

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

Judicial analysis

Second edition



Produced by IARMJ-Europe under contract to the EUAA

The EUAA judicial publications have been created in cooperation with members of courts and tribunals on the following topics:

- Article 15(c) Qualification Directive (2011/95/EU) (2014);
- Introduction to the Common European Asylum System for courts and tribunals (2016);
- Qualification for international protection (Directive 2011/95/EU) (2023, second edition);
- Evidence and credibility assessment in the context of the Common European Asylum System (2023, second edition);
- Asylum procedures and the principle of *non-refoulement* (2018);
- Country of origin information (2018);
- Detention of applicants for international protection in the context of the Common European Asylum System (2019);
- Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU) (2020);
- Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) (2020, second edition);
- Vulnerability in the context of applications for international protection (2021);
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**Judicial analysis on evidence and credibility
assessment in the context of the Common
European Asylum System
Second edition**

EUAA Judicial Publications for members of courts and tribunals

2023

On 19 January 2022, the European Asylum Support Office (EASO) became the European Union Agency for Asylum (EUAA). All references to EASO, EASO products and bodies should be understood as references to the EUAA.



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European Union Agency for Asylum

The European Union Agency for Asylum (EUAA), its predecessor being the European Asylum Support Office (EASO), is an agency of the European Union (EU). It has the mandate to support the enhancement of quality standards and to strive for consistency in the implementation of the legal instruments of the Common European Asylum System (CEAS). To that end, the EUAA contributes to the development and consistent implementation of the CEAS, promotes practical cooperation among Member States on asylum, and supports Member States that are subject to particular pressures.

Article 8(1) of the EUAA regulation ⁽¹⁾ specifies that the agency shall establish, develop and review training for members of courts and tribunals in the Member States. For this purpose, EUAA shall develop training in close cooperation with, inter alia, relevant training entities, academic institutions, judicial associations, training networks and 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 EUAA, as the EU centre for expertise in the field of international protection, therefore supports the development of judicial training materials and activities. These are available to members of courts and tribunals of the EU, its associated countries (EU+ countries), and beyond.

The International Association of Refugee and Migration Judges

The International Association of Refugee and Migration Judges (IARMJ) ⁽²⁾ 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 the foundation of the association in 1997, it has been heavily involved in the training of members of courts and tribunals around the world dealing with asylum cases. The European Chapter of the IARMJ (IARMJ-Europe) is the regional representative body for judges and tribunal members within Europe. One of the Chapter'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 (CEAS)'.

Contributors

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

⁽¹⁾ [Regulation \(EU\) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation \(EU\) No 439/2010 \[2021\] OJ L 468/1 \(hereafter, EUAA regulation\)](#). See also [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](#).

⁽²⁾ The International Association of Refugee and Migration Judges was formerly known as the International Association of Refugee Law Judges (IARLJ). See <https://www.iarmj.org>.





Editorial team of judges and tribunal members

In order to ensure the integrity of the principle of judicial independence and that the EUAA judicial publications for members of courts and tribunals is developed and delivered under judicial guidance, an editorial team composed of serving or recently retired 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, EUAA and IARMJ-Europe. The editorial team reviewed drafts, gave detailed guidance to the drafters, drafted amendments, and was the final decision-making body as to the scope, structure, content and design of the work. Their work was undertaken through a combination of regular virtual meetings, as well as regular electronic communication.

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Comments were received from Lars Bay Larsen, a judge, and Yann Laurans, a legal secretary, both of the Court of Justice of the European Union (CJEU) in their personal capacity. Jolien Schukking, judge at the European Court of Human Rights (ECtHR) and Bob Corstens, lawyer seconded to the registry of the European Court of Human Rights also provided comments in their personal capacity. The United Nations High Commissioner for Refugees (UNHCR) likewise expressed its views on the draft text.

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

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

This judicial analysis will be further updated, as necessary, by EUAA, in accordance with the methodology for the EUAA judicial publications for members of courts and tribunals.





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List of abbreviations

Abbreviation	Definition
AG	Advocate General (CJEU)
AIT	Asylum and Immigration Tribunal (predecessor to the Upper Tribunal, United Kingdom)
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)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court, Germany)
CCE	Conseil du contentieux des étrangers (Council for Aliens Law Litigation, Belgium)
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CNDA	Cour nationale du droit d’asile (National Court of Asylum Law, France)
COI	Country of origin information
COVID-19	Coronavirus disease
CRC	Convention on the Rights of the Child
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)
CRPD	Convention on the Rights of Persons with Disabilities
CRR	Commission des recours des réfugiés (Refugee Appeals Commission, France)
CUP	Cambridge University Press
DRC	Democratic Republic of the Congo
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
EASO regulation	Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing the European Asylum Support Office





ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
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
EUAA	European Union Agency for Asylum
EUAA regulation	Regulation (EU) No 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010/19
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
FGM	Female genital mutilation
GC	Grand Chamber (of both the CJEU and ECtHR)
Geneva Convention	See Refugee Convention
GRETA	Group of Experts on Action against Trafficking in Human Beings (Council of Europe)
IAC	Immigration and Asylum Chamber (Upper Tribunal, United Kingdom)
IARMJ	International Association of Refugee and Migration Judges
IASFM	International Association for the Study of Forced Migration
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally displaced person
IEHC	High Court (Ireland)
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
OJ	Official Journal (EU)
OUP	Oxford University Press





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)
QR	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 (European Commission)
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’]
Returns Directive	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
RVV	Raad voor Vreemdelingenbetwistingen (Council for Aliens Law Litigation, Belgium)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKIAT	United Kingdom Immigration and Asylum Tribunal
UKSC	United Kingdom Supreme Court
UKUT	United Kingdom Upper Tribunal
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees





UNHCR Handbook	UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
VG	Verwaltungsgericht (Administrative Court, Germany)
VGH	Verwaltungsgerichtshof (High Administrative Court, Germany)
VwGH	Verwaltungsgerichtshof (Supreme Administrative Court, Austria)





Preface

The European Union Agency for Asylum (EUAA), like its predecessor the European Asylum Support Office (EASO), works in close cooperation with courts and tribunals of the Member States as well as other key actors to create a judicial publication. This series aims to provide courts and tribunals with a full overview of the Common European Asylum System (CEAS) on a step-by-step basis. Soon after EASO became operational in 2011, it established a network of court and tribunal members. Following consultations with members of this network, including the International Association of Refugee and Migration Judges-Europe (IARMJ-Europe), it became apparent that there was a pressing need to make available to courts and tribunals judicial publications on certain core subjects dealt with in their day-to-day decision-making. It was recognised that the process for developing such core materials required the involvement of judicial and other experts in a manner fully respecting the principle of independence of the judiciary as well as also accelerating the development of the judicial publications overall.

The first edition of this judicial analysis, published in 2018, was the product of a project between EASO and IARMJ-Europe. It forms part of the EUAA (formerly EASO) judicial publications for Members of Courts and Tribunals. This (second) edition of the judicial analysis has been updated pursuant to a framework contract agreed between EASO (now EUAA) and IARMJ. An up-to-date list of all the publications in this series is provided at the end of this preface in [Table 1](#).

The judicial analysis is primarily intended for use by members of courts and tribunals of EU Member States who are 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 with 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. Checklists](#)) ⁽¹⁾. It is further complemented by a list of primary sources, listing not only relevant EU primary and secondary legislation but those relevant international treaties of universal and regional scope ([Appendix B. Primary sources](#)) ⁽²⁾. [Appendix C. Methodology](#) outlines the methodology used, while [Appendix D. Case-law](#) lists essential case-law of the Court of Justice of the European Union (CJEU), European Court of Human Rights (ECtHR) and the courts and tribunals of EU Member States. The case lists follow the same structure as the judicial analysis; and to ensure that the relevant legislation and case-law is easily and quickly accessible to readers, hyperlinks have been utilised. [Appendix E. Select bibliography](#) provides a select bibliography containing a selected list of relevant official documents and other publications, in particular the relevant publications of IARMJ and UNHCR as well as academic literature ⁽³⁾.

The aim is to set out the current state of the law clearly and in a user-friendly format. This new edition analyses the law as it stood in June 2022. However, the reader will be aware that this is a rapidly evolving area of law and practice. This has two aspects. One obvious one is that there will continue to be new case-law from the CJEU, ECtHR and national courts and tribunals. There is also the fact that, on 13 July 2016, the Commission proposed the adoption of a new Qualification Regulation (QR) ⁽⁴⁾. Then, on 23 September 2020, the Commission unveiled a ‘New Pact on Migration and Asylum’, which encompassed the proposed new QR. Significant progress was made in relation to one aspect of the pact, namely, the creation of the EUAA on 19 January 2022 by way of Regulation (EU) 2021/2303 (EUAA regulation) ⁽⁵⁾. However, other key features

-
- (1) In general terms, EU law parallels and has much consistency with international norms, as well as standards and guidance provided by the International Association of Refugee and Migration Judges (IARMJ) and United Nations High Commissioner for Refugees (UNHCR) in their international operations. See IARLJ (now IARMJ), [A Structured Approach to the Decision Making Process in Refugee and other International Protection Claims](#), June 2016.
- (2) In an act commonly referred to as ‘Brexit’, the United Kingdom left the EU on 31 December 2020. EU legislation that applied directly or indirectly to the United Kingdom before the end of 31 December 2020 has been retained in UK law as a form of domestic legislation known as ‘retained EU legislation’. ‘Retained EU legislation’ remains in force in the United Kingdom until such time as it may be changed by domestic legislation.
- (3) See Sections 2.1 and 2.2 of [Appendix E. Select bibliography](#) respectively for publications by the UNHCR and the IARLJ/IARMJ. This judicial analysis builds on the IARMJ’s body of work on this topic, and in consideration of UNHCR guidance and other studies. With regard to credibility assessment, IARMJ was assisted by the useful research and findings of the ‘CREDO project’, led by the Hungarian Helsinki Committee. Project partners were UNHCR, IARMJ and Asylum Aid (United Kingdom). The project was co-funded by the European Commission. The publications from this project may be found in [Appendix E. Select bibliography](#).
- (4) 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/2016/0466 final – 2016/0223 (COD) (hereafter European Commission, [proposal for a qualification regulation](#)).
- (5) [EUAA regulation](#).



of the pact, including new EU Regulations to replace the QD (recast), the APD (recast) and the Dublin III regulation, remain the subject of ongoing consideration at the time of writing ⁽⁶⁾.

This judicial analysis, together with other judicial publications ⁽⁷⁾, will be further 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 to help the reader to do that.

Table 1. Judicial publications: The judicial analyses and compilations of jurisprudence developed so far

Date	Judicial analysis ⁽⁸⁾	Compilation of jurisprudence
December 2014	Article 15(c) Qualification Directive (2011/95/EU)	
August 2016	Introduction to the Common European Asylum System for courts and tribunals	
December 2016	Qualification for international protection (Directive 2011/95/EU)	
2018	Evidence and credibility assessment in the context of the Common European Asylum System	Compilation of jurisprudence
2018	Asylum procedures and the principle of <i>non-refoulement</i>	Compilation of jurisprudence
2018	Judicial practical guide on country of origin information	Compilation of jurisprudence
2019	Detention of applicants for international protection in the context of the Common European Asylum System	Compilation of jurisprudence
2020	Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU)	
2020	Exclusion: Articles 12 and 17 Qualification Directive (2nd edition)	Compilation of jurisprudence
2021	Vulnerability in the context of applications for international protection	Compilation of jurisprudence
2021	Ending international protection (2nd edition)	Compilation of jurisprudence

⁽⁶⁾ The most recent official update on the proposed new QR is from 26 February 2019: [EUR-Lex – 52016PC0466 – EN – EUR-Lex \(europa.eu\)](#). That progress report shows that the matter had, at that time, reached an impasse: a provisional agreement between the Council and Parliament in June 2018 was overtaken by fresh Council amendments, which were confirmed by Coreper on 23 January 2019. However, the report states that the Parliament did not want to renegotiate the provisional agreement that was reached in June 2018.

⁽⁷⁾ The series is listed in full at <https://euaa.europa.eu/courts-and-tribunals>. This link also shows their availability in other languages apart from English.

⁽⁸⁾ In the case of judicial analyses that have been updated, this table only refers to the new edition. Note that the [Judicial Practical Guide on Country of Origin Information](#) is a practical guide not a judicial analysis.





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 issues can arise with remote hearings in the context of applications for international protection ([Section 3.4.2](#). Remote hearings)?
5. What are the specific principles and standards applicable to evidence and credibility assessment ([Part 4](#))?
6. 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](#))?
7. What are the general principles and standards for the assessment of evidence ([Section 4.3](#))?
8. 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](#))?
9. 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](#))?
10. 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](#))?
11. 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](#));
 - applications based on sexual orientation and/or gender identity (SOGI) and religious conversion ([Section 0](#));
 - the application of the concept of internal protection ([Section 0](#));





- the determination of family relationships (Section [5.5. Family relationships and evidence assessment](#));
- exclusion from international protection (Section [5.6. Exclusion and the assessment of evidence](#));
- withdrawal of protection (Section [5.7. Withdrawal of protection and assessment of evidence](#))
- subsequent applications (Section [5.8. Subsequent applications and assessment of new evidence](#))
- determination of the Member State responsible for examining an application for international protection under the Dublin III regulation (Section [5.9. Dublin III regulation and the assessment of evidence](#)); and
- the application of the safe country concepts (Section [5.10. Evidence assessment in the application of safe country concepts](#))?

12. 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 (CEAS), in particular the qualification directive (recast) ⁽⁹⁾ (QD (recast)) and the asylum procedures directive (recast) ⁽¹⁰⁾ (APD (recast)) ⁽¹¹⁾. Primary focus 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)).

Article 2(d) QD (recast) defines a refugee as:



Article 2(d) QD (recast)

[...] a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.

⁽⁹⁾ [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 \(recast\) \(OJ L 337, 20.12.2011\) \(hereafter QD \(recast\)\).](#)

⁽¹⁰⁾ [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 \(recast\) \(OJ L 180, 29.06.2013\) \(hereafter APD \(recast\)\).](#)

⁽¹¹⁾ For further information on the CEAS see EASO, [An Introduction to the Common European Asylum System for Courts and Tribunals](#), op. cit., fn. 7.





Article 2(f) QD (recast) defines a ‘person eligible for subsidiary protection’ as follows:



Article 2(f) QD (recast)

‘person eligible for subsidiary protection’ means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

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⁽¹²⁾.

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)⁽¹³⁾.

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 protection or subsidiary protection are met. Evidence and credibility assessment, therefore, plays a crucial role in international protection cases.

Whilst the primary focus is on the determination of whether an applicant qualifies for refugee protection or subsidiary protection, consideration is also given to evidence assessment in other CEAS contexts. Therefore, this judicial analysis also addresses evidence assessment in cases

⁽¹²⁾ European Council, [The Stockholm Programme: An Open and Secure Europe Serving and Protecting the Citizens](#) (OJ C 115, 4.5.2010), 2 December 2009, 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’.

⁽¹³⁾ See recitals 8, 10 and 12 of the [QD \(recast\)](#), and recitals 6 and 7 as well as Article 1 [APD \(recast\)](#).





concerning the Dublin III regulation ⁽¹⁴⁾ (Section [5.9. Dublin III regulation and the assessment of evidence](#)).

This judicial analysis will only cover procedural provisions in so far as they impact on evidence and credibility assessment. For a more extensive elaboration upon some of these provisions, readers are referred to *Asylum Procedures and the Principle of Non-refoulement – Judicial analysis* ⁽¹⁵⁾.

This judicial analysis has six parts in which different elements relevant to the evidence and credibility assessment are addressed.

1.2. Use of terminology

This section explains 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) ⁽¹⁶⁾. Article 4 QD (recast) refers to the ‘[a]ssessment of facts and circumstances’ and speaks of the ‘elements’ needed to substantiate an application for international protection. According to Article 4(2) QD (recast), these consist of the ‘applicant’s statements and all the 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**’ ⁽¹⁷⁾. The CJEU in *A, B and C*, referred to ‘assessing statements and

⁽¹⁴⁾ [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 \(recast\)](#) (OJ L 180, 29.06.2013) (hereinafter [Dublin III regulation](#)).

⁽¹⁵⁾ EASO, *Asylum Procedures and the Principle of Non-Refoulement*, op. cit., fn. 7.

⁽¹⁶⁾ Article 22(3) [Dublin III regulation](#), op. cit., fn. 14, defines ‘proof’ and ‘circumstantial evidence’ for the purpose of that Regulation. See Section 5.8.1.2.

⁽¹⁷⁾ Emphasis added.





documentary or **other evidence**' ⁽¹⁸⁾. 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' ⁽¹⁹⁾. 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. The CJEU judgments in *A, B, and C* and in *F*, show that certain evidence may be deemed to be **inadmissible** in the context of international protection applications ⁽²⁰⁾.

In *A, B and C*, the CJEU held as follows:

Article 4 [QD], read in the light of Article 1 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to "tests" with a view to establishing his homosexuality or, yet, the production by him of films of such acts ⁽²¹⁾.

In *F*, the CJEU ruled as follows:

Article 4 [QD (recast)], read in the light of Article 7 of the Charter of Fundamental Rights, must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, such as that at issue in the main proceedings, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant ⁽²²⁾.

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.

⁽¹⁸⁾ CJEU Grand Chamber (GC), judgment of 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, joined cases C-148/13 to C-150/13, EU:C:2014:2406 (hereafter CJEU (GC), 2014, *A, B and C*), para. 54, emphasis added.

⁽¹⁹⁾ UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems*, May 2013, p. 28. See Section 4.2.4 on types of evidence.

⁽²⁰⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, paras 65, 72 and 73; CJEU, judgment of 25 January 2018, *F*, C-473/16, EU:C:2018:36 (hereafter CJEU, 2018, *F*), paras 71 and 72.

⁽²¹⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 73.

⁽²²⁾ CJEU, 2018, *F*, op. cit. fn.20, para. 72(2).



1.2.4. What are material facts?

Material facts are the facts by which an application is substantiated 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 an application for international protection must be based on facts material to the core of the claim.

1.2.5. What are country of origin information and country information?

In the simplest and most general terms, country of origin information (COI) refers to information about the country of origin of an applicant that is used in procedures for determining their qualification for international protection. 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⁽²³⁾. The term 'country information' has a broader meaning and refers to information on any country including, for example, countries of transit⁽²⁴⁾, 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'⁽²⁵⁾. 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

⁽²³⁾ See also Section 4.8 Standards for assessing country of origin information (COI) which addresses Article 4(3)(a) QD (recast) as well as relevant provisions of the APD (recast) and EUAA regulation.

⁽²⁴⁾ See Article 10(3)(b) APD (recast).

⁽²⁵⁾ The term 'obtaining' of evidence is not found in the QD (recast). However the APD (recast) does use the terms 'obtained' and 'obtain' in Articles 10(3)(b), 45(2)(a) and recital 39 regarding country information.



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]’⁽²⁶⁾. 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](#).

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 them relating to the material facts⁽²⁷⁾ can be accepted in order to determine their qualification for international protection. As set out in [Section 4.5. Credibility indicators](#) on credibility indicators, this assessment may include verifying whether the applicant’s statements are consistent, sufficiently detailed, plausible, and compatible with, inter alia, their 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 and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed’⁽²⁸⁾.

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 their application for international protection nonetheless to succeed. An applicant may qualify for refugee or subsidiary protection status, for example, on the basis of country of origin information or a medical report notwithstanding a lack of credibility in some or all aspects of the applicant’s statements. By way of example, applicants may 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. Credibility assessment is thus not a goal or end, but a tool for determining eligibility for refugee protection or subsidiary protection.

⁽²⁶⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18 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).

⁽²⁷⁾ See [Table 2. Words and phrases explained in summary](#) and [Section 1.2.4](#) for further information on material facts.

⁽²⁸⁾ 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*, No 59166/12, ECLI:CE:ECHR:2016:0823JUD005916612 (hereafter ECtHR (GC), 2016, *JK and Others v Sweden*), para. 53.



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 application is substantiated 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.



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 have an impact on evidence and credibility assessment ⁽²⁹⁾. EU secondary law provides some more specific norms with regard to assessment of evidence and credibility ⁽³⁰⁾. The CJEU has developed some further principles, but these too are relatively few ⁽³¹⁾. Since the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Refugee Convention) ⁽³²⁾ also lacks 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, Article 52(3) Charter of Fundamental Rights of the European Union (EU Charter) ⁽³³⁾ 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) ⁽³⁴⁾ correspond, although this must ‘not prevent EU law providing more extensive protection’. The jurisprudence of the ECtHR, therefore, also constitutes an important source of such guidance ⁽³⁵⁾. Along with this judicial analysis, materials

⁽²⁹⁾ See EASO, An Introduction to the Common European Asylum System for Courts and Tribunals, op. cit., fn. 7 Part 2.

⁽³⁰⁾ The legal basis for the creation of secondary legislation is derived from Article 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 Article 78 TFEU, see EASO, An Introduction to the Common European Asylum System for Courts and Tribunals, op. cit., fn., 7, Sections 1.4 and 2.1.1.

⁽³¹⁾ See, for example: CJEU (GC), judgment of 5 September 2012, Bundesrepublik Deutschland v Y and Z, C-71/11, EU:C:2012:558 (hereafter CJEU (GC), 2012, Y and Z), (concerning assessment of an applicant’s exercise of the right to religious freedom); CJEU, judgment of 22 November 2012, M.M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General, C-277/11, EU:C:2012:744 (hereafter CJEU, 2012, M.M.), (concerning an applicant’s entitlement to be fully heard before an assessment is made of the applicant’s entitlement to international protection); CJEU (GC), 2014, A, B and C, op. cit., fn. 18, (concerning evidence that is inadmissible for the purposes of evidence and credibility assessment in the context of an application of international protection); CJEU, 2018, F., op. cit. fn.20, (concerning evidence that is inadmissible for the purposes of evidence and credibility assessment in the context of an application of international protection).

⁽³²⁾ 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).

⁽³³⁾ EU Charter of Fundamental Rights, op. cit., fn. 26.

⁽³⁴⁾ 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 Article 53.

⁽³⁵⁾ See EASO, An Introduction to the Common European Asylum System for Courts and Tribunals, op. cit., fn., 7, Section 3.4.1.





such as the publications on the assessment of credibility as part of the CREDO Project ⁽³⁶⁾, the United Nations High Commissioner's (UNHCR) Handbook and subsequent Guidelines on International Protection ⁽³⁷⁾ and other publications may also provide valuable guidance to national courts and tribunals on evidence and credibility assessment, although they are not binding ⁽³⁸⁾.

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* ⁽³⁹⁾. Those that may have particular importance to evidence and credibility assessment are set out in [Table 3](#) ⁽⁴⁰⁾.

⁽³⁶⁾ 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, UNHCR, *Beyond Proof*, op. cit., fn. 19; 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*). For further information on the CREDO Project see fn. 3.

⁽³⁷⁾ 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 (hereinafter *UNHCR Handbook*). See also UNHCR, *Beyond Proof*, op. cit., fn. 19. For a list of UNHCR publications relevant to evidence and credibility assessment, see Section 2.2 of [Appendix E](#).

⁽³⁸⁾ The position of UNHCR is discussed in EASO, *An Introduction to the Common European Asylum System for Courts and Tribunals*, op. cit., fn., 7. Section 1.3.

⁽³⁹⁾ Ibid.

