stories as Lived Experience: Narratives in Forced Migration Research', 2007, *Journal of Refugee Studies*, 248-264.

Figley, C. R. (ed.), *Compassion Fatigue: Coping with Secondary Traumatic Stress Disorder in Those who Treat the Traumatized,* 1995, Brunner-Routledge.

Fivush, R., 'Learning about School: The Development of Kindergartner's School Scripts', 1984, *Child Development*, 1697-1709.

Gärditz, K. F., *Deutsches Verwaltungsblatt*, 2015, 167.

Glynn, A. N. and Sen, M., 'Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?', 2015, *American Journal of Political Science*, 37-54.

Granhag, P. A., and Strömwall, L. A. , 'Deception Detection Based on Repeated Interrogations', 2001, *Legal and Criminological Psychology*, 85-101.

Granhag, P. A., Strömwall, L. A. and Jonsson, A.-C., 'Partners in Crime: How Liars in Collusion Betray Themselves', 2003, *Journal of Applied Social Psychology*, 848-868.

Grütters, C., Guild, E. and de Groot, S. (eds.), *Assessment of Credibility by Judges in Asylum Cases in the EU*, 2013, Wolf Legal Publishers.

Guadagno, B. L. and Powell, M. B., 'A Qualitative Examination of Police Officers' Questioning of Children about Repeated Events', 2009, *Police Practice and Research: An International Journal*, 61-73.

Hall, E. T. and Edward, T., *Beyond Culture*, 1976, Anchor Books.

Harris, L. M., 'Expert Evidence in gender-based asylum cases: cultural translation for the court', 2012, *Benders Immigration Bulletin*, 1811-1826.

Herlihy, J., 'Psychological barriers to fair refugee status determination related to our understanding and expression of gender', 2014, in Arbel, E., Dauvergne, C. and Millbank, J. (eds.), *Gender in Refugee Law: From the Margins to the Centre*, Routledge, 116-137.

Herlihy, J., Gleeson, K. and Turner, S., 'What Assumptions about Human Behaviour Underlie Asylum Judgments', 2010, *IJRL*, 351-366.

Herlihy, H., Jobson, L. and Turner, S., 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum', 2012, *Applied Cognitive Psychology*, 661-676.

Herlihy, J., Scragg, P. and Turner, S., 'Discrepancies in Autobiographical Memories-Implications for the Assessment of Asylum-Seekers: Repeated Interviews Study', 2002, *British Medical Journal*, 324-327.

Herlihy, J. and Turner, S., 'The Psychology of Seeking Protection', 2009, *IJRL*, 171-192.

Jaffe, P., 'Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice', 2003, *Juvenile and Family Court Journal*, 1-9.

Jarvis, C., 'The Judge as Juror Revisited', 2003, *Immigration Law Digest*, 7-23.

Kagan, M., 'Is truth in the eye of the beholder? Objective credibility assessment in refugee status determination', 2003, *Georgetown Immigration Law Review*, 367-415.

Kahneman, D., *Thinking, Fast and Slow*, 2011, Penguin Books Ltd.

Kaufmann, G., Drevland, G. C. B., Wessel, E., Overskeid, G. and Magnussen, S., 'The Importance of being earnest: Displayed emotions and witness credibility', 2003, *Applied Cognitive Psychology*, 21-34.

Kittler, M. G., Rygl, D. and Mackinnon, A., 'Beyond Culture or Beyond Control? Reviewing the Use of Hall's High-/Low-Context Concept', 2011, *International Journal of Cross Cultural Management*, 63-82.

Kjærum, A., 'Combating Torture With Medical Evidence: The Use of Medical Evidence and Expert Opinions in International and Regional Human Rights Tribunals', 2010, *Torture Journal*, 119-186.

Lee, L. C. and Zane, N. W. S., *Handbook of Asian American Psychology*, 1998, Sage.

Levrincova, P., 'Did It Really Happen? Testimonies before the International Criminal Tribunals and refugee status determination', 2010, dissertation, Charles University.

Loftus, E. F., Banaji, M. R., Schooler, J. W. and Foster, R. A., 'Who remembers what?: gender differences in memory', 1987, *Michigan Quarterly Review*, 64-85.

MacFarland, W. L. and Morris, S. J., 'Are dysphoric individuals more suggestible or less suggestible than nondysphoric individuals?', 1998, *Journal of Counselling Psychology*, 225-229.

Macklin, A., 'The truth about credibility', Paper presented at the 10th IASFM Conference, Toronto, Canada, 21-24 June 2006.

Markus, H. R. and Kitayama, S., 'Culture and the self: Implications for cognition, emotion, and motivation', 1991, *Psychological Review*, 224-253.

Markus, H. R. and Kitayama, S., 'A collective fear of the collective: Implications for selves and theories of selves', 1994, *Personality and Social Psychology Bulletin*, 568-579.

Maroney, T., 'Emotional regulation and judicial behavior', 2011, *California Law Review*, 1481-1551.

Marx, R., *Handbuch zur Qualifikationsrichtlinie: Flüchtlingsanerkennung and subsidärer Schutzstatus*, 2009, Luchterhand.