⁽⁴⁰⁾ On 23 September 2020 the European Commission unveiled a 'New Pact on Migration and Asylum'. Significant progress was made in relation to one aspect of the pact, namely, the creation of EUAA on 19 January 2022 by way of Regulation (EU) 2021/2303 (EUAA regulation). However, other key features of the pact, including new EU Regulations to replace the [QD \(recast\)](#), the [APD \(recast\)](#), and the [Dublin III regulation](#), remain the subject of ongoing consideration at the time of writing.





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
Family reunification directive ⁽⁴¹⁾	Article 5: Submission and examination of the application
	Article 11: Other evidence

⁽⁴¹⁾ [Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification](#), (OJ L 251, 03.10.2003) (hereinafter family reunification directive). Although this instrument does not form part of the CEAS, it has potential relevance to the question of qualification for international protection when issues of family relationships are at stake: see Section 5.5. Family relationships and evidence assessment of this judicial analysis for more detailed consideration of this instrument.



The CEAS in its present form (2nd phase instruments) is binding on all Member States with the exception of Denmark and Ireland. [Table 4](#) summarises the CEAS and other relevant instruments binding upon EU+ countries.

Table 4. The CEAS and other relevant instruments binding upon EU+

	CEAS 1st phase Instruments							CEAS 2nd phase instruments				Other secondary legislation				
	Temporary Protection Directive	Dublin II Regulation	Regulation on application of Dublin	Eurodac Regulation	RCD	APD	QD	Dublin III regulation	Eurodac Regulation (recast)	RCD (recast)	APD (recast)	QD (recast)	Family Reunification Directive	Long-Term Residence Directive	Returns Directive	EUAA regulation
EU Member States (except Denmark and Ireland)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
EEA States (Iceland, Norway, Switzerland)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Denmark																
Ireland	✓	✓	✓	✓		✓	✓	✓								

As is apparent in the table, Denmark consistently opted out of any Treaty provisions in the field of Justice and Home Affairs, including issues concerning asylum (Article 78 Treaty on the Functioning of the European Union (TFEU)). Consequently, Denmark does not participate and is not bound by the treaty provisions or any secondary legislation relating to the CEAS. The position of Ireland is different. Ireland is not bound by any instrument adopted pursuant to the Treaties in the field of asylum but can opt in to any such instrument if it so decides. As regards instruments that have particular relevance to evidence and credibility assessment, it can be seen from the table that Ireland opted into the QD, the APD and both the original and recast versions of the Dublin Regulation. It did not, however, opt into the QD (recast) or APD (recast)



but it continues to be bound by the provisions of the earlier instruments ⁽⁴²⁾. Ireland has not opted in to the EUAA regulation ⁽⁴³⁾.

Prior to 31 January 2020, the United Kingdom was an EU Member State and its courts and tribunals applied EU asylum law (except for the recast qualification and procedures directives (QD (recast) and APD (recast)). As from 31 January 2020, the United Kingdom ceased to be a Member State ⁽⁴⁴⁾) However, by virtue of domestic legislation implementing the EU–United Kingdom agreement ⁽⁴⁵⁾, the United Kingdom continued to apply EU law unless specifically revoked ⁽⁴⁶⁾. In the area of asylum law, the United Kingdom has revoked national legislation that had implemented the qualification directive and the Dublin III, Eurodac and EASO regulations ⁽⁴⁷⁾.

⁽⁴²⁾ It was held in CJEU, judgment of 10 December 2020, *M.S. v Minster for Justice*, C-616/19, EU:C:2020:1010, that Ireland was not precluded from enacting domestic legislation deeming an application for international protection inadmissible where the applicant benefits from subsidiary protection status in another Member State. The significance of the judgment lies in the fact that the relevant domestic legislation is in line with the wording of the [APD \(recast\)](#) (to which Ireland has not opted in) but not the wording of the original APD (to which Ireland has opted in).

⁽⁴³⁾ [EUAA regulation](#).

⁽⁴⁴⁾ [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#), 2019/C 384 I/01; UK Parliament, European Union (Withdrawal) Act 2018; and UK Parliament, European Union (Withdrawal Agreement) Act 2020.

⁽⁴⁵⁾ [Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#), 2019/C 384 I/02.

⁽⁴⁶⁾ The [EU \(Withdrawal\) Act 2018](#) ('the 2018 Act'), as amended by the [European Union \(Withdrawal Agreement\) Act 2020](#) ('the 2020 Act'), Section 6(7), creates a category of 'retained EU law', which includes UK legislation transposing directives as they had effect in domestic law immediately before 'exit day', namely 31 January 2020 (see [European Union \(Withdrawal\) Act 2018 \(Exit Day\) \(Amendment\) \(No 3\) Regulations 2019](#)).

⁽⁴⁷⁾ National legislation implementing the Dublin III, Eurodac and EASO regulations was revoked by the [Immigration, Nationality and Asylum \(EU Exit\) Regulations 2019](#), regulations 1–3. National law transposing the QD was revoked by the [Nationality and Borders Act 2022](#), Section 30(4).



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 and tribunals 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 has been given in *Asylum Procedures and the Principle of Non-refoulement - Judicial analysis* ⁽⁴⁸⁾.

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

3.1.1. Right to an effective remedy

Article 47 EU Charter guarantees the right to an effective remedy before a court or tribunal. Article 46 APD (recast) contains a specific guarantee of the right to an effective remedy in the context of appeals procedures. In several judgments concerning the interpretation of Article 46 APD (recast), the CJEU has expressly read Article 47 EU Charter in conjunction with Article 46 APD (recast) ⁽⁴⁹⁾.

Article 46(1) APD (recast) (titled 'Appeals Procedures') first identifies the types of decision against which the right to an effective remedy lies.

⁽⁴⁸⁾ EASO, *Asylum Procedures and the Principle of Non-Refoulement*, op. cit., fn., 7, Part 6.

⁽⁴⁹⁾ See: CJEU (GC), judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584 (hereafter CJEU (GC), 2018, *Alheto*); CJEU, order of 27 September 2018, *F.R.*, C-422/18, EU:C:2018:784 (hereafter CJEU, 2018, *F.R.*); CJEU, judgment of 19 March 2020, *P.G.*, C-406/18, EU:C:2020:216 (hereafter CJEU, 2020, *P.G.*); CJEU, judgment of 19 March 2020, *L.H.*, C-564/18, EU:C:2020:218 (hereafter, CJEU, 2020, *L.H.*); CJEU judgment of 9 September 2020, *J.P.*, C-651-19, EU:C:2020:681 (hereafter CJEU, 2020, *J.P.*).

**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;
- (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.

In *Sacko*, the CJEU held as follows:

[APD (recast)], in particular Articles 12, 14, 31 and 46 thereof, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the national court or tribunal hearing an appeal against a decision rejecting a manifestly unfounded application for international protection from dismissing the appeal without hearing the applicant where the factual circumstances leave no doubt as to whether that decision was well founded, on condition that, first, during the proceedings at first instance, the applicant was given

the opportunity of a personal interview on his or her application for international protection, in accordance with Article 14 [APD (recast)], and the report or transcript of the interview, if an interview was conducted, was placed on the case-file, in accordance with Article 17(2) [APD (recast)], and, second, the court hearing the appeal may order that a hearing be conducted if it considers it necessary for the purpose of ensuring that there is a full and ex nunc examination of both facts and points of law, as required under Article 46(3) [APD (recast)] ⁽⁵⁰⁾.

In *Alheto*, the CJEU held as follows:

Article 46(3) [APD (recast)], read in conjunction with Article 47 of the Charter, must be interpreted as meaning that the requirement for a full and ex nunc examination of the facts and points of law may also concern the grounds of inadmissibility of the application for international protection referred to in Article 33(2) [APD (recast)], where permitted under national law, and that, in the event that the court or tribunal hearing the appeal plans to examine a ground of inadmissibility which has not been examined by the determining authority, it must conduct a hearing of the applicant in order to allow that individual to express his or her point of view in person concerning the applicability of that ground to his or her particular circumstances ⁽⁵¹⁾.

Furthermore, the CJEU held that:

[T]he need to ensure that Article 46(3) [APD (recast)] has a practical effect and to ensure an effective remedy in accordance with Article 47 of the Charter requires that, in the event that the file is referred back to the quasi-judicial or administrative body referred to in Article 2(f) [APD (recast)], a new decision must be adopted within a short period of time and must comply with the assessment contained in the judgment annulling the initial decision ⁽⁵²⁾.

In *Torubarov*, the CJEU had to consider a situation where a national court had determined in the original appeal that an applicant should be granted international protection; annulled the decision refusing to grant protection; and remitted the matter to the original decision-maker for a fresh decision ⁽⁵³⁾. Notwithstanding that there had been no change in the substance or circumstances of the protection application since it was first refused, the decision-maker in the fresh decision failed to follow the finding by the national court that the applicant was entitled to international protection and again refused to grant international protection. An appeal against the fresh decision was made to the national court. The thrust of the CJEU's judgment was that the requirements of Article 46(3) APD (recast), in conjunction with Article 47 EU Charter, were such that the national court should, in effect, substitute its own finding that international

⁽⁵⁰⁾ CJEU, judgment of 26 July 2017, *Sacko*, C-348-16, EU:C:2017:591 (hereafter, CJEU, 2017, *Sacko*), para. 50

⁽⁵¹⁾ CJEU (GC), 2018, *Alheto*, op. cit., fn. 49., para. 130. More on the meaning of 'ex nunc examination' can be found in Section 3.1.2. Fact-finding by courts and tribunals.

⁽⁵²⁾ *Ibid.*, para. 149.

⁽⁵³⁾ CJEU, judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626 (hereafter CJEU, 2019, *Torubarov*).



protection should be granted for the fresh decision under appeal and must not allow any provision of national law to prevent it from doing so. The court ruled as follows:

Article 46(3) [APD (recast)], read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in circumstances, such as those at issue in the main proceedings, where a first-instance court or tribunal has found – after making a full and ex nunc examination of all the relevant elements of fact and law submitted by an applicant for international protection – that, under the criteria laid down by [QD (recast)], that applicant must be granted such protection on the ground that he or she relied on in support of his or her application, but after which the administrative or quasi-judicial body adopts a contrary decision without establishing that new elements have arisen that justify a new assessment of the international protection needs of the applicant, that court or tribunal must vary that decision which does not comply with its previous judgment and substitute its own decision for it as to the application for international protection, disapplying as necessary the national law that would prohibit it from proceeding in that way ⁽⁵⁴⁾.

Several other CJEU judgments issued in recent years have pronounced upon the interpretation and application of different aspects of Article 46 APD (recast), including: *Ahmedbekova* ⁽⁵⁵⁾; *Fathi* ⁽⁵⁶⁾; *P.G.* ⁽⁵⁷⁾; *L.H.* ⁽⁵⁸⁾ and *J.P.* ⁽⁵⁹⁾.

Article 46(3) APD (recast) does not prevent Member States from having appeal procedures that allow for courts or tribunals in addition to those of first instance to also conduct a full and ex nunc examination of both facts and points of law ⁽⁶⁰⁾.

⁽⁵⁴⁾ Ibid., para. 79.

⁽⁵⁵⁾ CJEU, judgment of 4 October 2018, *Ahmedbekova*, C-652/16, EU:C:2018/801 (hereafter, CJEU, 2018, *Ahmedbekova*). The CJEU considered the circumstances in which, to comply with Article 46(3) APD (recast), a court may be required to consider ‘further representations’ that are only raised for the first time on appeal.

⁽⁵⁶⁾ CJEU, judgment of 4 October 2018, *Fathi*, C-56/17, EU:C:2018/803 (hereafter, CJEU, 2018, *Fathi*). The CJEU held that Article 46(3) APD (recast) is to be interpreted as meaning that in the case of an appeal against the rejection of an application for international protection the court is not obliged to investigate whether the Dublin III regulation criteria have been applied correctly.

⁽⁵⁷⁾ CJEU, 2020, *P.G.*, op. cit., fn. 49. The CJEU delivered a judgment in line with its approach and ruling in the *Torubarov*, case. It also held that Article 46(3) APD (recast) does not preclude national legislation granting a period of sixty days to the court to decide an appeal against a decision rejecting an application for international protection, so long as that court is able to ensure, within that period, the effectiveness of the substantive rules and of the procedural guarantees granted.

⁽⁵⁸⁾ CJEU, 2020, *L.H.*, op. cit., fn. 49. Unlike the outcome in the *P.G.*, case, the CJEU held that Article 46(3) APD (recast) must be interpreted as precluding national legislation which only allows for a period of eight days to rule on an appeal against a decision declaring an application for international protection inadmissible. This is because the national court is not in a position to guarantee within such a period the effectiveness of the substantive and procedural guarantees which EU law grants to the applicant.

⁽⁵⁹⁾ CJEU, 2020, *J.P.*, op. cit., fn. 49. In this case the CJEU held that a ten-day limitation period for proceedings challenging a declaring a subsequent application for international protection to be inadmissible could, once certain basic requirements are met, be permissible under Article 46 APD (recast).

⁽⁶⁰⁾ See CJEU, judgment of 26 September 2018, *X and Y v Staatssecretaris van Veiligheid en Justitie*, C-180/17, ECLI:EU:C:2018/775 (hereafter, CJEU, 2018, *X and Y*), para. 26.



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 or tribunals needs to conduct a fact-finding function. In *Samba Diouf*, which considered Article 39 APD (the forerunner of Article 46 of the APD (recast)), 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’⁽⁶¹⁾.

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 CJEU has shed light on the meaning of a ‘full and *ex nunc* examination of both facts and points of law’ in a number of cases⁽⁶²⁾. It is apparent from the relevant CJEU case-law 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 consider all the evidence put forward by the parties up to that point and may, depending on national procedures, extend to the applicant the right 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.

The APD (recast) sets out a range of procedural guarantees to be enjoyed by applicants during the appeal procedure, as set out in [Table 5](#).

⁽⁶¹⁾ CJEU, judgment of 28 July 2011, *Samba Diouf*, C-69/10, EU:C:2011:524 (hereafter, CJEU, 2011, *Samba Diouf*), para. 69. This was reinforced in CJEU, 2018, *X and Y*, op. cit., fn. 60 para. 25, where the CJEU held that the obligation detailed in Article 46(3) APD (recast) ‘cannot, in the light of the objective of Directive 2013/32, be interpreted as requiring Member States to introduce a second level of jurisdiction, or to make provision for specific rules on the conduct of such appeals’.

⁽⁶²⁾ See: CJEU, 2017, *Sacko*, op. cit., fn. 50; CJEU (GC), 2018, *Alheto*, op. cit., fn. 49; CJEU, 2018, *Ahmedbekova*, op. cit., fn. 55; CJEU, 2019, *Torubarov*, op. cit., fn. 53.

**Table 5. 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)	<p>‘With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees:</p> <p>[...]</p> <p>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;</p> <p>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;</p> <p>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;</p> <p>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;’</p>
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’ ⁽⁶³⁾ .

⁽⁶³⁾ The latter requires courts and tribunals to have access to precise and up-to-date information obtained from various sources, such as EUAA 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.





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

It can be inferred from Article 47 EU Charter and Article 46 APD (recast) that the court or tribunal must also ensure that ‘applications for international protection are examined and decisions thereon are taken objectively and impartially’⁽⁶⁴⁾. 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 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 that the applicant has a proper opportunity to clarify, amend or add to their 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), (b) and (c) 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 concerning Article 39 APD (the forerunner to Article 46 APD (recast)), 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’⁽⁶⁵⁾. The court stressed that what is important is that ‘the reasons justifying the use of an accelerated procedure may be effectively challenged at a later stage before the national court and reviewed by it within the framework of the action that may be brought against the final decision closing the procedure relating to the application for asylum’⁽⁶⁶⁾.

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

⁽⁶⁴⁾ 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.

⁽⁶⁵⁾ CJEU, 2011, *Samba Diouf*, op. cit., fn. 61., paras 56 and 57.

⁽⁶⁶⁾ Ibid., para. 58. See also EASO, *Asylum Procedures and the Principle of Non-Refoulement*, op. cit., fn., 7, Subsections 5.1.2 and 6.1.3.1.





of law by obtaining evidence through the parties and/or by obtaining evidence themselves. The CJEU delivered a key judgment in relation to this matter in *Alheto* ⁽⁶⁷⁾. Amongst other issues for consideration in the judgment, the CJEU noted the following:

By its third question, the referring court asks, in essence, whether Article 46(3) [APD (recast)], read in conjunction with Article 47 of the Charter, must be interpreted as meaning that a court or tribunal of a Member State seised at first instance of an appeal against a decision on an application for international protection may take into account matters of fact or of law, such as the applicability of Article 12(1)(a) [QD (recast)] to the applicant's circumstances, which were not examined by the body that took that decision ⁽⁶⁸⁾.

In addressing this question, the CJEU stated:

[T]he words 'shall ensure that an effective remedy provides for a full and ex nunc examination of both facts and points of law' must, in order not to deprive them of their ordinary meaning, be interpreted as meaning that the Member States are required, by virtue of Article 46(3) [APD (recast)], to order their national law in such a way that the processing of the appeals referred to includes an examination, by the court or tribunal, of all the facts and points of law necessary in order to make an up-to-date assessment of the case at hand ⁽⁶⁹⁾.

Ultimately, the CJEU arrived at the following conclusion in relation to the question at hand:

Article 46(3) [APD (recast)], read in conjunction with Article 47 of the Charter, must be interpreted as meaning that a court or tribunal of a Member State seised at first instance of an appeal against a decision relating to an application for international

⁽⁶⁷⁾ CJEU (GC), 2018, *Alheto*, op. cit., fn. 49, para. 118. It should be noted that the ECtHR can in certain limited circumstances obtain materials *proprio 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*, No 1948/04., ECLI:CE:ECHR:2007:0111JUD000194804 (hereafter, ECtHR, 2007, *Salah Sheekh v the Netherlands*) 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 ECtHR's power to assess materials *proprio motu* was also considered in the more recent Grand Chamber judgment of 29 April 2022, *Khasanov and Rakhmanov v Russia*, Nos 28492/15 and 49975/15, para. 116. Although this judgment this concerned an extradition case, the applicable principles under Article 3 are the same.

⁽⁶⁸⁾ *Ibid.*, para. 102.

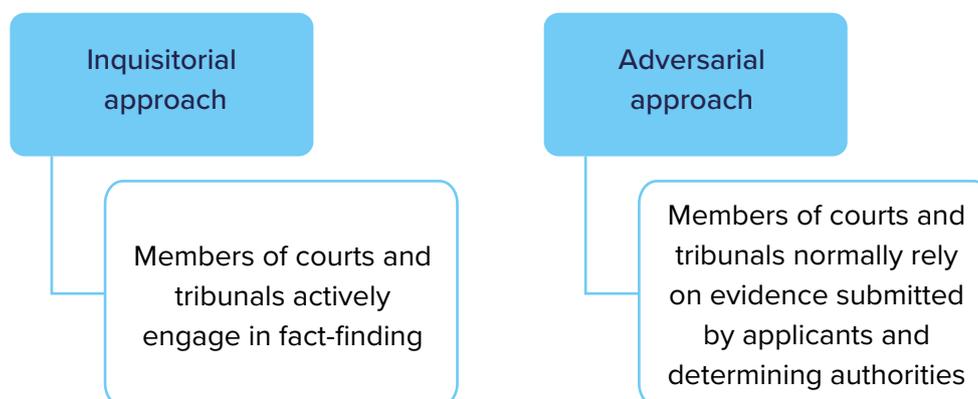
⁽⁶⁹⁾ CJEU (GC), 2018, *Alheto*, op. cit., fn. 49, para. 110.



protection must examine both facts and points of law, such as the applicability of Article 12(1)(a) [QD (recast)] to the applicant's circumstances, which the body that took that decision took into account or could have taken into account, and those which arose after the adoption of that decision ⁽⁷⁰⁾.

While it is clear that there is an obligation on courts and tribunals to make an up-to-date assessment of the case at hand, the source of relevant information is a separate matter and 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](#)).

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 national authorities and courts in this regard ⁽⁷¹⁾. The ECtHR states that:

[I]f an applicant chooses not to rely on or disclose a specific individual ground for asylum by deliberately refraining from mentioning it, be it religious or political beliefs, sexual orientation or other grounds, the State concerned cannot be expected to discover this ground by itself. However, considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and having regard to the position of vulnerability that asylum-seekers often find themselves in, if a Contracting State is made aware of facts relating to a specific individual that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States Parties under Articles 2 and 3 of the

⁽⁷⁰⁾ Ibid., para. 118. The CJEU reaffirmed this approach in CJEU, 2019, *Torubarov*, op. cit., fn. 53 (see, in particular, paras 51-54).

⁽⁷¹⁾ ECtHR, Grand Chamber (GC), judgment of 23 March 2016, *FG v Sweden*, No 43611/11, ECLI:CE:ECHR:2016:0323JUD00436111 (hereafter ECtHR (GC), 2016, *FG v Sweden*).



Convention entail that the authorities carry out an assessment of that risk of their own motion ⁽⁷²⁾.

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' ⁽⁷³⁾.

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 the power to direct or request one or both parties to adduce further evidence, including information about the general situation ⁽⁷⁴⁾. In others, members of courts or tribunals may have the power to obtain the evidence themselves, *proprio motu* ⁽⁷⁵⁾. In such a case, the principle of equality of arms dictates that the court or tribunal should inform the parties it has done so, affording them an opportunity to comment ⁽⁷⁶⁾. In this connection, some courts may even have access to information resources themselves ⁽⁷⁷⁾. 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.

⁽⁷²⁾ Ibid., para. 127.

⁽⁷³⁾ Ibid. See also paras 150-157.

⁽⁷⁴⁾ In Italy, the judge has the power to interact with the parties, to issue requests and to acquire information, if necessary, by directly accessing information on the general situation. This power is provided by Article 4(3) QD (recast) concerning the duty of the Member State to assess the relevant elements of the application in cooperation with the applicant. In the United Kingdom, the rules of procedure envisage that all evidence is submitted by the parties (see e.g. Tribunal Procedure Rules 2014, rules 4 and 14).

⁽⁷⁵⁾ See e.g. Article 86 of the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*) and Federal Administrative Court (Bundesverwaltungsgericht (BVerwG), Germany), judgment of 10 May 1994, No 9 C 434.93, in *Neue Zeitschrift für Verwaltungsrecht* 1994, p. 1123; for further details see 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 (Articles 39/2, § 1 and 39/62 of the [Act of 15 December 1980 on access to territory, stay, establishment and departure of foreigners](#)).

⁽⁷⁶⁾ The French Council of State requires that the parties be afforded the opportunity to comment on information obtained by the judge that falls outside of publicly available COI and which is likely to contradict the applicant's account on important facts: Council of State (Conseil d'État, 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 (Article R. 532-26 of the [Code on the entry and stay of foreigners and asylum law](#)).

⁽⁷⁷⁾ 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.



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 their 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 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⁽⁷⁸⁾. 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, a lower court or tribunal, or to itself remake the decision, it will usually require that they be shown to have a material effect on the outcome of the decision. See *Asylum Procedures and the Principle of Non-refoulement (judicial analysis)*⁽⁷⁹⁾.

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. 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 protection or subsidiary protection from fully presenting the grounds for their application. The right to an effective remedy may be breached if a determining authority disregards its obligation to state reasons for rejecting the application. Other factors, such as the lack of information on

⁽⁷⁸⁾ See recital 25 APD (recast).

⁽⁷⁹⁾ EASO, *Asylum Procedures and the Principle of Non-Refoulement*, op. cit., fn. 7.



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 being able to make 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 to 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 ⁽⁸⁰⁾.

3.3. Challenges

3.3.1. Difference from typical criminal and civil law settings

In an international protection case, the establishment of the past and present circumstances of the applicant will not be dispositive of the case. Rather, it can be seen as ‘Stage 1’ of a two-stage process. In the light of the material facts which are accepted, the decision-maker in the case of an international protection application must then, in ‘Stage 2’ of the process, determine whether the substantive conditions laid down in Articles 9 and 10 or Article 15 QD (recast) and related provisions are met ⁽⁸¹⁾. In other words, while the initial evidence and credibility assessment in an international protection application will centre on the establishment of past events that took place in the country of origin as well as the applicant’s present circumstances, the ultimate objective in an international protection case is to determine whether there is a possible future risk to an applicant that rises to a level that warrants the granting of international protection to that applicant ⁽⁸²⁾. While criminal and civil cases also entail the establishment of facts and a determination of whether those facts satisfy the requirements of the relevant law, a general point of difference with international protection cases is that the relevant law in criminal and civil cases will not usually focus on a possible future risk ⁽⁸³⁾.

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

⁽⁸⁰⁾ See Supreme Court (Tribunal Supremo, Spain), Cassation Appeal, judgment of 23 February 2015, appeal No 2944/2014.

⁽⁸¹⁾ The notion that the assessment of applications for international protection takes place in two separate stages is in line with the CJEU judgment in CJEU, 2012, *M.M.*, op. cit., fn. 31, para. 64. See also [Part 4. Specific principles and standards applicable to evidence and credibility assessment](#) of this judicial analysis.

⁽⁸²⁾ See EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7; High Court (Ireland), judgment of 17 January 2017, *ON v Refugee Appeals Tribunal & ors* [2017] IEHC 13, para. 63.

⁽⁸³⁾ It should be noted that in a narrow range of civil cases, issues of future risk can also arise, e.g. in a tort case involving risks that might materialise in the future.



whether an applicant has a well-founded fear of persecution or would face a real risk of serious harm if returned to their country of origin. In addition, international protection cases must be handled with particular caution and diligence, bearing in mind that mistakes can have grave implications, such as when an applicant is wrongfully returned to their country of origin and, as a consequence, exposed to persecution or serious harm ⁽⁸⁴⁾.

Asylum cases can also diverge from criminal and civil cases with respect to common evidentiary problems, such as the absence of documentary evidence. Where, pursuant to Article 4(1) QD (recast), a Member State applies the principle according to which it is the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection, applicants for international protection are responsible for presenting their reasons for applying for international protection and submitting all supporting evidence at their disposal. However, evidence in asylum cases, 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, destroyed, or cannot be obtained from the authorities of the country of origin. The latter is particularly the case where the authorities of the country of origin are the alleged actor of persecution and/or serious harm. This is 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

Article 10(5) APD (recast) provides that Member States 'shall provide for rules concerning the translation of documents relevant for the examination of applications'. Article 12(2) APD (recast) requires that guarantees available to applicants at the first instance stage (addressed in Chapter III APD (recast)) must also be available for appeals procedures (addressed in Chapter V APD (recast)). Amongst those guarantees is a requirement at Article 12(1)(b) APD (recast) that applicants 'shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary'.

Article 15(3) 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 for their applications in a comprehensive manner'. It is therefore mandatory to 'select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview' (Article 15(3)(c) APD (recast)). The interview must also '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,

⁽⁸⁴⁾ ECtHR, judgment of 21 January 2011, *MSS v Belgium and Greece*, No 30696/09, ECLI:CE:ECHR:2011:0121JUD003069609, para. 293, where the court underlined the importance of Article 3 ECHR and 'the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises'.



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. Wherever possible, Member States must ‘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’ (Article 15(3)(c) APD (recast))⁽⁸⁵⁾. 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⁽⁸⁶⁾ 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⁽⁸⁷⁾. It can also sometimes occur that interpreters may seek to go beyond their professional competence by offering their own opinion or evidence. Equally, members of courts and tribunals should be aware of the possibility of an unjustified challenge regarding the standard of interpretation.

Material that has been obtained through the use of remote, (or online, or videoconferencing) interpreting must be assessed with particular caution. A study designed specifically to measure interpreting quality in legal interviews showed that significant distortions were twice as likely to occur in remote interpreting compared to face-to-face interviewing⁽⁸⁸⁾.

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 their 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

⁽⁸⁵⁾ Supreme Administrative Court (Nejvyšší správní soud, Czech Republic), judgment of 30 June 2010, *AN v Ministry of Interior*, 9 Azs 17/2010-182.

⁽⁸⁶⁾ 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.

⁽⁸⁷⁾ See also UNHCR, *RSD Procedural Standards Unit 2.5: Interpretation in UNHCR RSD Procedures*, 26 August 2020.

⁽⁸⁸⁾ Braun, S., ‘Keep your distance? Remote interpreting in legal proceedings: A critical assessment of a growing practice’, *Interpreting*, Vol.15, No 2, 2013, pp. 200-228.





based on stereotypes about their presumed particular cultural or ethnic background, tradition, religion or gender ⁽⁸⁹⁾. If an applicant has not acted in conformity with a particular tradition or, for instance, has a relationship with someone from a different ethnic group or a different religion, their 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’ ⁽⁹⁰⁾.

See Section [6.4](#) for more on the impact of applicants’ cultural background on evidence and credibility assessment and Section [4.3.2](#). Objective and impartial assessment on the need for objectivity, impartiality and avoidance of conjecture or speculation in decision-making.

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 that applicants are unable to identify the exact time and/or date an event took place. It should also be noted that a different calendar may be used in some countries. 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.

⁽⁸⁹⁾ See e.g. Supreme Administrative Court (Nejvyšší správní soud, 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 (Article 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’).

⁽⁹⁰⁾ Court of Session (Outer House, Scotland, United Kingdom), 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 procedural 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, in accordance with Article 14(1) APD (recast), ‘the personnel of that other authority shall receive in advance the relevant training which shall include the elements listed in Article 6(4)(a) to (e) of Regulation (EU) No 439/2010.’ Article 14(1) APD (recast) also provides that ‘[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’. 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 their country of origin. Such a fear of authority figures may extend to the persons conducting personal interviews which may impact the applicant’s ability and willingness to engage and respond in an interview setting ⁽⁹¹⁾ (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 or an inability to recall and/or recount such an event in an interview setting (see Section [6.2](#)). Anger is also a possible

⁽⁹¹⁾ *UNHCR Handbook*, op. cit., fn. [37](#), para. 198.



response⁽⁹²⁾. Questions of a sensitive nature include, but are not limited to, those relating to gender-based violence such as sexual violence including rape⁽⁹³⁾, 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 personal identity and, in particular, his sexuality, 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’⁽⁹⁴⁾. 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 orientation, gender identity or vulnerability’ (Article 15(3)(a) APD (recast))⁽⁹⁵⁾. 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))⁽⁹⁶⁾.

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. Multidisciplinary approach to the assessment of evidence and credibility](#).

3.3.4.2. Factors affecting the court or tribunal member

3.3.4.2.1. Assumptions and personal beliefs

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

⁽⁹²⁾ Tuomisto Martti T. and Roche J. E., ‘Beyond PTSD and Fear-Based Conditioning: Anger-Related Responses Following Experiences of Forced Migration—A Systematic Review’, *Frontiers in Psychology*, Vol. 9, 2018, p. 2592; Grey, N., Holmes, E., and Brewin, C. ‘Peritraumatic Emotional ‘Hot Spots’ In Memory’, *Behavioural and Cognitive Psychotherapy*, Vol. 29, No 3, 2001, pp. 367-372. See also Hoffman J., Liddell B., Bryant R. A., Nickerson A., ‘The relationship between moral injury appraisals, trauma exposure, and mental health in refugees’, *Depression and Anxiety*, 2018 Vol. 35(11), pp.1030-1039, showing that exposure to ‘morally injurious events’ whether enacted by the self or another person, predicted scores on a reliable scale of ‘anger reactions’.

⁽⁹³⁾ Supreme Administrative Court (Nejvyšší správní soud, Czech Republic), *AN v Ministry of Interior*, 9 Azs 17/2010-182. op. cit., fn. 85.

⁽⁹⁴⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 69. See also Council for Aliens Law Litigation (Raad voor Vreemdelingenbetwistingen/Conseil du contentieux des étrangers (RVV/CCE, Belgium), decision of 12 January 2017, No [180657](#) (hereafter Council for Aliens Law Litigation (RVV/CCE, Belgium) 2017, No [180657](#)).

⁽⁹⁵⁾ 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 (Vrhovno sodišče, Slovenia), judgment of 18 October 2012, I U.P. 471/2012, paras 10-16 (see [EDAL English summary](#)); and High Administrative Court (Verwaltungsgerichtshof, Austria), judgment of 17 April 2007, VwGH 2006/19/0675 (see [Edal English summary](#)).

⁽⁹⁶⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 70. The same point was underscored by the CJEU in 2018, *F*, op. cit., fn. 20, para 41.



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. Similarly distressing or even traumatic experiences in one's own history can affect how others' experiences are heard.

3.3.4.2.2. *Stereotypes*

A robust finding in social psychology and other relevant disciplines is that all 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. 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⁽⁹⁷⁾. We all need stereotypes to categorise and make sense of the world. The answer is not to deny stereotypes, but to be aware of them, to question them, and to aim to bring in multi-disciplinary research findings, and a structured methodology⁽⁹⁸⁾. Court and tribunal members 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. 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.

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 Section [4.3.2](#).

3.3.4.2.3. *Compassion fatigue*

Importantly, where members of courts and tribunals have a high international protection-related 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'⁽⁹⁹⁾. 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](#). Emotion at the oral hearing).

⁽⁹⁷⁾ 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.

⁽⁹⁸⁾ IARLJ, *Assessment of Credibility*, CREDO project, op. cit., fn. 36, Part II; and UNHCR, *Beyond Proof*, op. cit., fn. 19, 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. Multidisciplinary approach to the assessment of evidence and credibility](#) of this judicial analysis, in its judgment in Administrative Court (Upravno sodišče, Slovenia), judgment of 24 April 2015, I U 411/2015-57, paras 98-109.

⁽⁹⁹⁾ 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.), *Compassion fatigue: Coping with secondary traumatic stress disorder in those who treat the traumatized*, New York: Brunner/Mazel, 2013.



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, any appeal is 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 EU Charter underlines the requirement to respect and protect the human dignity of each individual.

3.4.1. The conduct of a ‘facts and law’ hearing

By virtue of Article 46(3) APD (recast), Member States must ensure a full and *ex nunc* examination of both facts and points of law at least in appeals procedures before a court or tribunal of first instance. In other words, at least in appeals procedures of first instance, courts and tribunals must conduct appeal hearings on a *de novo* basis and have jurisdiction to receive evidence and determine whether international protection should be granted or not. For courts and tribunals with such a jurisdiction, there are some fundamental points that should be borne in mind as regards the conduct of such hearings ⁽¹⁰⁰⁾.

In the first place, the court or tribunal should ensure that such an appeal hearing is conducted in a sensitive manner. Questioning of an applicant for international protection, whether by their own legal representative, by the representative for the determining authority or by the court or tribunal itself, should be of an open and neutral kind. Furthermore, questioning should be thorough enough to give an applicant a fair opportunity to convey the detail of their application for international protection ⁽¹⁰¹⁾.

Secondly, the court or tribunal should ensure that the applicant has an opportunity to give an explanation regarding any apparent deficiencies, and/or any inconsistencies or contradictions in the applicant’s statements. An adverse credibility finding based on an inconsistency or

⁽¹⁰⁰⁾ It should be noted that this section only seeks to give broad guidance on the practical application in appeal hearings of fundamental principles that emerge from the CEAS instruments and related CJEU jurisprudence. The points made in this section are informed in particular by aspects of the [APD \(recast\)](#). The [APD \(recast\)](#) contains some specific requirements that are to be applied by courts and tribunals when dealing with facts and law, namely: those set out in Article 12(1)(b) – (e) (by virtue of Article 12(2)); those identified in Articles 20 – 26 as having application to Chapter V procedures (appeals procedures); and those identified in Articles 20 – 26 and 29 – 30 as applying to all aspects of the procedures, which must include appeals. In addition, there are requirements, which, although only stated to rest on the determining authority, would appear to apply by analogy, *ceteris paribus*, to courts and tribunals, in particular those set out in Article 10 [APD \(recast\)](#) (which comes within Chapter II, which sets out Basic Principles and Guarantees).

⁽¹⁰¹⁾ The fundamental importance of the right to be heard (which is connected to concepts of fairness and equality of arms) was underscored by the CJEU in CJEU, 2012, [M.M.](#), op. cit., fn. 31, paras 85-89. The point was further emphasised by the CJEU in CJEU, judgment of 9 February 2017, [M. v Minister for Justice and Equality, Ireland, Attorney General](#), C-560/14, EU:C:2017:101 (hereafter CJEU, 2017, [M.](#)), para. 25. In CJEU, judgment of 5 November 2014, [Sophie Mukairubega v Préfet de police](#), C-166/13, ECLI:EU:C:2014:3366 (hereafter CJEU, 2014, [Mukairubega](#)), para. 46, the CJEU held that ‘[t]he right to be heard 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’. The CJEU reiterated this position in CJEU, judgment of 11 December 2014, [Khaled Boudjrida v Préfet des Pyrénées-Atlantiques](#), C-249/13, ECLI:EU:C:2014:2431 (hereafter CJEU, 2014, [Boudjrida](#)), para. 36.



deficiency in an applicant's account will lack the quality of fairness if the applicant has not been given a chance to explain any perceived inconsistency or deficiency and have that explanation carefully evaluated by the court or tribunal before the making of that adverse credibility finding ⁽¹⁰²⁾.

A final point of fundamental importance is for the court or tribunal to ensure that there is an up-to-date assessment of the applicant's claim for international protection by, in particular, ensuring that regard is had to current, relevant COI and that any such COI is put to the applicant for any comment that they may have ⁽¹⁰³⁾. See also Section 4.8.4.1. Obtaining COI and equality of arms for more on the obtaining of COI by courts or tribunals and the principle of equality of arms.

3.4.2. Remote hearings

'Remote hearings' may be defined as hearings in which one or more of the participants in a hearing joins the hearing by way of an audio or audiovisual device. Remote hearings can either be purely remote or 'hybrid'. In the latter situation, there is a face-to-face hearing combined with participation by one or more party remotely. The use of this form of hearing was accelerated in many EU+ countries (including both those with 'law' and 'facts and law' jurisdictions in the context of international protection applications) by the exigencies of the COVID-19 pandemic that took hold in early 2020. Even in the event of a gradual return to conditions that existed before the advent of the COVID-19 pandemic, it would seem likely that many EU+ countries will retain remote hearings to at least some extent ⁽¹⁰⁴⁾.

The use of such hearings in the context of international protection claims has been seen to present some challenges, including the following:

- applicants may face technological difficulties joining such hearings, including joining the hearing in the first place; risks of technical hitches or 'drop out' affecting the communication of testimony and submissions; and a lack of 'flow' to testimony and

⁽¹⁰²⁾ CJEU, 2017, *M*, op. cit., fn. 101, paras 36-37.

⁽¹⁰³⁾ Article 10(4) *APD (recast)* requires that courts or tribunals shall have access to general information referred to in Article 10(3)(b), which includes '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 applicant and, where necessary, in countries through which they have transited'. Article 46(3) *APD (recast)* requires that '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 *[QD (recast)]*, at least in appeals procedures before a court or tribunal of first instance'.

⁽¹⁰⁴⁾ Two publications, namely EASO, *Practical recommendations on conducting the personal interview remotely*, May 2020 and UNHCR, *Remote Interviewing: Practical Considerations for States in Europe*, June 2020, that are aimed at first-instance decision-makers show that remote personal interviews became a significant feature of first-instance decision-making as a result of the Covid-19 pandemic. At appeal level, there is some evidence of a reluctance to embrace remote hearings, at least in the early stages of the Covid-19 pandemic. Reporting on events in 2020, EASO Asylum Report 2021 states, at 'Section 4.5 Processing asylum applications at second or higher instance', that '[d]espite the advantages of remote hearings, countries continued to prefer in-person hearings, as evidenced by the fact that as soon as lockdown restrictions were lifted, courts predominantly used in-person hearings again'. See also *Asylum Interviews*, UK Home Office, 3 June 2021, pp.22-24.



submissions by reason of technological delays and glitches. These difficulties may impair the ability to build and establish trust and promote a conducive interview setting;

- compared to ‘in-person’ hearings, applicants will be at a potential disadvantage in not being able to maximise any positive influence their presence might bring to bear on the provision of their testimony ⁽¹⁰⁵⁾;
- someone, whether a hearing participant or member of the public, may make and use an unauthorised audio or video recording. This may be feared particularly by asylum-seekers from oppressive regimes;
- applicants requiring the use of an interpreter may face additional difficulties in adequately conveying their testimony to the decision-maker; and,
- the overall persuasiveness of any testimony and submissions advanced in support of an application for international protection will be diminished and attenuated by virtue of being delivered ‘through a screen’ ⁽¹⁰⁶⁾.

In the context of remote hearings, decision-makers should take particular caution against using appearance and demeanour to inform credibility assessment. Academic studies have shown that remote hearings can introduce adverse effects ⁽¹⁰⁷⁾ and that factors including the camera framing (close up/head only/whole upper body) can affect credibility judgments ⁽¹⁰⁸⁾. Furthermore, recent field-based research in Europe suggests that there may be particular risks for ‘unrepresented and vulnerable parties’ ⁽¹⁰⁹⁾.

Guidance that has been issued to judges and tribunal members conducting remote or hybrid hearings has emphasised a number of practical points that seek to mitigate potential downsides of remote hearings, including:

- allowing more time in estimating the length of time needed to complete a remote hearing;

⁽¹⁰⁵⁾ It should be noted, however, that, as set out in Section 4.5.5, Demeanour of the judicial analysis, use of demeanour as a credibility indicator is to be avoided in virtually all situations. Thus, a correct application of established credibility indicators would suggest that the concern documented here is not well-founded. To put it another way, an applicant should not expect that a positive demeanour will have a positive bearing on the assessment of their credibility.

⁽¹⁰⁶⁾ These points are derived from concerns identified in the following: Outcome of ‘Stakeholder Engagement Process’ conducted by the International Protection Appeals Tribunal (IPAT), Ireland, the findings of which were presented at an IPAT members’ training day on 17 July 2020.; Judicial College (United Kingdom), [Good Practice for Remote Hearings](#), May 2020; Equal Treatment Bench Book (United Kingdom), Equal Treatment Bench Book, February 2021, Appendix E Remote Hearings.

⁽¹⁰⁷⁾ E.g. an analysis of immigration removal hearings in the USA showed that detainees seen over a video link were more likely to be deported than those heard in person. Interestingly this was not due to the attitude or rulings of the judges, but to the ‘disengagement’ of people only present by video. Eagly, I.V., Remote adjudication in immigration, Northwest. University Law Review, 2015, Vol. 933, No 4, pp. 933-1020.

⁽¹⁰⁸⁾ Landstrom, S., Granhag, P. A., and Hartwig, M., ‘Children’s live and videotaped testimonies: How presentation mode affects observers’ perception, assessment and memory’, *Legal and Criminological Psychology*, Vol. 12, 2007, pp.333-347.

⁽¹⁰⁹⁾ Sanders, A., 2021, *Video-Hearings in Europe Before, During and After the COVID-19 Pandemic*, International Journal for Court Administration, 12(2), p.3.



- including more breaks than would be the case for ‘in-person’ hearings in order to take account of the fact that a greater degree of concentration and focus is required for such hearings in comparison to ‘in-person’ hearings; and,
- taking greater care to explain, monitor and control ‘turn-taking’ than would be the case for conventional ‘in-person’ hearings ⁽¹¹⁰⁾.

3.4.3. 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 several international and European documents, such as the 2002 Bangalore Principles of Judicial Conduct ⁽¹¹¹⁾. These Principles recall six main values on which judicial conduct should be based (see [Table 6](#)).

Table 6. 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) ⁽¹¹²⁾. For instance, Opinion No 1 is devoted, inter alia,

⁽¹¹⁰⁾ UK Judicial College, Good Practice for Remote Hearings, May 2020. See also [Key Procedural Considerations on the Remote Participation of Asylum-Seekers in the Refugee Status Determination Interview](#), which also includes an Annex: Remote RSD Interviewing Checklist.

⁽¹¹¹⁾ The [Bangalore Principles of Judicial Conduct](#), op. cit., fn. 97, 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.

⁽¹¹²⁾ The opinions of the Consultative Council of European Judges are available at: http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp.



to the standards concerning the independence of the judiciary (including its impartiality) ⁽¹¹³⁾, Opinion No 3 addresses ethics of judges ⁽¹¹⁴⁾, Opinion No 6 is on fair trial within a reasonable time ⁽¹¹⁵⁾, Opinion No 11 discusses the quality of judicial decision ⁽¹¹⁶⁾, and Opinion No 15 focuses on the specialisation of judges ⁽¹¹⁷⁾.

The values and principles outlined above have been emphasised by the CJEU in a number of judgments in recent years concerning the judiciary in Poland. In *LM*, the CJEU held that '[i]n accordance with Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law' ⁽¹¹⁸⁾. In *European Commission v. Republic of Poland*, the CJEU held that the:

[R]equirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded ⁽¹¹⁹⁾.

In *A.B. and Others*, the CJEU held that:

[T]he guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it ⁽¹²⁰⁾.

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

⁽¹¹³⁾ Consultative Council of European Judges, *Opinion No 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges*, 2001.

⁽¹¹⁴⁾ 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.

⁽¹¹⁵⁾ 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.

⁽¹¹⁶⁾ Consultative Council of European Judges, *Opinion No 11 on the Quality of Judicial Decisions*, 2008.

⁽¹¹⁷⁾ Consultative Council of European Judges, *Opinion No 15 on the Specialisation of Judges*, 2012. See also: *Opinion No 21 on Preventing Corruption Among Judges*, 2018; *Opinion No 22 on the Role of Judicial Assistants*, 2019; *Opinion No 23 on the role of associations of judges in supporting judicial independence*, 2020; *Opinion No 24 on the Evolution of the Councils for the Judiciary*, 2021.

⁽¹¹⁸⁾ CJEU (GC), judgment of 25 July 2018, *LM*, C-216/18, ECLI:EU:C:2018:586 (hereafter CJEU (GC), 2018, *LM*) para. 50.

⁽¹¹⁹⁾ CJEU (GC), judgment of 5 November 2019, *European Commission v Republic of Poland*, C-192/18, ECLI:EU:C:2019:924 (hereafter CJEU (GC), 2019, *Republic of Poland*) para. 106.

⁽¹²⁰⁾ CJEU (GC), judgment of 2 March 2021, *A.B. and Others*, C-824/18, ECLI:EU:C:2021:153 (hereafter CJEU, 2021, *A.B. and Others*) para. 117.



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 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⁽¹²¹⁾. This may be particularly pertinent in the context of oral hearings. Findings of the aforementioned research, which studied international protection interviews, indicate that interviewers’ qualities of empathy, patience, acceptance and non-judgemental listening emerged as the strongest factor in either facilitating or impeding disclosure⁽¹²²⁾.