McCann, L. and Pearlman, L. A., 'Vicarious traumatization: A framework for understanding psychological effects of working with victims', 1990, *Journal of Traumatic Stress*, 131-149.

Memon, A., Meissner, C. A. and Fraser, J., 'The cognitive interview: A meta-analytic review and study space analysis of the past 25 years', 2010, *Psychology, Public Policy, & Law*, 340-372.

Neisser, U., *Cognitive psychology* (Classic Edition: Psychology Press & Routledge Classic Editions), 2014.

Noll, G., 'Evidentiary assessment and the EU Qualification Directive', 2005, UNHCR New Issues in Refugee Research, Research Paper, No 117.

O'Donnell, M. L., Creamer, M. and Pattison, P., 'Posttraumatic stress disorder and depression following trauma: Understanding comorbidity', 2004, *American Journal of Psychiatry*, 1390-1396.

Payne, D. G., 'Hypermnesia and reminiscence in recall: A Historical and Empirical Review', 1987, *Psychological Bulletin*, 5-27.

Reneman, M., *EU Asylum Procedures and the Right to an Effective Remedy* (Hart Publishing), 2014.

Roberts, K. P., Powell, M. B. and Guadagno, B. L., 'Particularisation of Child Abuse Offences: Common Problems when Interviewing Child Witnesses', 2007, *Current Issues in Criminal Justice*, 64-74.

Rousseau, C., Crépeau, F., Foxen, P. and Houle, F., 'The Complexity of Determining Refugeehood: A Multidisciplinary analysis of the Decision-making Process of the Canadian Immigration and Refugee Board', 2002, *JRS*, 43-70.

Saakvitne, K. W. and Pearlman, L. A., *Transforming the Pain: A Workbook on Vicarious Traumatization,* 1996, WW Norton.

Schauer, M. and Elbert, T., 'Dissociation following Traumatic Stress Etiology and Treatment', 2010, *ZeitschriftfürPsychologie/Journal of Psychology*, 109-127.

Silove, D., Sinnerbrink, I., Field, A., Manicavasagar, V. and Steel, Z., 'Anxiety, Depression and PTSD in Asylum-Seekers: Associations with Pre-Migration Trauma and Post-Migration Stressors', 1997, *British Journal of Psychiatry*, 351-357.

Simitis, S., *Bundesdatenschutzgesetz*, 2014, 8th edn, Nomos.

Stanek, H., '*Die Informations- und Dokumentationsstelle für Asyl- und Ausländerverfahren und ihre Datenbank asylfact*', 20 November 2014, Akademie der Diözese Rottenburg-Stuttgart.

Steel, Z., Frommer, N. and Silove, D., 'Part I — The Mental Health Impacts of Migration: The Law and its Effects Failing to Understand: Refugee Determination and the Traumatized Applicant', 2004, *International Journal of Law and Psychiatry*, 511-528.

Sutherland, R. and Hayne, H., 'Age-Related Changes in the Misinformation Effect', 2001, *Journal of Experimental Child Psychology*, 388-404.

Thomas, R., *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication,* 2011, Hart Publishing.

Tiedmann, P., *Flüchtlingsrecht: Die materiellen und verfahrensrechlichen Grundlagen,* 2014 Springer.

Turner, S. W., Bowie, C., Shapo, L. and Yule, W., 'Mental Health of Kosovan Albanian Refugees in the United Kingdom', 2003, *British Journal of Psychiatry*, 444-448.

Valentine, T. and Mesout, J., 'Eyewitness Identification under Stress in the London Dungeon', 2009, *Applied Cognitive Psychology*, 151-161.

Vrklevski, L. P. and Franklin, J., 'Vicarious Trauma: The Impact on Solicitors of Exposure to Traumatic Material', 2008, *Traumatology*, 106-118.

Wagenaar, W. A. and Dalderop, A., *Remembering the Zoo: A Comparison of True and False Stories Told by Pairs of Witnesses*, 1994, Leiden University.

Wang, Q., 'Emotion Knowledge and Autobiographical Memory across the Preschool Years: A Cross-Cultural Longitudinal Investigation', 2008, *Cognition*, 117-135.

Wang, Q. and Conway, M. A., 'The stories we keep: Autobiographical memory in American and Chinese middle-aged adults', 2004, *Journal of Personality and Social Psychology*, 911-938.

Wang, Q., Leichtman, M. D. and Davies, K. I., 'Sharing Memories and Telling Stories: American and Chinese Mothers and their 3-Year-Olds', 2000, *Memory*, 159-178.

Westaby, C., '"Feeling like a Sponge": The Emotional Labour Produced by Solicitors in their Interactions with Clients Seeking Asylum', 2010, *International Journal of the Legal Profession*, 153-174.

Wilson-Shaw, L., Pistrang, N. and Herlihy, J., '*Non-Clinicians' Judgments about Asylum Seekers' Mental Health: How Do Legal Representatives of Asylum-Seekers Decide when to Request Medico-Legal Reports*', 2012, *European Journal of Psycho-Traumatology*.

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