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 they would if the case was being dealt with in a written procedure. 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.

A systematic review⁽¹²³⁾ has explored how rapport is used in information gathering, including in legal contexts by examining studies of specific verbal, non-verbal and para-verbal (e.g. tone of voice) behaviours and examining their effects in terms of the amount and accuracy of information elicited⁽¹²⁴⁾.

⁽¹²¹⁾ Bögner, D., Brewin, C., and Herlihy, J., ‘Refugees’ Experiences of Home Office Interviews: A Qualitative Study on the Disclosure of Sensitive Personal Information’, *Journal of Ethnic and Migration Studies*, 2009, p. 525. See also Memon, A., Meissner, C. A., and Fraser, J., ‘The Cognitive Interview: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years’, *Psychology, Public Policy, & Law*, 2010, pp. 340-372.

⁽¹²²⁾ *Ibid.*, Bögner, D., Brewin, C., and Herlihy, J., p. 525.

⁽¹²³⁾ See [Part 6. Multidisciplinary approach to the assessment of evidence and credibility](#).

⁽¹²⁴⁾ Gabbert, F., Hope, L., Luther, K., Wright, G. R. T., Ng, M., and Oxburgh, G., ‘Exploring the use of rapport in professional information gathering contexts by systematically mapping the evidence base’, *Applied Cognitive Psychology*, Vol.35, No 2, 2021 (hereafter Gabbert and others, *Applied Cognitive Psychology* 2021), pp. 329-341. Thirty-five studies were included in the review, of which 28 focused on investigative interviews in the criminal justice context. The authors note that most of the studies found are ‘Western-centric’ (p.339) and caution should be applied when applying them across different cultures (see [Section 6.4. Cultural differences](#) in this document for ways in which cultures can differ). An ongoing project is mapping the results of studies of rapport-building, showing ‘what works best’, in terms of the amount and accuracy of information gathered – see a [guide to the searchable materials](#).



Across the studies identified, the three key methods to build rapport include:

1. Relationship-building (showing an interest in them as a person, the use of the person's preferred name).
2. Presenting an approachable demeanour (smiling, use of open body language, and using an appropriate (not hostile) tone of voice).
3. Paying attention (active listening, empathic responses, eye contact (with awareness of cultural appropriateness) and head nodding).

These behaviours were shown to improve the amount and accuracy of information disclosed.

In an oral hearing it can be useful to have a conscious awareness of such directed behaviours ⁽¹²⁵⁾. At the same time, the above-mentioned 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.

3.4.4. Emotion at the oral hearing

Of possible relevance is research regarding the subject of emotion and the law ⁽¹²⁶⁾. 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) ⁽¹²⁷⁾ and respond differently (e.g. anger/irritation). Such presentations may be a poor indicator for the credibility of the claim ⁽¹²⁸⁾.

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 and when considering cases before them in purely written procedures. It is one aspect of taking 'reasonable steps to

⁽¹²⁵⁾ The authors propose: 'Contemplating the underlying intention of a behavior may be helpful when training people how to build rapport for the purpose of information elicitation, as with this information in hand, interviewers can select which behaviors are likely to be most effective for achieving a particular goal or outcome', whilst also noting that such behaviours need to be used with care as, for example, 'displaying signs of attentiveness without really listening, or over-using rapport behaviors, may quickly appear disingenuous or insincere' Gabbert and others, *Applied Cognitive Psychology* 2021 op. cit., fn. 124, p.338.

⁽¹²⁶⁾ Maroney, T., 'Emotional Regulation and Judicial Behavior', *California Law Review*, 2011, pp. 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'.

⁽¹²⁷⁾ Kaufmann, G., Drevland, G. C. B., Wessel, E., Overskeidand, G., and Magnussen, S., 'The Importance of Being Earnest: Displayed Emotions and Witness Credibility', *Applied Cognitive Psychology*, 2003, pp. 21-34.

⁽¹²⁸⁾ See e.g. *ibid.* Kaufmann et. al. 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.



maintain and enhance the judge's knowledge, skills, and personal qualities necessary for the proper performance of judicial duties' ⁽¹²⁹⁾.

3.4.5. Manner of decision-making

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 ⁽¹³⁰⁾.

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* ⁽¹³¹⁾. 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 ⁽¹³²⁾.

3.4.6. 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 providing untruthful accounts of persecution. The effects of repeatedly hearing distressing

⁽¹²⁹⁾ The *Bangalore Principles of Judicial Conduct*, op. cit., fn. 97, 6.3. See also Consultative Council of European Judges, *Opinion No 15*, op. cit., fn. 117.

⁽¹³⁰⁾ See Kahneman, D., *Thinking, Fast and Slow*, Penguin Books Ltd, 2011 for a useful summary of the research. See also Evans Cameron, H., *Refugee Law's Fact-Finding Crisis*, Cambridge University Press, 2018, p.37 for a discussion of the use of 'gut feeling' in decision-making in a context of 'radical uncertainty'.

⁽¹³¹⁾ Hungarian Helsinki Committee, *Credibility Assessment Training Manual, Vol. 1*, op. cit., fn. 36, pp. 129-140.

⁽¹³²⁾ UNHCR, *Beyond Proof*, op. cit., fn. 19, p. 77. Internal references originally in this excerpt refer to: Thomas, R., *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication*, Hart Publishing, 2011 p. 166; Millbank, J., "The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations', *International Journal of Refugee Law (IJRL)*, 2009, vol. 21, No 1; Macklin, A., *Truth and Consequences: Credibility Determination in the Refugee Context*, 3rd Conference, IARLJ, 1998, pp. 134-140; Graycar, R., 'The gender of judgements: an introduction', in Thornton, M., (ed.), *Public and Private: Feminist Legal Debates*, OUP, 1995, p. 267.



material have been documented in a wide range of professionals, including members of courts and tribunals ⁽¹³³⁾ as well as lawyers ⁽¹³⁴⁾ (see also Section 3.3.4.2 concerning ‘compassion fatigue’).

It is useful to distinguish the different ways that distressing material can affect decision-makers. The term ‘compassion fatigue’ is used to describe a range of effects. The occupational exhaustion and cynicism of ‘burnout’ is something that can occur in many jobs. Secondary traumatic stress or secondary traumatisation captures the occurrence of feelings and behaviours similarly to those seen in post-traumatic stress disorder – repeated intrusive memories or thoughts about applicants or efforts to avoid reminders of their accounts. Vicarious traumatisation describes more gradual shifts in thinking and beliefs about the world – it seems a more dangerous, or unjust place ⁽¹³⁵⁾.

Decision makers, including members of courts and tribunals, need to be aware of these potential effects ⁽¹³⁶⁾ and find appropriate ways of managing them ⁽¹³⁷⁾.

⁽¹³³⁾ See e.g. Edwards, C.P., and Miller, M.K., ‘An assessment of judges’ self-reported experiences of secondary traumatic stress’, *Juvenile and Family Court Journal*, Vol. 70, No 2, 2019, pp. 7-29; See e.g. 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*’, JRS, 2002, pp. 43-70; Jaffe, P. ‘Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice’, *Juvenile and Family Court Journal*, 2003, pp. 1-9; 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*, Documentation Center of Cambodia, 2011.

⁽¹³⁴⁾ See study and useful review in Weir, P., Jones, L. and Sheeran, N., ‘Australian lawyers’ experience of exposure to traumatic material: a qualitative study’, *Psychiatry, Psychology and Law*, 2020; Westaby, C., ‘“Feeling like a Sponge”: The Emotional Labour Produced by Solicitors in their Interactions with Clients Seeking Asylum’, *International Journal of the Legal Profession*, 2010, pp. 153-174.

⁽¹³⁵⁾ See the introduction to Iversen, S., and Robertson, N., ‘Prevalence and predictors of secondary trauma in the legal profession: a systematic review’, *Psychiatry, Psychology and Law*, 2021. Note that these authors also point to ‘significant variability between [the studies reviewed] making systematic comparisons challenging, as well as the need for further conceptually consistent and scientifically robust studies.’

⁽¹³⁶⁾ Board Members in Rousseau et al.’s study, ‘*The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board*’, JRS, 2002, op. cit., fn. 136 were observed employing humour to laugh off accounts, 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.

⁽¹³⁷⁾ 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. 36, Chapter VIII. See also Snider, K.M., Devereux, P.G., and Miller, M.K., ‘Judges’ emotion: an application of the emotion regulation process model’, *Psychiatry, Psychology and Law*, 2021, on ways that judges report managing emotion in the courtroom; and Raynor, D., and Hicks, R., ‘Empathy and coping as predictors of professional quality of life in Australian Registered Migration Agents (RMAs)’, *Psychiatry, Psychology and Law*, Vol. 26, No 4, 2019, pp. 530-540, for how maladaptive cognitive, emotional and behavioural methods of coping may predict levels of burnout and, conversely, high levels of empathy and adaptive coping were associated with professional satisfaction.



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 assessment 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), some of 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 the directive's context and purpose ⁽¹³⁸⁾.

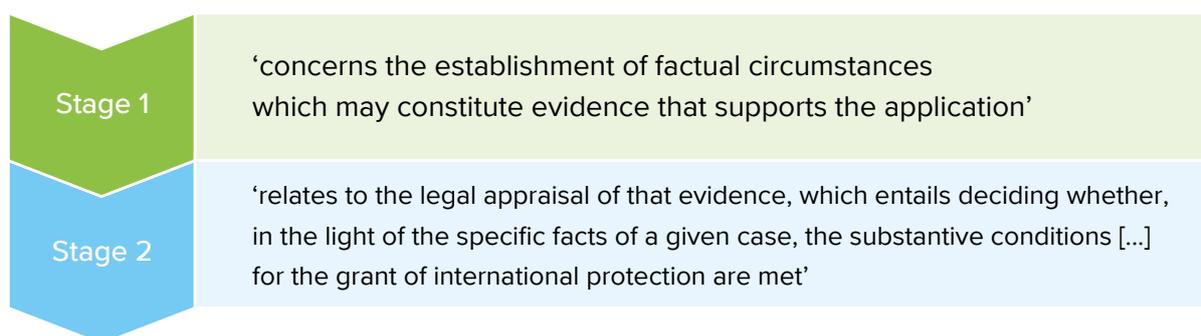
⁽¹³⁸⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18. See also EASO, *An Introduction to the Common European Asylum System for Courts and Tribunals*, op. cit., fn. 7.



The reference to ‘Member States’ in Article 4 includes all levels of decision-making within a State, including the judiciary ⁽¹³⁹⁾. 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 *M.M.*, the ‘assessment’ of applications for international protection takes place in **two separate stages** ⁽¹⁴⁰⁾. This two-stage assessment is detailed in [Figure 2](#).

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 EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU), 2022* ⁽¹⁴¹⁾.

The checklists in [Appendix A. Checklists](#) may provide further assistance on how to go about this assessment.

⁽¹³⁹⁾ For example, in Germany, federal law sets out obligations on 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 (BVerwG, Germany) has e.g. referred to Article 4 QD (now Article 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 Article 4(3)(e) QD by asserting the Armenian citizenship (Federal Administrative Court (BVerwG, Germany), judgment of 29 May 2008, No 10 C 11.07, BVerwG:2008:290508U10C11.07.0, para. 34).

⁽¹⁴⁰⁾ CJEU, 2012, *M.M.*, op. cit., fn. [31](#), paras 64 and ff.

⁽¹⁴¹⁾ EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU), 2022*, op. cit., fn. 7, Section 1.5.1.



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' ⁽¹⁴²⁾. 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 the mandatory effect flows from the national law provision. 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** ⁽¹⁴³⁾. The concrete elements needed to substantiate the application are stated in Article 4(2) QD (recast) (see Section [4.2.4](#)). Where a Member State imposes a duty of substantiation, the applicant is obliged to take positive steps to support their 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](#)), 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 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](#)).

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 ⁽¹⁴⁴⁾.

⁽¹⁴²⁾ Emphasis added.

⁽¹⁴³⁾ UNHCR, *Beyond Proof*, op. cit., fn. 19, p. 85; 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*, 3rd edn, C. H. Beck, 2022, p. 1252, Article 4, para. 8.

⁽¹⁴⁴⁾ ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 92, as well as paras 96-97. See also ECtHR (GC), 2022, *Khasanov and Rakhmanov v Russia*, op. cit., fn. 67, para. 110.



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 submit as soon as possible all the elements needed to ‘substantiate’ the application** ⁽¹⁴⁵⁾. 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 makes clear in its *M.M.* judgment that the applicant’s duty is to submit all elements needed to ‘substantiate’ the application for international protection ⁽¹⁴⁶⁾. In *EZ*, the CJEU stated that:

[...] it cannot be found that it is for the applicant for international protection to prove the connection between the reasons mentioned in Article 2(d) and Article 10 [QD (recast)] and the prosecution and punishment which he or she will face as a result of his or her refusal to perform military service in the circumstances referred to in Article 9(2)(e) of that directive. Such a burden of proof would be inconsistent with the detailed rules for the assessment of applications for international protection, as set out in Article 4 [QD (recast)]. First, as was recalled in paragraph 52 of the present judgment, Article 4(1) of that directive allows only Member States to place the onus on the applicant ‘to submit as soon as possible all the elements needed to substantiate the application for international protection’ and places on Member States the onus of assessing the relevant elements of the application. Second, as the Advocate General noted in point 70 of her Opinion, Article 4(5) of Directive 2011/95 acknowledges that an applicant may not always be able to substantiate his or her claim with documentary or other evidence and lists the cumulative conditions under which such evidence is not required. In that regard, the reasons for the refusal to perform military service and, consequently, the prosecution to which it exposes the conscript constitute subjective elements of the application in respect of which it may be particularly difficult to adduce direct evidence ⁽¹⁴⁷⁾.

Without stating whether their observation applied more generally, the CJEU stated in *NB and AB* in the context of Article 4(1) QD, together with Article 12(1)(a) QD (recast) that:

[A]lthough under Article 4(1) [QD] it is the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection, the Court has clarified that the authorities of the Member States must, if necessary, cooperate actively with him or her in order to determine and supplement the relevant elements of the application, those authorities indeed often being better placed than an applicant to gain access to certain types of documents ⁽¹⁴⁸⁾.

⁽¹⁴⁵⁾ Dörig, H., op. cit., fn. 143, p. 1252, Article 4, para. 7.

⁽¹⁴⁶⁾ CJEU, *M.M.*, op. cit., fn. 31, para. 65.

⁽¹⁴⁷⁾ CJEU, judgment of 19 November 2020, *EZ v Bundesrepublik Deutschland*, C-238/19, ECLI:EU:C:2020:945 (hereafter CJEU, 2020, *EZ*), paras 54-55.

⁽¹⁴⁸⁾ CJEU, judgment of 3 March 2022, *NB and AB v SSHD*, C-349/20, ECLI:EU:C:2022:151 (hereafter, CJEU, 2022, *NB and AB*), para. 64. It should be noted that the case concerned the original QD rather than the recast version; however, there is no difference between the two versions as regards the text of Article 4(1)) and Article 12(1)(a).





The CJEU continued:

Thus, in the present case, it is indeed possible to infer from Article 4(1) [QD] that the burden of proof lies with the applicants to prove that they have actually had recourse to UNRWA's protection or assistance and that that protection or assistance has ceased. However, provided that the applicants are able to prove that, at the time of leaving the UNRWA area of operations, they were actually forced to do so, for reasons beyond their control and independent of their volition – in particular because their personal safety was at serious risk and UNRWA could not guarantee them living conditions commensurate with its mission in that area – it is then for the Member State to demonstrate, as the case may be, that the circumstances have in the meantime changed in the area of operations concerned, so that those persons may once again receive protection or assistance from UNRWA ⁽¹⁴⁹⁾.

A 2019 European Commission report on the application of Article 4 QD (recast) by the Member States ⁽¹⁵⁰⁾ finds that, in 22 Member States, the burden of proof, as a matter of law, is shared between the applicant and the determining authority ⁽¹⁵¹⁾. Earlier research and literature had identified differences in approach across the Member States to the burden of proof in the context of international protection applications ⁽¹⁵²⁾.

National case-law reveals how Member States adopt varying approaches to 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 ⁽¹⁵³⁾. Courts are thus, as a rule, obliged to investigate the facts of a case *ex officio* ⁽¹⁵⁴⁾. Applicants are 'personally required to cooperate in establishing the facts of the case' ⁽¹⁵⁵⁾. If necessary, elements of the claim are not confirmed in the court's assessment procedure, the

⁽¹⁴⁹⁾ CJEU, judgment of 3 March 2022, *NB and AB v SSHD*, C-349/20, ECLI:EU:C:2022:151 (hereafter, CJEU, 2022, *NB and AB*), para. 65.

⁽¹⁵⁰⁾ European Commission, *Evaluation of the application of the recast Qualification Directive (2011/95/EC)*, Final Report, 22 January 2019 (hereafter *2019 Commission Report*) '3.3. Assessment of Facts and Circumstances', pp. 36 – 53.

⁽¹⁵¹⁾ AT, BE, BG, CY, CZ, DE, EE, EL, FI, FR, HR, IE, LU, LV (in law), MT, NL, PL, PT, RO, SE, SI, UK, *2019 Commission Report*, op. cit. fn. 150, Table 3.2, p. 52.

⁽¹⁵²⁾ UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* (16 December 1998); UNHCR, '*Summary of Deliberations on Credibility Assessment in Asylum Procedures, Expert Roundtable in Budapest on 14-15 January 2015*' (5 May 2015) paras 56-59; G. Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff, 2005); G. Noll, *Credibility, Reliability and Evidential Assessment*, in *Oxford Handbook on International Refugee Law*, eds Costello et al, OUP 2021.

⁽¹⁵³⁾ Federal Administrative Court (BVerwG, Germany), No 9 C 434.93, op. cit., fn. 75, p. 1123; see also Dörig, H., op. cit., fn. 143, p. 1252, Article 4, para. 7. The Federal Administrative Court (BVerwG, Germany), judgment of 19 July 2012, No 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).

⁽¹⁵⁴⁾ German Code of Administrative Court Procedure, op. cit., fn. 75, Article 86(1).

⁽¹⁵⁵⁾ German *Asylum Act*, op. cit., fn. 139, Article 15.





burden to substantiate the application (*materielle Beweislast* ⁽¹⁵⁶⁾ rests on the applicant ⁽¹⁵⁷⁾. 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) ⁽¹⁵⁸⁾. On the other hand, in Ireland and the United Kingdom the burden of proof is considered to rest in principle on the applicant, but to place a shared burden on the applicant and determining authority to ascertain the relevant facts ⁽¹⁵⁹⁾.

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’ ⁽¹⁶⁰⁾. 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’ ⁽¹⁶¹⁾. If Member States do so provide in their national legislation, these become mandatory obligations by virtue of that national legislation. 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](#)).

⁽¹⁵⁶⁾ Substantive burden of proof. See also German Federal Administrative Court, Decision of 10 March 2021, 1 B 2.21, para. 8.

⁽¹⁵⁷⁾ See e.g. Federal Administrative Court (BVerwG, Germany), judgment of 13 February 2014, No [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.

⁽¹⁵⁸⁾ See Supreme Administrative Court (Naczelny Sąd Administracyjny, 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 \(Nejvyšší správní soud, Czech Republic\)](#), judgment of 30 September 2008, *SN v Ministry of Interior*, 5 Azs 66/2008-70 (see [EDAL English summary](#)).

⁽¹⁵⁹⁾ 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. 37]. [...] 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. (Insofar as this judgment might be seen to be an endorsement of the ‘bipartite’ approach to the concept of a ‘well-founded fear’ i.e. a requirement that an applicant establish both a subjective and objective fear of persecution, it should be noted that there has been considerable criticism of the notion that a subjective fear must be established in addition to an objective fear: see EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, p.107.) 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.

⁽¹⁶⁰⁾ Emphasis added.

⁽¹⁶¹⁾ Emphasis added.





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 their control (Article 28(1)(a) APD (recast)). For further information, see *Asylum Procedures and the Principle of Non-refoulement – Judicial analysis* ⁽¹⁶²⁾.

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 they understand, of their duty to substantiate the application, the time frame and the means at their disposal for fulfilling this obligation (see Section 4.2.3). On occasion, an applicant may not realise that an element is relevant to their application. Once a decision-maker has informed the applicant 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 ⁽¹⁶³⁾.

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)):

[T]o 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 ⁽¹⁶⁴⁾.

⁽¹⁶²⁾ EASO, *Asylum Procedures and the Principle of Non-Refoulement*, op. cit., fn. 7, Subsection 4.2.10.

⁽¹⁶³⁾ Dörig, H., op. cit., fn. 143, p. 1252, Article 4, para. 10; Baldinger, D., *Rigorous Scrutiny Versus Marginal Review, Standards on Judicial Scrutiny and Evidence in International and European Asylum Law*, Wolf Legal Publishers, 2013, pp. 354 and ff; and Noll, G., ‘*Evidentiary Assessment and the EU Qualification Directive*’, *UNHCR New Issues in Refugee Research*, Research Paper, No 117, 2005, p. 6.

⁽¹⁶⁴⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, paras 70 and 71.





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’ ⁽¹⁶⁵⁾.

Mental disorder, illness, or cases where the person concerned is an unaccompanied minor in the sense of Article 2(l) QD (recast) may also constitute good reasons for not substantiating an application as soon as possible ⁽¹⁶⁶⁾. 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**’ ⁽¹⁶⁷⁾.

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 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’ ⁽¹⁶⁸⁾.

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 applicant, including the means at their disposal to obtain documentary or other evidence and translations, where required ⁽¹⁶⁹⁾.

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 7](#).

⁽¹⁶⁵⁾ Ibid., para. 69.

⁽¹⁶⁶⁾ Dörig, op. cit., fn. 143, p. 1253, Article 4, para. 11. See also Bögner, D., Herlihy, J., and Brewin, C., ‘The Impact of Sexual Violence on Disclosure during Home Office Interviews’, *British Journal of Psychiatry*, 2007, 75-81; and Bögner, D., Brewin, C., and Herlihy, J., op. cit., fn. 121, pp. 1-17.

⁽¹⁶⁷⁾ Emphasis added. See also: EASO, *Judicial Analysis: Vulnerability in the context of applications for international protection*, 2021, particularly Parts 6 – 8.

⁽¹⁶⁸⁾ ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 92.

⁽¹⁶⁹⁾ UNHCR, *Beyond Proof*, op. cit., fn. 19, p. 103.



Table 7. 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, in cooperation with the applicant, assess 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.

Where the Member State imposes a duty on the applicant to submit as soon as possible all the elements needed to substantiate the application, the applicant must be informed of that obligation in a language which they understand or are reasonably supposed to understand in accordance with Article 12(1)(a) APD (recast). They must also be informed of 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 as 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 their application for international protection' ⁽¹⁷⁰⁾. The personal interview provides the main opportunity for the applicant to substantiate the application. As such, pursuant to 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.

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]n cooperation with the applicant, it 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 ⁽¹⁷¹⁾.

Concerning the duty to cooperate with the applicant, in *M.M.*, the CJEU stated that under Article 4(1), 'although it is generally for the applicant to submit all elements needed to

⁽¹⁷⁰⁾ Emphasis added.

⁽¹⁷¹⁾ CJEU, 2022, *NB and AB*, op. cit., fn. 148.



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'** ⁽¹⁷²⁾. 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' ⁽¹⁷³⁾. In *F.*, the CJEU held that:

Article 4 [QD (recast)] must be interpreted as meaning that it does not preclude the authority responsible for examining applications for international protection, or, where an action has been brought against a decision of that authority, the court or tribunal seised, from ordering that an expert's report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant, provided that the procedures for such a report [sic] are consistent with the fundamental rights guaranteed by the Charter, that that authority and those courts or tribunals do not base their decision solely on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation ⁽¹⁷⁴⁾.

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 *M.M.*:

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 ⁽¹⁷⁵⁾.

In this respect, the CJEU in *M.M.* 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'** ⁽¹⁷⁶⁾. 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

⁽¹⁷²⁾ CJEU, *M.M.*, op. cit., fn. 31, para. 65 (emphasis added).

⁽¹⁷³⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 56.

⁽¹⁷⁴⁾ CJEU, 2018, *F.*, op. cit. fn.20, para. 46.

⁽¹⁷⁵⁾ CJEU, 2012, *M.M.*, op. cit., fn. 31, para. 66. Concerning the obligation of courts or tribunals by national law to gather evidence *proprio motu*, see Section 3.1.2.1.

⁽¹⁷⁶⁾ *Ibid.*, (emphasis added).





of applicants for asylum and, where necessary, in countries through which they have transited ⁽¹⁷⁷⁾.

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 within the meaning of the first sentence of Article 4(1) ⁽¹⁷⁸⁾.

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 ⁽¹⁷⁹⁾, 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. In considering the duty of a determining authority to investigate a mental illness asserted by an applicant for international protection, the High Court in Ireland has held the following:

Such matters are primarily matters for the applicant [...]. Nonetheless, the decision-maker may have a role to seek clarification of an applicant's mental state in certain circumstances but a meaningful threshold would need to be surmounted by an applicant before any such duty could realistically or properly arise. That is not met by an applicant simply asserting that he or she is unable to remember matters, is 'not that sharp', is mentally confused or is 'mentally sick', especially when he or she tried to remember the alleged persecution ⁽¹⁸⁰⁾.

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' ⁽¹⁸¹⁾.

See Sections 4.2.5 and 4.8. [Standards for assessing country of origin information \(COI\)](#) 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 8](#).

⁽¹⁷⁷⁾ Ibid., para. 67.

⁽¹⁷⁸⁾ 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](#)).

⁽¹⁷⁹⁾ Czech Republic, [Act No 325/1999 Coll. on Asylum](#), 11 November 1999 (as amended).

⁽¹⁸⁰⁾ High Court (Ireland), judgment of 25 February 2019, *AAI(Nigeria) v IPAT (No.2)* [2019] IEHC 123.

⁽¹⁸¹⁾ ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 96.





Table 8. 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 their 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⁽¹⁸²⁾. Whilst Article 4(2) only refers 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**'⁽¹⁸³⁾ and the CJEU's judgment in *A, B and C*, which refers to 'assessing statements and documentary **or other evidence**'⁽¹⁸⁴⁾, that the elements may include evidence, other than statements and documentary evidence, such as objects, 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⁽¹⁸⁵⁾. 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 9](#) contains a non-exhaustive list of types of evidence.

⁽¹⁸²⁾ Baldinger, D., 2013, op. cit., fn. 163, pp. 349 and ff.

⁽¹⁸³⁾ Emphasis added.

⁽¹⁸⁴⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 54.

⁽¹⁸⁵⁾ UNHCR, *Beyond Proof*, op. cit., fn. 19, pp. 90 and ff.



Table 9. Types of evidence

Oral	<ul style="list-style-type: none"> ■ statements of applicant ■ statements of family members ■ statements of witnesses ■ statements of experts 	
Documents	<ul style="list-style-type: none"> ■ identity card/passport ■ birth certificate ■ medical reports ■ forensic reports ■ legal reports ■ court decisions or judgments ■ witness reports ■ reports on country of origin 	<ul style="list-style-type: none"> ■ reports on age assessment ■ reports on language assessment ■ emails ■ letters ■ travel documents ■ arrest warrants ■ (official) reports of the police ■ media reports
Visual	<ul style="list-style-type: none"> ■ social media ■ photographs ■ videos ■ drawings 	
Audio	<ul style="list-style-type: none"> ■ audio recordings 	
Exhibits	<ul style="list-style-type: none"> ■ 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 EU Charter, such as the right to respect for human dignity, enshrined in Article 1 EU 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⁽¹⁸⁶⁾. 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 provide such evidence’⁽¹⁸⁷⁾. Respect for the aforementioned fundamental rights also precludes the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist’s expert report, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant⁽¹⁸⁸⁾. For more on the methods for assessing the credibility of the applicant’s statements and documentary and/or other evidence, see Section 4.4.

⁽¹⁸⁶⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 65.

⁽¹⁸⁷⁾ *Ibid.*, para. 66.

⁽¹⁸⁸⁾ CJEU, 2018, *F.*, op. cit. fn.20, para. 71.



Documentation **at the applicant's disposal** goes beyond documentation in the applicant's possession. Instead, documentation is at the applicant's disposal, when they **may reasonably be expected to be able to obtain it** ⁽¹⁸⁹⁾. 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 they 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(1) APD (recast) states that 'Member States shall impose upon applicants the obligation to cooperate with the competent authorities with a view to establishing their identity [...]', and Article 13(2) (b) APD (recast) states that '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 ⁽¹⁹⁰⁾. 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' ⁽¹⁹¹⁾. 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

⁽¹⁸⁹⁾ See Upper Tribunal (Immigration and Asylum Chamber (IAC)), United Kingdom), judgment of 3 October 2016, *MW (Nationality; Art 4 QD; duty to substantiate)* [2016] UKUT 453 (hereinafter Upper Tribunal (IAC, United Kingdom)). See also UNHCR, *Beyond Proof*, op. cit., fn. 19 p. 93; and Garlick, M. in Grütters, C., Guild, E., and de Groot, S., *Assessment of Credibility by Judges in Asylum Cases*, Wolf Legal Publishers, 2013, p. 59.

⁽¹⁹⁰⁾ 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 \(recast\)](#) (OJ L 180, 29.06.2013).

⁽¹⁹¹⁾ See e.g. in France, where the 2015 Asylum Law (Article 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 if the applicant has refused to give his/her fingerprints as provided for under the Eurodac Regulation (recast).





APD (recast)) ⁽¹⁹²⁾. For further information, see *Asylum Procedures and the Principle of Non-refoulement – Judicial analysis* ⁽¹⁹³⁾.

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 ⁽¹⁹⁴⁾. For details, see Section [5.1](#) which analyses assessment of evidence relating to nationality.

The inclusion of '**travel route**' in Article 4(2) may have relevance both in assessing an application for international protection ⁽¹⁹⁵⁾ 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 [5.9. Dublin III regulation and the assessment of evidence](#)). For instance, the German Federal Administrative Court has decided that an asylum procedure may be discontinued according to German procedural law ⁽¹⁹⁶⁾ 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 ⁽¹⁹⁷⁾.

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, or on their 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) and Article 10 APD (recast).

⁽¹⁹²⁾ See e.g. Federal Administrative Court (BVerwG, Germany), judgment of 5 September 2013, No [10 C 113](#), DE:BVerwG:2013:050913U10C1.13.0, including in [English](#). The decision refers mainly to the obligations of 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. [139](#), Articles 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. [139](#)).

⁽¹⁹³⁾ EASO, [Asylum Procedures and the Principle of Non-Refoulement](#), op. cit., fn. [7](#), (Subsections 3.5.2 and 4.2.9).

⁽¹⁹⁴⁾ For elaboration on the distinction, see the EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. [7](#), (Section 1.3.2).

⁽¹⁹⁵⁾ Information regarding the travel route may be indicative of when the applicant left the country of origin.

⁽¹⁹⁶⁾ See Sections 32 and 33(1) of the German Asylum Procedure Act (now: [Asylum Act](#), op. cit., fn. [139](#)).

⁽¹⁹⁷⁾ Federal Administrative Court (BVerwG, Germany), judgment of 17 June 2014, No [10 C 713](#), BVerwG:2014:170614U10C7.13.0, including in [English](#).





4.2.5. Obtaining information on country of origin and countries of transit

Member States have an **investigative duty** with regard to the information listed in Article 4(3) QD (recast) which is separate from the applicant's duty to substantiate the application ⁽¹⁹⁸⁾. 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' ⁽¹⁹⁹⁾. This norm applies, inter alia, to obtaining information about the **country of origin**. Obtaining such information is part of the Member State's investigative duty.

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**' ⁽²⁰⁰⁾. Such information must be made available to the personnel responsible for examining applications and taking decisions. This includes, but is not limited to, 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'.

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 assessment), according to Article 10(4) APD (recast) courts and tribunals shall, 'through the determining authority or the applicant or otherwise, have access to the 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 country of origin information (COI).

Obligations to obtain and consider COI also derive from the EUAA regulation ⁽²⁰¹⁾. Article 11(1) of the Regulation tasks the EUAA with coordinating 'efforts among Member States to develop a common analysis on the situation in specific countries of origin (the 'common analysis') and guidance notes to assist Member States in the assessment of relevant applications for

⁽¹⁹⁸⁾ Noll, G., 'Evidentiary Assessment and the EU Qualification Directive', UNHCR New Issues in Refugee Research, Research Paper, No 117, 2005, p. 5.

⁽¹⁹⁹⁾ Article 4(3) QD (recast) is cited in full at the start of Section 4.1.

⁽²⁰⁰⁾ Emphasis added.

⁽²⁰¹⁾ EUAA regulation.





international protection'. Article 11(3) of the EUAA regulation provides that Member States 'shall take into account the common analysis and guidance notes when examining applications for international protection, without prejudice to their competence to decide on individual applications for international protection.'

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 ⁽²⁰²⁾, and UNHCR and Hungarian Helsinki Committee materials ⁽²⁰³⁾.

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. [Standards for assessing country of origin information \(COI\)](#)

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'.

Article 14(1) APD (recast) provides that 'before 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 with a person competent under national law to conduct such an interview' ⁽²⁰⁴⁾. 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 their 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, even

⁽²⁰²⁾ IARLJ, *A Structured Approach to the Decision Making Process in Refugee and other International Protection Claims*, June 2016, 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.

⁽²⁰³⁾ Gyulai, G., *Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU*, Hungarian Helsinki Committee, 2011. See also EASO, *Judicial Practical Guide on Country of Origin Information*, 2018.

⁽²⁰⁴⁾ The importance of affording an applicant a personal interview was emphasised by the CJEU in its judgment CJEU, judgment of 16 July 2020, *Milkiyas Addis v Bundesrepublik Deutschland*, C-517/17, ECLI:EU:C:2020:579 (hereafter CJEU, 2020, *Addis*). In that case the CJEU held that 'Articles 14 and 34 [APD (recast)] must be interpreted as precluding national legislation under which failure to comply with the obligation to give an applicant for international protection the opportunity of a personal interview before the adoption of a decision on the basis of Article 33(2)(a) of that directive declaring the application to be inadmissible does not lead to that decision being annulled and the case being remitted to the determining authority, unless that legislation allows the applicant, in the appeal procedure against that decision, to set out in person all of their arguments against the decision in a hearing which complies with the applicable conditions and fundamental guarantees set out in Article 15 of that directive, and those arguments are not capable of altering that decision'.





though Article 47 EU Charter guarantees effective judicial protection, secondary EU law does not explicitly guarantee the applicant a right to an oral hearing before a judicial body. Even if national law may provide for courts and tribunals to direct an 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 ⁽²⁰⁵⁾.

According to Article 13(2)(f) APD (recast), ‘the competent authorities may record the applicant’s oral statements provided he or 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 their application for international protection is central to the procedural fairness of the process leading to the administrative decision.

According to Article 14(1) APD (recast), personal interviews ‘shall be conducted by the personnel of the determining authority’. However, ‘[w]here simultaneous applications for international protection are made by a large number of third-country nationals or stateless persons make it impossible in practice for determining authority to conduct timely interviews on the substance of each application, Member States may provide that the personnel of another authority be temporarily involved in conducting such interviews’ ⁽²⁰⁶⁾.

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 point (b) or, where applicable, with a dependant, reasonable efforts must be made to allow the applicant or the dependant to submit further information.

⁽²⁰⁵⁾ CJEU, 2017, *Sacko*, op. cit., fn. 50, para 50. See also CJEU, 2017, *M*, op. cit., fn. 101, para. 38.

⁽²⁰⁶⁾ Article 14(1) *APD (recast)* also provides that ‘[w]here a person has lodged an application for international protection on behalf of his or her dependants, each dependent adult shall be given the opportunity of a personal interview. The provision further provides that ‘Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview’.





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.'

The only other exception envisaged by the APD (recast) concerns subsequent applications. Article 42(b) states that Member States may lay down, in national law, rules which 'permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview, with the exception of the cases referred to in Article 40(6)'.

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 ⁽²⁰⁷⁾.

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' ⁽²⁰⁸⁾, 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 ⁽²⁰⁹⁾. 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 ⁽²¹⁰⁾. The observance of the right to be heard is required even when the applicable legislation does not expressly provide for such a procedural requirement ⁽²¹¹⁾.

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

⁽²⁰⁷⁾ See Győr Administrative and Labour Court (Hungary), judgment of 24 June 2016, *17.K.27132/2016/6*; Council for Aliens Law Litigation (RVV/CCE, 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*, Article 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.

⁽²⁰⁸⁾ CJEU, 2012, *M.M.*, op. cit., fn. *31*, 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 and 55.

⁽²⁰⁹⁾ CJEU, 2012, *M.M.*, op. cit., fn. *31*, para. 81.

⁽²¹⁰⁾ *Ibid.*, para. 85; CJEU, 2017, *M*, op. cit., fn. *101*, para. 31. In its judgment of 2012, *M.M.*, op. cit., fn. *31*, para. 87, the CJEU stated that '[t]he right to be heard 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'. The CJEU reiterated this position in its judgment of 2015, *Mukairubega*, op. cit., fn. *101*, para. 46, and its judgment of 2014, *Boudjiida*, op. cit., fn. *101*, para. 36.

⁽²¹¹⁾ CJEU, 2012, *M.M.*, op. cit., fn. *31*, para. 86; CJEU, 2017, *M*, op. cit., fn. *101*, para. 26.



carry out the individual assessment of the facts and circumstances that is provided for in Article 4 of [the QD] with full knowledge thereof [...] (212).

In this context, the CJEU mentions the possibility for the applicant to annex documentary evidence to their application (213). 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' (214). [...] 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' (215).

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 where the information in question is supplemental to that already provided in the personal interview. This may be provided in writing.

In *M.M. and M.*, the CJEU states that the right to be heard should be 'fully guaranteed' (216).

It is apparent from the CJEU case-law that 'in principle, an infringement of the rights of defence results in annulment of the decision taken at the end of the administrative procedure at issue only if the outcome of the procedure might have different had it not been for such an irregularity' (217). However, the CJEU has stated that:

That case-law cannot, however, be applied to an infringement of Articles 14, 15 and 34 of the Procedures Directive. First, those provisions set out, in binding terms, the obligation on the Member States to give the applicant the opportunity of a personal interview as well as specific, detailed rules on how that interview is to be conducted. Second, those rules seek to ensure that the applicant has been invited to provide, in cooperation with the authority responsible for the interview, all information that is relevant to the assessment of the admissibility and, as the case may be, the substance of the application for international protection, which gives that interview, as stated in the preceding paragraph of this judgment, paramount importance in the procedure for examination of that application (see, by analogy, judgment of 14 May 2020, NKT

(212) CJEU, 2017, *M.*, op. cit., fn. 101, paras 36-37.

(213) *Ibid.* para. 39.

(214) *Ibid.*, para. 40.

(215) *Ibid.* para. 45; see also paras 48 and 50.

(216) CJEU, 2012, *M.M.*, op. cit., fn. 31, para. 91; CJEU, 2017, *M.*, op. cit., fn. 101, para. 26.

(217) CJEU, 2020, *Addis*, op. cit., fn. 204, para. 70.





Verwaltung and NKT v Commission, C-607/18 P, not published, EU:C:2020:385, paragraph 57 and the case-law cited) ⁽²¹⁸⁾.

Nevertheless, annulment of a decision may not be warranted if the appeal proceedings afford the applicant the opportunity ‘to be heard in full compliance with the conditions and fundamental guarantees applicable to the case in the main proceedings, in order to allow him to present, in person and in a language with which he is familiar, his view concerning the application to his personal situation of the ground referred to in Article 33(2)(a) of that directive’ ⁽²¹⁹⁾.

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’ ⁽²²⁰⁾. 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 ⁽²²¹⁾.

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.

⁽²¹⁸⁾ Ibid., para. 70.

⁽²¹⁹⁾ CJEU, 2020, *Addis*, op. cit., fn. 204, para. 73.

⁽²²⁰⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, paras 60-62, these requirements being set out in what is now Article 4(3)(c) *QD (recast)* and Article 15(3)(a) *APD (recast)* respectively.

⁽²²¹⁾ Ibid., para. 64. In High Court (Ireland), judgment of 9 May 2019, *WH v IPAT* [2019] IEHC 297, the Irish High Court rejected an argument that the CJEU judgment in *A, B and C* was authority for the proposition that it was an error of law for the decision-maker to consider the applicant’s inability to answer the questions that were put to him about his knowledge of gay rights groups, organisations and personalities in a neighbouring country as part of the assessment of the credibility of the applicant’s declared sexual orientation in circumstances where the questions put by the decision-maker were not based on stereotypes, but on the specific statement of the applicant that he had engaged in various campaigns and seminars to advocate for an identified gay rights activist in the country in question.



Article 17(2) APD (recast) provides as follows:



Article 17(2) APD (recast)

Member States may provide for audio or audiovisual recording of the personal interview. Where such a recording is made, Member States shall ensure that the recording or a transcript thereof is available in connection with the applicant's file.

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 or she has previously been informed thereof'.

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. [...]

Article 17(4) APD (recast) provides that: 'Where an applicant refuses to confirm that the content of the report or the transcript correctly reflects the personal interview, the reasons for his or her refusal shall be entered on the applicant's file. Such refusal shall not prevent the determining authority from taking a decision on the application.'

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 10](#). 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](#)).



Table 10. Summary of main requirements for carrying out personal interviews under APD (recast)

Article 14(1) APD (recast)	Personal interviews shall 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 for the determining authority to conduct timely interviews.
Article 14(2) (a) and (b) APD (recast)	<p>The personal interview on the substance of the application may be omitted where:</p> <p>(a) [T]he determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available; or</p> <p>(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.</p>
Article 15(1) APD (recast)	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.
Article 15(2) APD (recast)	A personal interview shall take place under conditions which ensure appropriate confidentiality.
Article 15(3)(a) APD (recast)	<p>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:</p> <p>(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.</p>
Article 15(3)(b) 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.
Article 15(3)(c) APD (recast)	(c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview [...].
Article 15(3)(d) APD (recast)	(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.



Article 15(3)(e) APD (recast)	(e) ensure that interviews with minors are conducted in a child-appropriate manner.
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.
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.
Article 17(2) APD (recast) and Article 13(2)(f)	Member States may provide for audio or audiovisual recording of the personal interview [...]; and Member States may provide that the competent authorities may record the applicant's oral statements, provided he or she has previously been informed thereof.
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 a 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' 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.
Article 17(4) APD (recast)	Where an applicant refuses to confirm that the content of the report or transcript correctly reflects the personal interview, the reasons for his or her refusal shall be entered in the applicant's file. Such refusal shall not prevent the determining authority from taking a decision on the application.
Article 17(5) APD (recast)	Applicants 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.



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’ ⁽²²²⁾. 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 ⁽²²³⁾. In *F.*, the CJEU held that:

It cannot be ruled out that, in the specific context of the assessment of statements made by an applicant for international protection relating to his sexual orientation, certain forms of expert reports may prove useful for the assessment of the facts and circumstances and may be prepared without prejudicing the fundamental rights of that applicant ⁽²²⁴⁾.

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) ⁽²²⁵⁾.

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)) ⁽²²⁶⁾.

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

⁽²²²⁾ Emphasis added.

⁽²²³⁾ 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., *Flüchtlingsrecht: Die materiellen und verfahrensrechtlichen Grundlagen*, Springer, 2nd ed., 2019).

⁽²²⁴⁾ CJEU, 2018, *F.*, op. cit. fn. 20, para. 37.

⁽²²⁵⁾ Article 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; Article 18(1) [APD \(recast\)](#) concerns when the determining authority may arrange for a medical examination of the applicant; Article 24 [APD \(recast\)](#) concerns applicants in need of special procedural guarantees; and Article 25 [APD \(recast\)](#) concerns guarantees for unaccompanied minors.

⁽²²⁶⁾ Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 2 July 2013, [No 106216](#).





circumstances in accordance with Article 4(3)(c) QD (recast) ⁽²²⁷⁾. Further information regarding the assessment of medical evidence may be found in Section [4.7.2. Medical evidence and medical experts](#).

An expert is often called upon to provide independent **country-specific information** in asylum cases ⁽²²⁸⁾. 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 ⁽²²⁹⁾.

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 UK Upper Tribunal (UKUT) had access to both written and oral evidence from two experts on Algeria ⁽²³⁰⁾. 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 protection, assessment of religion-based asylum applications is complex and challenging due to the inherently internal and personal nature of religion and belief ⁽²³¹⁾. This is compounded by the

⁽²²⁷⁾ See e.g. Upper Tribunal (IAC, United Kingdom), judgment of 4 February 2016, [OO \(Gay Men\) Algeria CG](#) [2016] UKUT 00065, in which the Upper Tribunal had access to the evidence of a consultant psychiatrist regarding the applicant's mental health.

⁽²²⁸⁾ For example, see Upper Tribunal (IAC, United Kingdom), judgment of 1 October 2015, [AA \(Article 15\(c\)\) Iraq CG](#) [2015] UKUT 00544, 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 (IAC, United Kingdom), judgment of 2 June 2015, [BM and Others \(returnees – criminal and non-criminal\) DR Congo \(CG\)](#) [2015] UKUT 293, in which the Upper Tribunal (United Kingdom) undertook a detailed analysis and evaluation of, inter alia, expert evidence on the Democratic Republic of Congo.

⁽²²⁹⁾ Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 14 February 2017, No [182265](#).

⁽²³⁰⁾ Upper Tribunal (IAC, United Kingdom), [OO \(Gay Men\) Algeria CG](#), op. cit., fn. [227](#), 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.

⁽²³¹⁾ See Section 0 for further detail on the specific challenges that can arise in relation to religious conversion cases.





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 ⁽²³²⁾. 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) ⁽²³³⁾. 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 ⁽²³⁴⁾.

As further examined in Sections 4.7 and 5.2, 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.

⁽²³²⁾ 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 UK and Religious Freedom Grounds*, 2016.

⁽²³³⁾ See Harris, L. M., '*Expert Evidence in Gender-Based Asylum Cases: Cultural Translation for the Court*', Benders Immigration Bulletin, 2012, 1811-1826; for details with respect to Article 9(2)(f) QD (recast) concerning acts of gender-specific or child-specific nature see Dörig, H., op. cit., fn. 143, p. 1180, Article 9, para. 50.

⁽²³⁴⁾ Upper Tribunal (IAC, United Kingdom), judgment of 18 March 2010, *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80. See also Council for Aliens Law Litigation (RVV/CCE, 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, their 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]’ ⁽²³⁵⁾. 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 in 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 ⁽²³⁶⁾. 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. 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 ⁽²³⁷⁾. Regulation of artificial

⁽²³⁵⁾ 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).

⁽²³⁶⁾ CJEU (GC), judgment of 13 May 2014, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12, EU:C:2014:317; see also CJEU, judgment of 17 July 2014, *YS v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v M and S*, joined cases C-141/12 and C-372/12, EU:C:2014:2081..

⁽²³⁷⁾ 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, 04.05.2016)). In the CJEU judgment of 11 November 2020, *Orange Romania SA v Autoritatea Națională de Supraveghere a Prelucrării Datelor cu Caracter Personal (ANSPDCP)*, C-61/19, ECLI:EU:C:2020:901, the CJEU emphasised that a request of a data subject (within the meaning of the GDPR) must be freely given, specific, informed and unambiguous.



intelligence is on the EU legislative agenda and the regulation of aspects of this field may, in due course, have a bearing on the processing of claims for international protection ⁽²³⁸⁾.

4.3. Principles for the assessment of facts and circumstances

The principles set out in this section and listed in [Table 11](#) 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 ⁽²³⁹⁾, and to the hearing of appeals or actions by courts and tribunals.

Table 11. 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 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) requires that the '**assessment of an application for international protection is to be carried out on an individual basis**'. The assessment relates to both the assessment of factual circumstances which may constitute evidence that supports the application, as well as the legal appraisal of that evidence and both aspects of the assessment must be carried out on an individual basis. Article 4(3) QD (recast) has to be considered together with other provisions of the APD (recast) including Article 10(3)(a) and Article 15(3) APD (recast) ⁽²⁴⁰⁾.

⁽²³⁸⁾ See: COM(2021) 206, Proposal for a regulation of the European Parliament and Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, 21 April 2021.

⁽²³⁹⁾ Article 31(8) [APD \(recast\)](#) enables Member States to provide an accelerated examination procedure and Article 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.

⁽²⁴⁰⁾ See also Section 4.1. [Introduction to Article 4 QD \(recast\)](#), which addresses complementary provisions of the [APD \(recast\)](#) that touch upon the subject matter of Article 4 QD (recast).



The need for an individual assessment 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). Except for (a), these set out matters personal to the applicant.



Article 4(3) QD (recast)

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.

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 they will be exposed in their country of origin. By way of example, in *Y and Z* the CJEU stated as follows:

The subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, is of particular importance to the applicant concerned in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned ⁽²⁴¹⁾.

⁽²⁴¹⁾ CJEU (GC), *Y and Z*, op. cit., fn. 31, para. 70. See EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, Section 1.6.2.2.



As set out above Article 4(3)(c) QD (recast) identifies **background** as a factor to be taken into account. This includes an applicant's personal history and circumstances, and their cultural, educational and religious background, all of which may be relevant in assessing a claim for international protection ⁽²⁴²⁾.

Gender is also identified in Article 4(3)(c) QD (recast) as a factor to be taken into consideration in the assessment of the facts and circumstances relevant to an application for international protection ⁽²⁴³⁾. 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](#).

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 ⁽²⁴⁴⁾, 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.

⁽²⁴²⁾ See e.g. Refugee Board (Rada do Spraw Uchodźców, 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 (Nejvyšší správní soud, Czech Republic), *LO v Ministry of Interior*, op. cit., fn. 89, for further details about the case.

⁽²⁴³⁾ 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*, HCR/GIP/02/01, 7 May 2002.

⁽²⁴⁴⁾ 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, C-13/94, *P v S and Cornwall County Council*, EU:C:1996:170, para. 20. For national case law, see e.g. Supreme Administrative Court (Nejvyšší správní soud, 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 Article 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.



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 12](#) below. In the case of *F.*, the CJEU acknowledged the relevance of the Yogyakarta Principles ⁽²⁴⁵⁾.

Table 12. The 2007 Yogyakarta Principles definitions ⁽²⁴⁶⁾

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.’

In 2017 the so-called ‘Yogyakarta Principles Plus 10’ were adopted ⁽²⁴⁷⁾. The document supplements – and does not replace – the original 29 Yogyakarta Principles. It sets out additional principles and states obligations on the application of international human rights law in relation to sexual orientation and gender identity; and additionally recognises the distinct and intersectional grounds of gender expression and sex characteristics. The preamble defines ‘gender expression’ as ‘each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references’, and notes ‘further that gender expression may or may not conform to a person’s gender identity’. ‘Sex characteristics’ are defined as ‘each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty’.

Article 4(3)(c) QD (recast) also identifies **age** as a relevant factor. There are special protection and procedural guarantees for minors which are considered in 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

⁽²⁴⁵⁾ CJEU, 2018, *F.*, op. cit. fn.20, para. 62.

⁽²⁴⁶⁾ *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*, HCR/GIP/12/09, 23 October 2012.

⁽²⁴⁷⁾ *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (Yogyakarta Principles Plus 10)*, 10 November 2017.



fears harm ⁽²⁴⁸⁾. Old age may 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).

It is important to note that Article 4(3)(c) QD (recast) does not contain an exhaustive list of factors and that other factors may be relevant in a particular application for protection.

Article 4(3)(c) QD (recast) has a connection with a number of different procedural guarantees in the APD (recast).

Article 10(3)(a) APD (recast) requires Member States to ensure that applications are examined, and decisions are taken individually. For a consideration of how this requirement of an individual assessment applies in the context of vulnerable applicants, see the *Judicial analysis: Vulnerability in the Context of Applications for International Protection* ⁽²⁴⁹⁾. 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 for 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 [...]'. 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'.

In its judgment in the case of *A, B, and C*, the CJEU explicitly stated that taking into account the personal or general circumstances surrounding the application includes the requirements to take into account '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' ⁽²⁵⁰⁾. It is clear that the obligations to take into account the applicant's 'individual position' and 'personal circumstances', as well as general circumstances surrounding the application, includes circumstances regarding 'the **vulnerability** of the applicant' ⁽²⁵¹⁾. This includes, but is not limited to, the matters set out in recital 29 APD (recast)

⁽²⁴⁸⁾ Upper Tribunal (IAC, United Kingdom), judgment of 24 November 2016, *JA (child and risk of persecution) Nigeria* [2016] UKUT 560, para. 16.

⁽²⁴⁹⁾ EASO, *Judicial Analysis: Vulnerability in the context of applications for international protection*, 2021; see, specifically, Part 6.2.1 and, more generally, Parts 6 and 7.

⁽²⁵⁰⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 70, emphasis added. The CJEU was referring to the requirement under Article 13(3)(a) APD (now Article 15(3)(a) *APD (recast)* and Article 4(3) QD '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'.

⁽²⁵¹⁾ See e.g. Council for Aliens Law Litigation (Raad voor Vreemdelingenbetwistingen (RVV)/Conseil du contentieux des étrangers (CCE), Belgium), judgment of 24 June 2019, *A 223104*.



(see further Section [6.7](#). Vulnerability) ⁽²⁵²⁾. The notion that an applicant may be vulnerable on account of their gender, sexual orientation and/or gender identity is further analysed in Sections [6.5](#) and [6.6](#) 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.

In the context of ensuring procedural guarantees so that an applicant is enabled to give evidence in support of their application for protection, disability, serious illness and mental disorders and any other vulnerability ⁽²⁵³⁾, 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 their 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 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 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 may not know the reasons why they were 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 ⁽²⁵⁴⁾.

In *JL (medical reports – credibility)* ⁽²⁵⁵⁾, the UKUT referred to the Joint Presidential Guidance to be followed in UK 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

⁽²⁵²⁾ See also: EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, Section 2.1.

⁽²⁵³⁾ For further background information on vulnerable groups and practical tools guidance for administrative decision-makers see EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, particularly Parts 6 – 8. See also the EUAA [Tool for Identification of Persons with Special Needs](#), 2016.

⁽²⁵⁴⁾ Supreme Administrative Court (Nejvyšší správní soud, Czech Republic), *KB v Ministry of Interior*, op. cit., fn. 244.

⁽²⁵⁵⁾ Upper Tribunal (IAC, United Kingdom), judgment of 28 January 2013, *JL (medical reports-credibility)* [2013] UKUT 145, para. 26.



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 Tribunal 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 ⁽²⁵⁶⁾.

It is therefore essential to identify whether an applicant has a vulnerability and the extent to which it affects the assessment of material evidence ⁽²⁵⁷⁾.

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 ⁽²⁵⁸⁾. For example, despite a lack of credibility in their statements, there may be a medical report which is considered decisive ⁽²⁵⁹⁾. 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 ⁽²⁶⁰⁾.

⁽²⁵⁶⁾ UK Tribunals Judiciary, Joint Presidential Guidance Note No 2 of 2010, Child, Vulnerable Adult and Sensitive Appellant Guidance, 2010.

⁽²⁵⁷⁾ See Council of State (Netherlands), judgment of 7 March 2012, 201007907/1/V3, ECLI:NL:RVS:BV9262; National Asylum Court (Cour nationale du droit d'asile, France), grande formation, decision of 30 March 2017, Mme E, decision No 16015058.

⁽²⁵⁸⁾ ECtHR, judgment of 26 July 2005, N v Finland, No 38885/02, ECLI:CE:ECHR:2005:0726JUD003888502 (hereafter ECtHR, 2005, N v Finland), 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 (GC), 2016, JK and Others v Sweden, op. cit., fn. 28, para. 93. In ECtHR, judgment of 22 March 2022, T.K. and Others v Lithuania, No 55978/20, ECLI:CE:ECHR:2022:0322JUD005597820 (hereafter, ECtHR, 2022, T.K. and Others v Lithuania), para. 80 the ECtHR stated: 'Nonetheless, it observes that, even when some of an applicant's statements are found not to be credible, that does not necessarily constitute grounds to doubt his or her overall credibility, or to dismiss all of his or her statements. Indeed, the domestic authorities accepted certain other statements given by the applicants as being true'.

⁽²⁵⁹⁾ ECtHR, judgment of 5 September 2013, I v Sweden, No 61204/09, ECLI:CE:ECHR:2013:0905JUD006120409, paras 59-69; and ECtHR, judgment of 19 September 2013, RJ c France, No 10466/11, ECLI:CE:ECHR:2013:0919JUD001046611, 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 Article 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. See also ECtHR, judgment of 9 March 2010, RC v Sweden, No 41827/07, ECLI:CE:ECHR:2010:0309JUD004182707 (hereafter, ECtHR, 2010, RC v Sweden) para. 53.

⁽²⁶⁰⁾ ECtHR, 2007, Salah Sheekh v the Netherlands, op. cit., fn. 67, 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)⁽²⁶¹⁾ 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⁽²⁶²⁾. However, in all cases the requirement remains to consider in the light of the individual position and 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⁽²⁶³⁾. In *C.F. & D.N.*, the CJEU held that Article 15(c) of the QD (recast) must be interpreted as meaning that, in order to determine whether there is a ‘serious and individual threat’, within the meaning of that provision, a comprehensive appraisal of all the circumstances of the individual case, in particular those which characterise the situation of the applicant’s country of origin, is required⁽²⁶⁴⁾.

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⁽²⁶⁵⁾ 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[.]

⁽²⁶¹⁾ CJEU (CG), judgment of 17 February 2009, C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, EU:C:2009:94. 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, HCR/GIP/16/12, 2 December 2016.

⁽²⁶²⁾ See EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, Sections 1.5.4. and 2.4.4.

⁽²⁶³⁾ CJEU (GC), *Y and Z*, op. cit., fn. 31, para. 72 and CJEU (CG), 2009, *Elgafaji*, op. cit., fn. 261.

⁽²⁶⁴⁾ CJEU, judgment of 10 June 2021, *C.F. & D.N. v Bundesrepublik Deutschland*, C-901/19, ECLI:EU:C:2021:472.

⁽²⁶⁵⁾ Defined in Article 2(f) *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’.





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.

In reviewing decisions of the determining authority, it is therefore the task of courts and tribunals to ensure that the 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 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 will 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 ⁽²⁶⁶⁾ together with all other relevant evidence. There must be an objective assessment of the evidence putting aside speculation, intuition or subjective or unfounded assumptions ⁽²⁶⁷⁾.

Objectivity also involves the decision-maker being aware of prejudices and preconceptions about how people behave, including their own. 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.

⁽²⁶⁶⁾ Hungarian Helsinki Committee, *Credibility Assessment Training Manual, Vol. 1*, op. cit., fn. 36 p. 48. See also Section [6.6](#).

⁽²⁶⁷⁾ Ibid., p. 47. See also Herlihy, J., Gleeson, K., and Turner, S., 'What Assumptions about Human Behaviour Underlie Asylum Judgments', *IJRL*, 2010, pp. 351-366.



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 ⁽²⁶⁸⁾.

In *A, B and C*, the CJEU 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' ⁽²⁶⁹⁾.

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' ⁽²⁷⁰⁾.

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 applications for international protection**' ⁽²⁷¹⁾. 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' ⁽²⁷²⁾. In *Samba Diouf*, it held that the applicant should have the right

⁽²⁶⁸⁾ See Supreme Administrative Court (Nejvyšší správní soud, Czech Republic), *SN v Ministry of Interior*, 5 Azs 66/2008-70, op. cit., fn. 158, 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 (Outer House, Scotland, United Kingdom), 2005, *Joyce Wani*, op. cit., fn. 90, 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. 19 p. 77, and Herlihy, J., Gleeson, K., and Turner, S., op. cit., fn. 267.

⁽²⁶⁹⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 62. In La Corte Suprema di Cassazione (Supreme Court of Cassation) (Italy), judgment No 9815/2020, the court stated that the credibility assessment cannot be based on stereotyped notions of gay people.

⁽²⁷⁰⁾ See also the provisions of Article 10 of the [Universal Declaration of Human Rights](#), General Assembly Resolution 217 A, 10 December 1948.

⁽²⁷¹⁾ Emphasis added. Upheld e.g. in Council of State (Συμβούλιο της Επικρατείας, Greece), decision of 29 August 2011, application No 2512/2011 (see [EDAL English summary](#)).

⁽²⁷²⁾ CJEU (GC), judgment of 2 March 2010, *Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland*, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105 (hereafter, CJEU (GC), 2010, *Abdulla and Others*), para. 90.



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 ⁽²⁷³⁾. In *Y and Z*, in the context of the assessment of risk, the court cited *Abdulla* ⁽²⁷⁴⁾ and referred again to the need for vigilance and care ⁽²⁷⁵⁾.

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’ ⁽²⁷⁶⁾.

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 ⁽²⁷⁷⁾. 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 ⁽²⁷⁸⁾ (in this context see Section 3.1.1 on effective remedy).

The Greek Council of State has, on various occasions, emphasised that in view of the nature and importance of the matters at stake in the event of a forced return of an applicant for international protection to their country of origin, it is necessary, in the context of the evaluation of the application for protection on an individual basis, to thoroughly examine the essential claims made and to provide a specific and complete justification for any rejection of the application for protection ⁽²⁷⁹⁾.

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 their removal would expose them to ill-treatment contrary to Article 3 ECHR ‘must imperatively be subject to close scrutiny by a ‘national authority’” ⁽²⁸⁰⁾. The ECtHR uses the phrase ‘rigorous assessment’ when considering the standard to be met

⁽²⁷³⁾ CJEU, *Samba Diouf*, op. cit., fn. 61, para. 56.

⁽²⁷⁴⁾ CJEU (GC), 2010, *Abdulla and Others*, op. cit., fn. 272, para. 90.

⁽²⁷⁵⁾ CJEU (GC), *Y and Z*, op. cit., fn. 31, para. 77.

⁽²⁷⁶⁾ CJEU, 2012, *M.M.*, op. cit., fn. 31, para. 88.

⁽²⁷⁷⁾ 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. 62, 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*, op. cit., fn. 7, Section 6.1.

⁽²⁷⁸⁾ Note the qualification in Article 46(3) to ‘at least in appeals before a court or tribunal of first instance’.

⁽²⁷⁹⁾ Greek Council of State judgments: 1628/07, 817/09, 1379/11.

⁽²⁸⁰⁾ ECtHR, judgment of 12 April 2005, *Shamayev and Others v Georgia and Russia*, No 36378/02, ECLI:CE:ECHR:2005:0412JUD003637802, para. 448 and ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 77. See also ECtHR (GC), judgment of 7 December 2021, *Savran v Denmark*, No 57467/15, ECLI:CE:ECHR:2021:1207JUD005746715, para. 130.



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’ ⁽²⁸¹⁾.

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’ ⁽²⁸²⁾. The article then sets out five circumstances when access may be denied on condition that two cumulative conditions are met, as outlined in [Table 13](#) and [Table 14](#).

Table 13. 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 14. 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’.

⁽²⁸¹⁾ ECtHR, judgment of 17 July 2008, *NA v United Kingdom*, No 25904/07, ECLI:CE:ECHR:2008:0717JUD002590407, para. 111, referring to ECtHR (GC), judgment of 15 November 1996, *Chahal v United Kingdom*, No 22414/93, ECLI:CE:ECHR:1996:1115JUD002241493, para. 96, and ECtHR (GC), judgment of 28 February 2008, *Saadi v Italy*, No 37201/06, ECLI:CE:ECHR:2008:0228JUD003720106, para. 128. See also ECtHR, judgment of 2 June 2020, *S.A. v the Netherlands*, No 49773/15, ECLI:CE:ECHR:2020:0602JUD004977315, para. 62; ECtHR, 2022, *T.K. and Others v Lithuania*, op. cit., fn. 258, para. 88; ECtHR (GC), 2022, *Khasanov and Rakhmanov v Russia*, op. cit., fn. 67, para. 109.

⁽²⁸²⁾ For a detailed consideration of Article 23(1) APD (recast), see: EASO, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU)*, op. cit., fn. 7, Section 5.2.



This provision could be linked to the principles recognised by the CJEU ⁽²⁸³⁾ permitting the use of undisclosed evidence provided that the non-disclosure has a legitimate aim and is necessary ⁽²⁸⁴⁾. 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).

Whilst not relating to Article 3 ECHR, the ECtHR has addressed the use of undisclosed evidence, in the context of Article 5 ECHR, in *A and Others v the United Kingdom* ⁽²⁸⁵⁾. The court accepted that there was a strong and legitimate public interest in Member States obtaining information about terrorist groups and their associates and in maintaining the secrecy of the sources of such information ⁽²⁸⁶⁾. 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 ⁽²⁸⁷⁾.

Article 23(1) APD (recast) refers specifically to ‘information in the applicant’s file’ as disclosable. However, there may be circumstances in which disclosure is sought of information not in the file as such. This may be a request for further details about how the information was obtained or who it was obtained 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 undisclosed source need not be disclosed in the light of the need to protect their 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 ⁽²⁸⁸⁾. This jurisprudence is consistent

⁽²⁸³⁾ The principles have not yet been considered in the context of international protection claims but in CJEU (GC), judgment of 4 June 2013, *ZZ v Secretary of State for the Home Department*, 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.

⁽²⁸⁴⁾ Article 52(1) 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’.

⁽²⁸⁵⁾ ECtHR (GC), judgment of 19 February 2009, *A and Others v United Kingdom*, No 3455/05, ECLI:CE:ECHR:2009:0219JUD000345505.

⁽²⁸⁶⁾ *Ibid.*, paras 202-224.

⁽²⁸⁷⁾ *Ibid.*, para. 218. Compare this with the principle of proportionality under Article 52(1) EU Charter.

⁽²⁸⁸⁾ National Asylum Court (Cour nationale du droit d’asile, France), judgment of 10 October 2018, *M. T.*, No 11015942; Supreme Administrative Court (Nejvyšší správní soud, Czech Republic), judgment of 20 June 2007, *RK v Ministry of Interior*, 6 Azs 142/2006-58, where a similar conclusion was reached.





with the reform of French asylum law adopted in July 2015. [Article L. 532-9](#) 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), which is the determining authority, relies on an undisclosed 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 UK Upper Tribunal has held that while in international protection claims there is no general duty of disclosure on the state, '[w]here the respondent [the Secretary of State] relies on absence of material risk by reference to Country of Origin Information Service (COIS) reports, UKBA Operational Guidance Notes (OGN), or responses to the evidence of others, she cannot 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' ⁽²⁸⁹⁾. 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 ⁽²⁹⁰⁾.

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 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 ⁽²⁹¹⁾.

⁽²⁸⁹⁾ Upper Tribunal (IAC, United Kingdom), judgment of 31 January 2013, [CM \(EM country guidance; disclosure\) Zimbabwe CG](#) [2013] UKUT 00059 (hereafter Upper Tribunal (IAC, United Kingdom), 2013, [CM \(EM country guidance; disclosure\) Zimbabwe CG](#)), 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.

⁽²⁹⁰⁾ Upper Tribunal (IAC, United Kingdom), 2013, [CM \(EM country guidance; disclosure\) Zimbabwe CG](#), op. cit., fn. 289, para. 29.

⁽²⁹¹⁾ CJEU (GC), 2013, [ZZ](#), op. cit., fn. 283, para. 64. With regard to Article 5 ECHR, see also ECtHR (GC), 2009, [A and Others v United Kingdom](#), op. cit., fn. 285, 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. There is a pending case before the CJEU on this question: CJEU, Opinion of 28 April 2022, [Országos Idegenrendészeti Főigazgatóság and Others](#) C-159/21, ECLI:EU:C:2022:326.





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 ⁽²⁹²⁾. 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 ‘the applicant’s statements and all the documentation at the applicant’s disposal [...]’ concerning, inter alia, ‘the reasons for applying for international protection’ (for the full list of such elements, see [Table 8](#) in Section 4.2.4). 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 the consideration of other relevant matters.

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 ⁽²⁹³⁾.

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 R.A.T. [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 over another, it should be justified so that

⁽²⁹²⁾ 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.’ In *VwGH 26.1.2021, Ra 2020/14/0122* (Verwaltungsgerichtshof, Austrian Supreme Administrative Court), the court ruled that a free consideration of evidence as demanded by § 45 para 2 Austrian Administrative Code can only be carried out after all evidence has been gathered; an anticipating consideration of evidence consisting of an abstract evaluation of the significance of the evidence in advance, is illegal.

⁽²⁹³⁾ 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.





the tribunal can be seen not to have acted arbitrarily but to have acted reasonably, rationally and impartially ⁽²⁹⁴⁾.

The UK 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 ⁽²⁹⁵⁾ 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 ⁽²⁹⁶⁾.

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) on Member States to ensure that precise and 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](#)).

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.

The practical consequence of this requirement is to ensure that there is a rigorous and thorough assessment of all the evidence ⁽²⁹⁷⁾. Consequently, the Irish High Court has considered that if a decision-maker decides to reject some evidence presented before the court or tribunal, they shall then provide 'any cogent or reasoned decision as to why the [evidence] submitted by the applicant [was] rejected' ⁽²⁹⁸⁾. Likewise, a UK court has judged that

⁽²⁹⁴⁾ High Court (Ireland), judgment of 30 November 2007, *S v Minister for Justice Equality & Law Reform & ors* [2007] IEHC 451.

⁽²⁹⁵⁾ This is a reference to Section 8 of the UK [Asylum and Immigration \(Treatment of Claimant's, etc.\) Act 2004](#) which provides 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.

⁽²⁹⁶⁾ UK Asylum and Immigration Tribunal, judgment of 5 July 2005, *SM (Section 8: Judge's process) Iran* [2005] UKAIT 00116, para. 10. Section 8 has been further amended by the [Nationality and Borders Act 2022](#), Section 19.

⁽²⁹⁷⁾ See High Court (Ireland), 2009, *IR v Minister for Justice, Equality and Law Reform*, op. cit., fn. 292, 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'.

⁽²⁹⁸⁾ 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. 292, para. 11, principle 9.





a decision-maker will err in law if they approach 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 ⁽²⁹⁹⁾.

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 criteria for qualification for international protection. 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 ⁽³⁰⁰⁾. It is important, therefore, that a court or tribunal makes clear findings as regards the material facts of an application ⁽³⁰¹⁾.

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. Sometimes, however, the effect of lies can be fatal to an application if they are the basis for the qualification. Even if no lies are involved, a reliance on facts, which have subsequently been revealed to be incorrect, will negate the basis for the grant of international protection and justify withdrawal of status, as illustrated by the CJEU judgment in *Bilali* ⁽³⁰²⁾. 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 QD (recast), however little such persons may have assisted their case by lying or acting in bad faith ⁽³⁰³⁾.

⁽²⁹⁹⁾ 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.

⁽³⁰⁰⁾ IARLJ, *Assessment of Credibility*, CREDO project, op. cit., fn. 36 p. 36.

⁽³⁰¹⁾ In VwGH 21.5.2021, Ra 2021/18/0196 (Verwaltungsgerichtshof, Austrian Supreme Administrative Court), the court noted that the facts which the court states in its decision form the factual basis of the decision. They must not be restricted to a mere repetition of the statements given by the appellant. In its assessment of evidence, the court is to lay out its rationale why it considers these facts established. A reference to the statements in this regard is only necessary insofar as it is required to understand the considerations of the court.

⁽³⁰²⁾ CJEU, judgment of 23 May 2019, *Mohammed Bilali v Bundesamt für Fremdenwesen und Asyl*, C-720/17, EU:C:2019:448 (hereafter CJEU, 2019, *Bilali*). In this case, the CJEU held that 'Article 19(1) of [QD (recast)], read in conjunction with Article 16 thereof, must be interpreted as meaning that a Member State must revoke subsidiary protection status if it granted that status when the conditions for granting it were not met, in reliance on facts which have subsequently been revealed to be incorrect, and notwithstanding the fact that the person concerned cannot be accused of having misled the Member State on that occasion', (para. 65). It should be noted that the applicant in that case did not lie.

⁽³⁰³⁾ 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.





In *MA (Somalia)* ⁽³⁰⁴⁾, the UK 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 ⁽³⁰⁵⁾.

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 ⁽³⁰⁶⁾.

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

It is important to emphasise that, whilst the optional 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 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 in Article 4(2) QD (recast) that the duty to substantiate only extends to documentation 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 substantiate their applications. Someone who has left their country of origin in danger of persecution or serious harm may have difficulty producing documentary

⁽³⁰⁴⁾ Supreme Court (United Kingdom), judgment of 24 November 2010, *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49.

⁽³⁰⁵⁾ *Ibid.*, para. 33.

⁽³⁰⁶⁾ Council of State (Conseil d’État, France), decision of 28 November 2016, *OFPRA c MB*, application No [389733 B](#).





or other evidence to support their application ⁽³⁰⁷⁾, or there may simply be no documentary or other evidence to support asserted material facts.

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 their duty to do so) and identifies those elements in Article 4(2) QD (recast). Article 4(3) QD (recast) sets out how the assessment is to be carried out, and Article 4(4) QD (recast) specifies that previous persecution is a serious indication of 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 applicants can be excused from the duty to confirm aspects of their statements where these are not supported by documentary or other evidence. In *Fathi*, the CJEU stated the following in relation to the fulfilment of Article 4(5):

In verifications carried out by the competent authorities, pursuant to Article 4 of the directive, when certain aspects of the statements of an applicant for international protection are not substantiated by documentary or other evidence, those aspects may be taken into account only if the cumulative conditions laid down in Article 4(5)(a) to (e) of that directive are met ⁽³⁰⁸⁾.

However, even though the requirements of Article 4(5) are 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) ⁽³⁰⁹⁾. 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](#).

⁽³⁰⁷⁾ See CJEU, 2020, *EZ*, op. cit. fn. [147](#). See also *UNHCR Handbook*, op. cit., fn. [37](#), 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.

⁽³⁰⁸⁾ CJEU, 2018, *Fathi*, op. cit., fn. [56](#), para. 86.

⁽³⁰⁹⁾ In *La Corte Suprema di Cassazione* (Supreme Court of Cassation) (Italy), judgment No 20580/2019, the court said the credibility assessment of the applicant is the result of a legal proceduralisation of the decision, which must be carried out in light of the specific criteria indicated in Article 4(5) QD (recast), as well as general presumptive criteria suitable for enlightening the judge about the truthfulness of the statements made.





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, 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, 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 their duty of substantiation under Article 4(1), where Member States use the faculty provided by the first sentence of this article ⁽³¹⁰⁾. A failure to make a genuine effort does not, as the CJEU in *M.M.* makes clear, relieve Member States of the duty to cooperate as this arises where confirmation is lacking 'for any reason whatsoever' ⁽³¹¹⁾. 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 ⁽³¹²⁾.

⁽³¹⁰⁾ There is, as yet no guidance from the CJEU as to how a 'genuine effort' is to be interpreted insofar as that phrase relates to an applicant. See Council for Aliens Law Litigation (RVV/CCE, Belgium), judgment of 27 August 2020, No [A 240 175](#), para. 30. See also High Court (Ireland), judgment of 22 September 2015, *O.N. & ors v Refugee Appeals Tribunal & ors* [2015] IEHC 585.

⁽³¹¹⁾ CJEU, 2012, *M.M.*, op. cit., fn. 31, para. 66.

⁽³¹²⁾ *Ibid.*, paras 67 and 66.



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'. The relevant elements which need to be submitted by the applicant are stipulated in Article 4(2) QD (recast) which also refers to 'documentation at the applicant's disposal'. For the meaning of 'at the applicant's disposal', see Section 4.2.4. The requirement in Article 4(5)(b) QD (recast) links with the requirement 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. 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 ⁽³¹³⁾.

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' ⁽³¹⁴⁾. 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) ⁽³¹⁵⁾.

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

⁽³¹³⁾ See e.g. Supreme Court (Vrhovno sodišče, 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*, No 15576/89, ECLI:CE:ECHR:1991:0320JUD001557689, para. 78. See also: EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, Section 6.2.2.

⁽³¹⁴⁾ CJEU, judgment of 26 February 2015, C-472/13, *Andre Lawrence Shepherd v Bundesrepublik Deutschland*, EU:C:2015:117, para. 43.

⁽³¹⁵⁾ UNHCR, *Beyond Proof*, op. cit., fn. 19, p. 60.





relevant expert evidence which meets the standards set out in Sections 4.7 and 4.8 above ⁽³¹⁶⁾. 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 or both. However, in some particular cases applicants may be able to identify specific circumstances that lend credibility to their own account even if they run counter to general COI. For example, if an applicant has been subjected to a traumatic experience such as torture, rape or other serious forms of psychological, physical or sexual violence, it is important for a decision-maker to be aware of how traumatic experiences may impact an applicant's ability to present coherent statements. Decision makers and members of courts and tribunals should remain alive to possible exceptions ⁽³¹⁷⁾.

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 ⁽³¹⁸⁾.

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) ⁽³¹⁹⁾. In any event, an opportunity must be given to explain any delay which may be relied on against an applicant.

⁽³¹⁶⁾ 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. 95.

⁽³¹⁷⁾ See also: EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, Section 6.2.2.

⁽³¹⁸⁾ There is, as yet, no guidance from the CJEU as to how the phrase 'at the earliest possible time' is to be interpreted. The 2019 *Commission Report* op. cit. fn. 150, p.49, notes that national guidelines in the Netherlands provide that an application made within 48 hours upon arrival in the Netherlands is indicated as reasonable. However, the interpretation of the concept was mainly put forward by the relevant Ministry and the report notes that the courts have only rarely applied it. The report notes that on 8 September 2011 the Council of State ruled that when the applicant has not applied for international protection at the earliest possible time, the 'positive persuasiveness' test is applied (in the Netherlands an application that cannot be fully substantiated needs to have a 'positive persuasiveness'). See also Raad van State/Conseil d'État (Council of State) (Belgium), decision of 18 October 2021, No A 262 369, and Raad van State/Conseil d'État (Council of State) (Belgium), decision of 7 December 2021, No A 265 059, and High Court (Ireland), judgment of 8 April 2022, *Z.A. v The International Protection Appeals Tribunal & Ors*, [2022] IEHC 280, paras 49-52.

⁽³¹⁹⁾ See also: EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, Section 6.2.2.





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 ⁽³²⁰⁾. 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) ⁽³²¹⁾. There is no guidance to date in CJEU jurisprudence 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 their account. It can also be so when the Member State has done its best to cooperate with the applicant in the assessment of the application by obtaining and taking into account COI and by giving the applicant an opportunity to produce further evidence and comment on areas of concern.

As set out in Section 4.3.7, Article 4(5) QD (recast) provides 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.

⁽³²⁰⁾ The wording of Article 4(5)(c) and (e) QD (recast) reflects the wording of the *UNHCR Handbook*, op. cit., fn. 37, para. 204 which reads: ‘The benefit of the doubt should, however, 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. The applicant’s statements must be coherent and plausible, and must not run counter to generally known facts.’ When this is read in the light of para. 202 (which reads: ‘Since the examiner’s conclusion on the facts of the case and his personal impression of the applicant will lead to a decision that affects human lives, he must apply the criteria in a spirit of justice and understanding and his judgement should not, of course, be influenced by the personal consideration that the applicant may be an ‘undeserving case’”), it is questionable whether the Handbook is drawing a distinction between the credibility of the statements and the credibility of the applicant. As regards the term ‘credibility’ within the phrase ‘general credibility’, see *Upravno sodišče (Administrative Court) (Slovenia)*, judgment of 29 August 2012, *I U 787/2012-4*, paras 91-95.

⁽³²¹⁾ ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, 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*, No 2345/02, ECLI:CE:ECHR:2005:0705JUD000234502, para. 53, and, *mutatis mutandis*, ECtHR, 2005, *N v Finland*, op. cit., fn. 258, paras 154-155. See also ECtHR, 2022, *T.K. and Others v Lithuania*, op. cit., fn. 258, para. 80, and ECtHR, judgment of 15 May 2012, *SF and Others v Sweden*, No 52077/10, ECLI:CE:ECHR:2012:0515JUD005207710, para. 66. 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].





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⁽³²²⁾. 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⁽³²³⁾ 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'⁽³²⁴⁾.

The ECtHR also refers to it being frequently necessary to give an applicant the benefit of the doubt⁽³²⁵⁾. 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 [...]⁽³²⁶⁾.

In a document produced by the Research Division of the ECtHR on the court's approach to the burden of proof in asylum cases under Article 3 ECHR, the following is stated:

*When the applicant fails to comply with this initial burden of proof, the Court can dismiss the application. When he/she does comply with it, the burden of proof shifts to the respondent Government who are then to 'dispel any doubts' about it (see *Saadi v. Italy* [GC], cited above, § 129; *N.A. v. the United Kingdom*, cited above, § 111; *R.C. v. Sweden*, no. 41827/07, § 50, 9 March 2010)⁽³²⁷⁾.*

⁽³²²⁾ See e.g. *Supreme Administrative Court (Nejvyšší správní soud, Czech Republic), SN v Ministry of Interior*, 5 Azs 66/2008-70, op. cit., fn. 158; High Court (Ireland), judgment of 15 March 2022, *O.O. v. The International Protection Appeals Tribunal and the Minister for Justice* [2022] IEHC 155.

⁽³²³⁾ CJEU, judgment of 6 October 1982, C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, EU:C:1982:335, para. 18.

⁽³²⁴⁾ CJEU, judgment of 27 October 1977, case 30/77, *Regina v Pierre Bouchereau*, EU:C1977:172, para. 14.

⁽³²⁵⁾ ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 93. See also ECtHR, judgment of 10 September 2015, *RH v Sweden*, No 4601/14, ECLI:CE:ECHR:2015:0910JUD00460114, para. 58, ECtHR, judgment of 20 July 2010, *N v Sweden*, No 23505/09, ECLI:CE:ECHR:2010:0720JUD002350509, para. 53; ECtHR, *RC v Sweden*, op. cit., fn. 259, para. 50.

⁽³²⁶⁾ ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 93.

⁽³²⁷⁾ European Court of Human Rights, Research Division, *Article 3 The Court's approach to the burden of proof in asylum cases*, 2016, para. 2.





At the conclusion of the same report, the following is stated:

While taking account of the inherent difficulties in presenting evidence in an asylum context, the Court does acknowledge that it is frequently necessary to give an asylum seeker the benefit of the doubt and not to raise too high the threshold for discharging the initial burden of proof. In such circumstances, all that can reasonably be expected of the applicant is the establishment of a consistent and credible prima facie case ⁽³²⁸⁾.

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' ⁽³²⁹⁾.

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' ⁽³³⁰⁾.

In a jurisdiction such as Germany where Article 4(5) QD (recast) is not treated as an expression of the principle of the 'benefit of the doubt', there are seen to be two main differences between the principle and the wording of Article 4(5) QD (recast). First, as the IARMJ has pointed out in its study on credibility assessment, the principle in Germany 'is a concept in criminal law only, but unfamiliar in refugee and subsidiary protection law'; in a criminal law 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 ⁽³³¹⁾. 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 ⁽³³²⁾. 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') ⁽³³³⁾. On the other hand, there are Member States where the benefit of the doubt principle and Article 4(5) are regarded as essentially one and the same thing in the context of international protection applications. In the Netherlands, as mentioned above, the phrase 'the benefit of the doubt' is to be found in the Dutch translation of Article 4(5) QD (recast) and, in Ireland, the High

⁽³²⁸⁾ Ibid., para. 29.

⁽³²⁹⁾ *UNHCR Handbook*, op. cit., fn. 37, para. 196. See also paras 203 and 204.

⁽³³⁰⁾ ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 97. See also ECtHR, judgment of 15 April 2021, *K.I. v France*, No 5560/19, ECLI:CE:ECHR:2021:0415JUD000556019, paras 139-140, where the ECtHR considers that the benefit of the doubt does not apply when an applicant is no longer a 'vulnerable' asylum-seeker.

⁽³³¹⁾ IARLJ, *Assessment of Credibility*, CREDO project, op. cit., fn. 36, p. 50.

⁽³³²⁾ Upper Tribunal (IAC, United Kingdom), judgment of 10 December 2014, *KS (benefit of the doubt)* [2014] UKUT 552, para. 85; consenting: Dörig, H., op. cit., fn. 143, p. 1142, Article 4 QD, para. 39.

⁽³³³⁾ Ibid., para. 83.





Court has repeatedly referred to the application of the Irish domestic law version of Article 4(5) QD (recast) as the application of the benefit of the doubt ⁽³³⁴⁾.

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 ⁽³³⁵⁾.

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 ⁽³³⁶⁾.

4.3.9. Standard of proof/level of conviction

Whilst the QD (recast) sets out the material conditions for eligibility for refugee and subsidiary protection, it does not refer directly to the required standard of proof or level of conviction for establishing the facts and circumstances of an application for international protection ⁽³³⁷⁾. The principle of procedural autonomy leaves this matter to individual Member States and there is not, as yet, any CJEU judgment that engages with the approaches to this matter taken by the various Member States.

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 ⁽³³⁸⁾.

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

⁽³³⁴⁾ See High Court (Ireland), judgment of 29 January 2020, *MR (Bangladesh) v IPAT & Another* [2020] IEHC 41 and High Court (Ireland), 2022, *O.O. v. The International Protection Appeals Tribunal*, op. cit., fn. 322.

⁽³³⁵⁾ See also 2019 *Commission Report*, op. cit. fn. 150, p. 41.

⁽³³⁶⁾ La Corte Suprema di Cassazione (Supreme Court of Cassation) (Italy), judgment No 22527/2020 – said that an overall and non-atomistic evaluation of the credibility of asylum-seeker has to consider and apply also the principle of ‘the benefit of the doubt’.

⁽³³⁷⁾ Diverse terminology is used regarding the standard of proof/degree of conviction and this terminology is not used in all Member States.

⁽³³⁸⁾ CJEU (GC), *Y and Z*, op. cit., fn. 31, para. 76.





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’⁽³³⁹⁾.

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*⁽³⁴⁰⁾ and has been affirmed consistently by the court since then. According to the well-established case-law of the ECtHR, it is, in principle, 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, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 ECHR⁽³⁴¹⁾. The mere possibility of ill-treatment on account of an unsettled situation in the receiving country cannot on its own give rise to a breach of Article 3⁽³⁴²⁾. The same approach is implicit in the CJEU’s judgment in *Elgafaji* when considering serious harm within Article 15 QD⁽³⁴³⁾. 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’.

The 2019 Commission Report concerning the implementation of the QD (recast) in the Member States notes that:

...the concept of standard of proof, referring to the required degree of certainty or probability of accuracy of the evidence, is widely used in Common Law systems. However, in many continental systems, based on the Civil Law tradition, it is ‘not so objectively, or perhaps scientifically, defined by the judge’⁽³⁴⁴⁾. Such differences may in practice lead to different approaches to applying the provisions of the Directive⁽³⁴⁵⁾.

⁽³³⁹⁾ Ibid., para. 80.

⁽³⁴⁰⁾ ECtHR, *Cruz Varas v Sweden*, op. cit., fn. 313, para. 69.

⁽³⁴¹⁾ See ECtHR (GC), 2008, *Saadi v Italy*, op. cit. fn. 281, para. 129; ECtHR, 2005, *N v Finland*, op. cit., fn. 258, para. 167; ECtHR, 2008, *NA v United Kingdom*, op. cit. fn. 281, para. 111; ECtHR, judgment of 15 January 2015, *A.A. v France*, No 18039/11, ECLI:CE:ECHR:2015:0115JUD001803911, para. 53; ECtHR, judgment of 9 July 2015, *R.K. v France*, No 61264/11, ECLI:CE:ECHR:2015:0709JUD006126411, para. 59; ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 86; ECtHR (GC), 2022, *Khasanov and Rakhmanov v Russia*, op. cit., fn. 67, para. 109; ECtHR, judgment of 7 December 2021, *Tewelde and Others v Russia*, Nos 48352/19, 48496/19, 48720/19 and 48773/19, ECLI:CE:ECHR:2021:1207JUD004835219, para. 32; ECtHR, 2021, *K.I. v France*, op. cit., fn. 330, para. 125; ECtHR, 2020, *S.A. v the Netherlands*, op. cit., fn. 281, para. 62.

⁽³⁴²⁾ See ECtHR (GC), 2008, *Saadi v Italy*, op. cit. fn. 281, para. 131; ECtHR, judgment of 30 October 1991, *Vilvarajah and Others v the United Kingdom*, Nos 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, ECLI:CE:ECHR:1991:1030JUD001316387, para. 111; ECtHR, judgment of 30 May 2001, *Fatgan Katani and Others v Germany*, No 67679/01, ECLI:CE:ECHR:2001:0531DEC006767901; ECtHR, judgment of 5 July 2016, *A.M. v The Netherlands*, No 29094/09, ECLI:CE:ECHR:2016:0705JUD002909409 para. 79; ECtHR, decision of 5 December 2017, *B.T. v Russia*, No 40755/16, ECLI:CE:ECHR:2017:1205DEC004075516, para. 22; ECtHR, decision of 29 January 2019, *M.I. v Bosnia and Herzegovina*, No 47679/17, ECLI:CE:ECHR:2019:0129DEC004767917, para. 50.

⁽³⁴³⁾ CJEU (CG), 2009, *Elgafaji*, op. cit., fn. 261, para. 43.

⁽³⁴⁴⁾ International Association of Refugee Law Judges, Discussion Paper on the burden of proof and standard of proof in refugee and subsidiary protection claims and appeals in the EU, in *Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive – Judicial criteria and standards*, 2013.

⁽³⁴⁵⁾ 2019 Commission Report, op. cit. fn. 150, para. 3.3.1, p.36.



The vast majority of Member States have legal systems that may be characterised as **civil law jurisdictions**. In such jurisdictions, if the law simply says that a condition must be fulfilled then generally the party which has the burden of proof (the prosecutor in a criminal case or the plaintiff in a civil case) must persuade the court to a high degree of probability 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 lower degree of probability as a part of the material rules by which they are bound. This is precisely the case with international protection cases.

In civil law jurisdictions the judge must be convinced that the applicant in fact fulfils the criteria for qualification as a refugee or eligibility for subsidiary protection. However, the material standard of their conviction is defined by the provisions of the QD (recast) ⁽³⁴⁶⁾.

In the case of refugee protection, it is whether the applicant’s fear of being persecuted is well-founded. According to the German Federal Administrative Court, this is the case when there is a ‘considerable probability’ that an applicant for protection will be persecuted, but this does not require a probability of more than 50 % ⁽³⁴⁷⁾. The court held that 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; when weighing all of the circumstances, the particular severity of the feared interference must be taken into consideration.

The same applies to granting subsidiary protection. The material standard of conviction for the judge in subsidiary protection cases is the existence of a real risk of serious harm for the applicant. This, in essence, is the same standard as applied for refugee protection when considering whether the applicant’s fear is well-founded ⁽³⁴⁸⁾. Courts in Slovenia use the standard of reasonable degree of likelihood when assessing whether an applicant’s fear is well-founded, which is below a 50 % probability ⁽³⁴⁹⁾.

In **common law jurisdictions**, which account for the type of legal system in a small minority of Member States ⁽³⁵⁰⁾, the assessment of evidence is approached on the basis of considering whether an applicant has met a required standard of proof. During the period when the United Kingdom applied EU asylum law, it applied a single standard of reasonable degree of likelihood

⁽³⁴⁶⁾ Federal Administrative Court (BVerwG, Germany), judgment of 14 July 2011, [10 B 7.10](#), BVerwG:2010:140710B10B7.10.0, para. 8; Federal Administrative Court (BVerwG, Germany), judgment of 16 April 1985, No 9 C 109.84, BVerwGE 71, paras 180 and 181.

⁽³⁴⁷⁾ Federal Administrative Court (BVerwG, Germany), judgment of 4 July 2019, No [1 C 31.18](#), BVerwG:2019:040719U1C31.18.0, para. 16, available in English at <http://www.bverwg.de>. See also Supreme Court (Tribunal Supremo, Spain), judgment of 9 December 2015, application No [1699/2015](#), ECLI:ES:TS:2015:5211, p. 9 (see [EDAL English summary](#)).

⁽³⁴⁸⁾ Federal Administrative Court (BVerwG, Germany), judgment of 1 June 2011, No [10 C 25.10](#), BVerwG:2011:010611U10C25.10.0, para. 22, available in English at <http://www.bverwg.de>.

⁽³⁴⁹⁾ See e.g. Administrative Court (Upravno sodišče, Slovenia), judgment of 24 April 2015, I U 411/2015-57, para. 118., which adopts the approach set out in 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.

⁽³⁵⁰⁾ Since the United Kingdom left the EU on 31 January 2020, only Ireland and Malta count among the Member States as having legal systems that might be described as common law in nature.



to past, present and future facts, i.e. a lower standard than the civil standard of balance of probabilities⁽³⁵¹⁾. The Irish High Court took a somewhat different view. Having reviewed UK and international case-law, the Irish High Court concluded that the appropriate standard of proof in relation to the establishment of the (past and present) material facts and circumstances of an application for international protection is ‘the balance of probabilities – coupled with, where appropriate, the benefit of the doubt’⁽³⁵²⁾. However, when considering whether an applicant has shown a well-founded fear of future persecution in connection with the established facts and circumstances, decision-makers in international protection applications in Ireland are then expected to follow a similar approach to that long-mandated in UK jurisprudence, namely that it is 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⁽³⁵³⁾. The same standard applies to subsidiary protection applications, which entail a consideration of 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 to applications for qualification for refugee protection⁽³⁵⁴⁾.

It is, perhaps, notable that the approach in Ireland entails the application of two different standards of proof in the assessment of an application for international protection: one in connection with the establishment of the (past and present) material facts and circumstances of an application and another in assessing whether the established material facts and circumstances give rise to a future ‘well-founded fear of persecution’ or a future ‘real risk of serious harm’.

There remain, then, 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

⁽³⁵¹⁾ Supreme Court (United Kingdom), *MA (Somalia) v Secretary of State for the Home Department*, op. cit., fn. 304, paras 12-20.

⁽³⁵²⁾ See High Court (Ireland), 2017, *ON v Refugee Appeals Tribunal & ors*, op. cit., fn. 82, para. 63. In subsequent cases, including *MR (Bangladesh) v IPAT & Another* [2020] IEHC 41, the Irish High Court has confirmed that the reference to the ‘benefit of the doubt’ in the test first enunciated in *ON* is a reference to domestic Irish legislation (Section 28(7) of the International Protection Act 2015) that effectively reproduces Article 4(5) of the *QD (recast)* i.e. the test to be applied where aspects of an applicant’s statements are not supported by documentary or other evidence.

⁽³⁵³⁾ House of Lords (United Kingdom), 1987, *R v Sivakumaran*, op. cit., fn. 349, 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. 304, 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.

⁽³⁵⁴⁾ 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 UK 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.





concerning well-founded fear in the Article 2(d) QD (recast) differs from the test concerning real risk in Article 2(d) QD (recast)⁽³⁵⁵⁾; whether the approach to the assessment of evidence differs in the light of the diverse phraseology used; and whether an approach that applies one standard of proof (drawing, in part, on a civil standard of proof) to the establishment of material facts and circumstances and another standard of proof to the matter of whether established material facts and circumstances give rise to a ‘well-founded fear of persecution’ or a ‘real risk of serious harm’ is compatible with EU law⁽³⁵⁶⁾.

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 of their claim 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⁽³⁵⁷⁾. 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⁽³⁵⁸⁾.

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 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’⁽³⁵⁹⁾. 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

⁽³⁵⁵⁾ For further discussion on the well-founded fear and the real risk tests, see EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, Sections 2.8.1 and 3.2.1.6 respectively.

⁽³⁵⁶⁾ The CJEU in *Y and Z*, held that, when assessing whether an applicant has a well-founded fear of being persecuted, the competent authorities are required, ‘[i]n the system provided for by the [QD] [...] 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.’, para. 76. It is to be noted that the CJEU does not treat this process as requiring two standards of proof. It cannot be said, however, that the case makes clear that the application of two different standards of proof to different aspects of the process is incompatible with EU law.

⁽³⁵⁷⁾ See Section 1.2.4. What are material facts?

⁽³⁵⁸⁾ See Articles 31(8) and 43(1) [APD \(recast\)](#) on accelerated and border procedures.

⁽³⁵⁹⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 48.





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]’⁽³⁶⁰⁾. It followed that, although it was for the applicant to identify their sexual orientation, which was an aspect of their 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 the QD⁽³⁶¹⁾.

In *A, B and C*, the CJEU held that:

[T]he methods used by the competent authorities to assess the statements and documentary or other evidence submitted in support of those applications must be consistent with the provisions of [QD] and [APD] and, as is clear from recitals 10 and 8 in the preambles to those directives respectively, 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⁽³⁶²⁾.

In consequence, the competent authorities must ‘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’⁽³⁶³⁾.

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 15](#).

⁽³⁶⁰⁾ Ibid., para. 49.

⁽³⁶¹⁾ Ibid., para. 52.

⁽³⁶²⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, 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 (GC), 2014, *A, B and C*, op. cit., fn. 18.

⁽³⁶³⁾ Ibid., para. 54.



Table 15. 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 ‘may be a useful element at the disposal of competent authorities for the purposes of the assessment’ but 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 ⁽³⁶⁴⁾ . ‘The inability of the applicant for asylum to answer such questions cannot, in itself, constitute sufficient grounds for concluding that the applicant lacks credibility’ ⁽³⁶⁵⁾ .
2	At interview, ‘where appropriate, [...] questions concerning details of the sexual practices of the 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 [EU Charter]’ ⁽³⁶⁶⁾ .
3	Allowing sexual ‘acts to be performed, the submission of the applicants to possible ‘tests’ in order to demonstrate their [sexuality] or even the production by those applicants of evidence such as films of their intimate acts, [...] would of its nature infringe human dignity’ contrary to Article 1 of the EU Charter ⁽³⁶⁷⁾ .
4	Finding a lack of credibility merely because an applicant does not reveal their 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). It is clear that ‘having regard to the sensitive nature of questions relating to a person’s personal identity and, in particular, his sexuality, 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 [sexuality] at the outset’ ⁽³⁶⁸⁾ .

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 ⁽³⁶⁹⁾ are confined to the context of an assessment of the applicant’s account and not to their personal credibility as such. Similarly, in its *Y and Z* judgment, the CJEU stated that ‘[t]hat 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’ ⁽³⁷⁰⁾.

⁽³⁶⁴⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, 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 (GC), 2014, *A, B and C*, op. cit., fn. 18, paras 62 and 73.

⁽³⁶⁵⁾ Ibid., para. 63.

⁽³⁶⁶⁾ Ibid., para. 64.

⁽³⁶⁷⁾ Ibid., para. 65.

⁽³⁶⁸⁾ Ibid., paras 67-70.

⁽³⁶⁹⁾ Ibid., paras 59, 63 and 69.

⁽³⁷⁰⁾ CJEU (GC), *Y and Z*, op. cit., fn. 31, 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 Berlitz, U., Dörig, H., and Storey, H., ‘*Credibility Assessment in Claims Based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach*’, *IJRL*, vol. 27, No 4, 2015, 649-666.



In *F.* the CJEU reaffirmed the principles that emerged from the *A, B and C* case⁽³⁷¹⁾. In applying those principles to the facts of the case at hand, it concluded that:

Article 4 of [QD (recast)] must be interpreted as meaning that it does not preclude the authority responsible for examining applications for international protection, or, where an action has been brought against a decision of that authority, the court or tribunal seised, from ordering that an expert's report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant, provided that the procedures for such a report are consistent with the fundamental rights guaranteed by the Charter, that that authority and those courts or tribunals do not base their decision solely on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation (372).

In the same case the CJEU stated the following in relation to the reliability of such evidence:

In this respect, it should be noted that the suitability of an expert's report such as that at issue in the main proceedings may be accepted only if it is based on sufficiently reliable methods and principles in the light of the standards recognised by the international scientific community (373).

In the same case the CJEU stated:

It is also necessary to take account, in order to assess the seriousness of the interference arising from the preparation and use of a psychologist's expert report, such as that at issue in the main proceedings, of Principle 18 of the Yogyakarta principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, to which the French and Netherlands Governments have referred, which states, inter alia, that no person may be forced to undergo any form of psychological test on account of his sexual orientation or gender identity (374).

The CJEU continued:

When those elements are looked at together, it is apparent that the seriousness of the interference with private life entailed by the preparation and use of an expert's report, such as that at issue in the main proceedings, exceeds that entailed by an assessment of the statements of the applicant for international protection relating to a fear of persecution on grounds of his sexual orientation or recourse to a psychologist's expert report having a purpose other than that of establishing the applicant's sexual orientation (375).

(371) CJEU, 2018, *F.*, op. cit. fn.20: specific reiteration of the principles that emerged from the *A, B and C* case is to be found at paras 28, 29, 35, 53 and 61.

(372) *ibid.*, para. 46.

(373) *ibid.*, para. 58.

(374) *ibid.*, para. 62.

(375) *ibid.*, para. 63.



The CJEU ruled that:

Article 4 of [QD (recast)], read in the light of Article 7 of the EU Charter, must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, such as that at issue in the main proceedings, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant ⁽³⁷⁶⁾.

The QD (recast) in Article 4(2), (3)(b), and (5), contains specific rules in respect of an applicant's statements. Accordingly, when assessing the applicant's statements, it is necessary to consider whether they are confirmed by documentary or other evidence of any type as set out in Section [4.3.7](#).

4.5. Credibility indicators

Assessing the credibility of an applicant's statements requires knowledge of the scientific evidence on human behaviour and memory, as those can be counter to common beliefs and can shape perceptions of credibility. Therefore, it is recommended that the content of this section should be read in conjunction with [Part 6. Multidisciplinary approach to the assessment of evidence and credibility](#).

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 and has given no specific guidance as to 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) QD (recast) as set out in Section [4.3.7](#), provide a basic framework for understanding the approach which the competent national authorities ⁽³⁷⁷⁾, acting under the supervision of their courts and tribunals, must follow when assessing the facts and circumstances under Article 4(3) QD (recast) and conducting 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

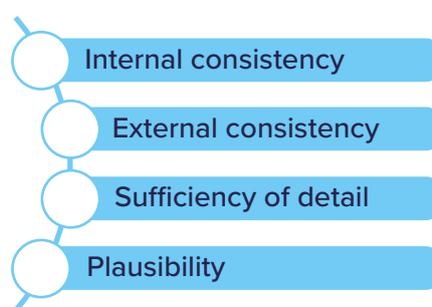
⁽³⁷⁶⁾ Ibid., para. 71.

⁽³⁷⁷⁾ CJEU, 2012, *M.M.*, op. cit., fn. [31](#), para. 70.

of procedure and evidence of each Member State subject to compliance with the requirements of the EU Charter and the provisions of any relevant regulation or directive ⁽³⁷⁸⁾.

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 Contracting States 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 3](#) and the subsequent subsections below. These sources have, in turn, drawn on the very considerable work done by background studies on ‘credibility indicators’ ⁽³⁷⁹⁾. 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 3. 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. This principle is at the heart of the rationale for the CEAS. This rationale finds expression in recital 12 QD (recast), which states: ‘The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all Member States.’ 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.

⁽³⁷⁸⁾ In the Opinion of Advocate General Sharpston in *A, B and C v Staatssecretaris van Veiligheids 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. 31, 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’.

⁽³⁷⁹⁾ See e.g. IARLJ, *Assessment of Credibility*, CREDO project, op. cit., fn. 36; IARLJ, *A Structured Approach to the Decision Making Process*, op. cit., fn. 1; UNHCR, *Beyond Proof*, op. cit., fn. 19; 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. 36; Hungarian Helsinki Committee, *Credibility Assessment Training Manual, Vol. 2*, op. cit., fn. 36.



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. A negative finding pursuant to the application of a particular indicator can be outweighed by other 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 the context of the procedural standards referred to in Section [4.5.8](#), as compliance with proper procedural standards is relevant when considering the applicability of the indicators.

4.5.1. Internal consistency

Internal consistency concerns findings regarding consistency, and any inconsistencies, discrepancies, additions 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 a final decision. The focus here is on the extent to which an applicant's account is coherent.

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 ⁽³⁸⁰⁾. The court has also said that when assessing the general credibility of the statements, complete accuracy of dates and events cannot be expected ⁽³⁸¹⁾. However, 'when information is presented which gives strong reasons to question the veracity of an asylum-seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions' ⁽³⁸²⁾.

⁽³⁸⁰⁾ ECtHR, *Said v the Netherlands*, op. cit., fn. 321, 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.

⁽³⁸¹⁾ See e.g. *ibid.*; ECtHR, decision of 17 January 2006, *Bello v Sweden*, No 32213/04, ECLI:CE:ECHR:2006:0117DEC003221304. See also Section [6.1](#).

⁽³⁸²⁾ ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 93; and ECtHR, *RH v Sweden*, op. cit., fn. 325, para. 58.





In a 2016 report, the ECtHR explained its approach in the following manner:

The Court entertains a holistic approach with regard to the assessment of the credibility of the statements made by the applicant before the national authorities and during the proceedings before the Court [...]. Even if the applicant's account of some details may appear somewhat remarkable, the Court has considered that this does not necessarily detract from the overall general credibility of the applicant's claim [...]. In R.C. v. Sweden, cited above, the Court found that the applicant's basic story was consistent throughout the proceedings and that notwithstanding some uncertain aspects, such as his account as to how he escaped from prison, such uncertainties did not undermine the overall credibility of his story [...]⁽³⁸³⁾.

At the conclusion of the same report the ECtHR stated the following:

While taking account of the inherent difficulties in presenting evidence in an asylum context, the Court does acknowledge that it is frequently necessary to give an asylum seeker the benefit of the doubt and not to raise too high the threshold for discharging the initial burden of proof. In such circumstances, all that can reasonably be expected of the applicant is the establishment of a consistent and credible prima facie case⁽³⁸⁴⁾.

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 (see Section 6.1, in particular [Table 31](#) for a summary of the different ways in which we remember). 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 they experienced rather than what they stated previously (see Section 6.1). The normal functioning of memory can also be further disrupted by a history of traumatic events (see Section 6.2. The impact of traumatic experiences). Additionally, proper consideration should 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)⁽³⁸⁵⁾. Finally, there are cultural differences that affect memory which need to be understood before an assessment can be made (see Section 6.1.1. [Cultural differences](#)).

⁽³⁸³⁾ European Court of Human Rights, [Research Division, Article 3 The Court's approach to the burden of proof in asylum cases](#), 2016, para. 10. References to specific ECtHR case law have been omitted. ECtHR, judgment of 9 March 2010, *R.C. v Sweden*, No 41827/07, ECLI:CE:ECHR:2010:0309JUD004182707.

⁽³⁸⁴⁾ European Court of Human Rights, [Research Division, Article 3 The Court's approach to the burden of proof in asylum cases](#), 2016, para. 29.

⁽³⁸⁵⁾ See e.g. Corte Suprema di Cassazione (Supreme Court of Cassation) (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.





Consideration must also be given to the fact that, when initially interviewed, an applicant may only have had the opportunity of putting their account briefly ⁽³⁸⁶⁾ or it may be that at that stage they were in fear of the authorities ⁽³⁸⁷⁾ or had limited understanding of what was required in relation to the provision of evidence for the purpose of an assessment of their claim. Moreover, the quality of interviewing or conduct of a hearing at any stage in the process can give rise to apparent inconsistencies, internal and external, for example, applicants changing their answers under ‘interrogative pressure’ (see [Table 31](#)).

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 (see also [Section 6.3. Disclosure](#)). It is one of the factors to be taken into account ⁽³⁸⁸⁾. Late submission of statements and late presentation of evidence may negatively affect credibility, unless valid explanations are provided ⁽³⁸⁹⁾. 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](#)).

In any event, it is important to take into account that, in and of itself, consistency is not necessarily an indication of credibility ⁽³⁹⁰⁾. It may sometimes indicate an account that has been memorised by a dishonest applicant or conversely, inconsistencies may be indicative of an honest applicant trying to recall details of what they have experienced ⁽³⁹¹⁾ (see also [Section 6.1](#)), or as a result of speaking about a traumatic event which they had previously been unable or unwilling to disclose (see [Sections 6.2](#) and [6.3](#)), or as a result of additional detail surfacing the more an applicant speaks about an event ⁽³⁹²⁾. As regards the latter point, the question might be posed as to what the difference is between an account that has become more detailed over time and an account that is internally inconsistent.

4.5.2. External consistency

External consistency relates to consistency between the applicant’s account (as given in their personal interview, at their hearing, and/or in other statements) and generally known information, other evidence such as evidence from family or other witnesses, medical and

⁽³⁸⁶⁾ ECtHR, judgment of 18 November 2014, *MA v Switzerland*, No 52589/13, ECLI:CE:ECHR:2014:1118JUD005258913, 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.

⁽³⁸⁷⁾ *UNHCR Handbook*, op. cit., fn. 37, para. 198.

⁽³⁸⁸⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18.

⁽³⁸⁹⁾ See ECtHR, *Cruz Varas v Sweden*, op. cit., fn. 313, para. 78.

⁽³⁹⁰⁾ Vredevelde, A., van Koppen, P., Granhag, P.A. (2014). *The Inconsistent Suspect: A Systematic Review of Different Types of Consistency in Truth Tellers and Liars*. In: Bull, R. (eds) *Investigative Interviewing*. Springer, New York, NY.

⁽³⁹¹⁾ See Granhag, P.A., Strömwall, L.A. *Repeated Interrogations –Stretching the Deception Detection Paradigm. Expert Evidence* 7, 163–174 (1999), who show that whilst liars *repeat* their story, truth-tellers *reconstruct* theirs, possibly introducing inconsistencies.

⁽³⁹²⁾ See [Table 31](#).





documentary evidence relating to issues relevant to the claim, COI, and any other relevant country evidence ⁽³⁹³⁾. One of the reasons why external consistency is important to assess is that many aspects of an applicant's statements may be memory based and, as such, should be assessed within the context of the semantic memory processes outlined in Section 6.1. Memory: reliability and consistency of applicants' statements. 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. On occasion, an account of the material facts of a claim, as set out in a submission by the applicant's legal representative or as set out by a physician in a medico-legal report, may conflict with an account given by an applicant themselves ⁽³⁹⁴⁾. In such a situation it is incumbent on a decision-maker to give an applicant an opportunity to comment on any such inconsistency before a decision is made whether that inconsistency warrants the making of an adverse credibility finding. In the latter regard, particular care should be taken around the fact that an account of an applicant which is reported or transcribed by a legal representative or physician may not have been taken in the same controlled fashion as, for example, an interview with an applicant conducted by a determining authority.

It is also important to consider the consistency of an applicant's statements with the documentary evidence produced by them in support of the application ⁽³⁹⁵⁾. Further consideration of documentary evidence is set out at Section 4.6.

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 ⁽³⁹⁶⁾ 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 events and matters such as dates, locations,

⁽³⁹³⁾ See e.g. ECtHR, decision of 1 October 2002, *Tekdemir v the Netherlands*, Nos 46860/99 and 49823/99,, ECLI:CE:ECHR:2002:1001DEC004686099; National Asylum Court (Cour nationale du droit d'asile, France), judgment of 25 January 2017, *M. T.*, No [15037987](#).

⁽³⁹⁴⁾ This can be seen as an example of a situation that falls into an overlap between the categories of 'internal inconsistencies' and 'external inconsistencies'.

⁽³⁹⁵⁾ ECtHR, *MA v Switzerland*, op. cit., fn. 386, 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.

⁽³⁹⁶⁾ Supreme Administrative Court (Nejvyšší správní soud, 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.





and the viability of making particular journeys or even scientific or biological facts, it may raise serious concerns about credibility ⁽³⁹⁷⁾.

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 ⁽³⁹⁸⁾. 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. Much will depend on the quality and reliability of the COI. 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'.

However, this raises the issue of how much detail can reasonably be expected ⁽³⁹⁹⁾.

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 their particular circumstances, who is relating a genuine personal experience ⁽⁴⁰⁰⁾.

This will involve taking into account factors personal to the applicant, such as education and background, which may or may not explain why they are unable to provide such detail (see

⁽³⁹⁷⁾ Court of Appeal (England and Wales, United Kingdom), judgment of 26 July 2006, *Y v Secretary of State 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.

⁽³⁹⁸⁾ ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28 para. 114.

⁽³⁹⁹⁾ For example, when observers were asked to judge the same witness account, 17 thought it was rich in detail and 10 thought it lacked detail. See Granhag, P-A. and Strömwall, L.A., Effects of preconceptions on deception detection and new answers to why lie-catchers often fail, *Psychology, Crime and Law*, 2000, Vol. 6, No 3, pp.197-218. A study of experts by the same research group showed that police officers, prosecutors, and judges differed significantly on the importance they put on detail for judging the veracity of an account. See Strömwall, L. and Granhag, P-A. How to Detect Deception? Arresting the Beliefs of Police Officers, Prosecutors and Judges. *Psychology, Crime and Law* 2001, Vol. 9, pp.19-36.

⁽⁴⁰⁰⁾ Whilst always noting that a detailed account is not a wholly reliable indicator of truthfulness, see e.g. Vrij, A., Hartwig, M. and Granhag, P-A. *Reading Lies: Nonverbal Communication and Deception*, *Annual Review of Psychology*, 2019, Vol. 70, No 1, pp.295-317 for an overview and critical review, as well as Strömwall, L. and Granhag, P-A. How to Detect Deception? Arresting the Beliefs of Police Officers, Prosecutors and Judges.





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. Assessment of this indicator will also involve consideration of issues relating to memory, disclosure, level of education, culture, and vulnerability as set out in Sections 6.1, 6.3, 6.4, and 6.7⁽⁴⁰¹⁾. Such considerations may not necessarily explain 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 and/or hearing⁽⁴⁰²⁾. 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 they have 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.

Similar considerations apply in assessing evidence where an applicant has been asked detailed questions about issues relating to religion⁽⁴⁰³⁾, sexual orientation⁽⁴⁰⁴⁾ or political opinion. Clearly the extent of an applicant's knowledge about the issue which forms the basis of their 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⁽⁴⁰⁵⁾.

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⁽⁴⁰⁶⁾.

⁽⁴⁰¹⁾ 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. (See also fn. 840-842 on overgeneral memory).

⁽⁴⁰²⁾ Supreme Administrative Court (Nejvyšší správní soud, 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. In a similar vein, in Supreme Administrative Court (Nejvyšší správní soud, Czech Republic), judgment of 25 April 2019, 5 Azs 207/2017-36, the court held that, in an application concerning an applicant from Dagestan whose family disapproved of his marriage to a Ukrainian due to religious reasons, the interview by the determining authority did not focus enough on the perceived danger from the applicant's family members since it lacked specific questions.

⁽⁴⁰³⁾ Supreme Administrative Court (Nejvyšší správní soud, 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.

⁽⁴⁰⁴⁾ See Section 6.6 and [Table 32](#).

⁽⁴⁰⁵⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, paras 62 and 63.

⁽⁴⁰⁶⁾ UK Immigration Appeal Tribunal, judgment of 12 June 2003, *JB (DR Congo)* [2003] UKIAT 00012.





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 ⁽⁴⁰⁷⁾.

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 their statements with supporting documentary or other evidence (see Section 4.3.7.3). In *Shepherd*, in the context of an applicant seeking to qualify for refugee protection under Article 9(2)(e) QD, the CJEU referred to the need to establish the facts relied on ‘with sufficient plausibility’ ⁽⁴⁰⁸⁾. 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[n]g 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) ⁽⁴⁰⁹⁾.

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) ⁽⁴¹⁰⁾.

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 have happened or 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). The Irish High Court has held that ‘[a] finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding ⁽⁴¹¹⁾. In this context it may be particularly

⁽⁴⁰⁷⁾ 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.

⁽⁴⁰⁸⁾ CJEU, *Shepherd*, op. cit., fn. 314, para. 43.

⁽⁴⁰⁹⁾ UNHCR, *Beyond Proof*, op. cit., fn. 19, p. 60.

⁽⁴¹⁰⁾ Court of Appeal (England and Wales, United Kingdom), 2006, *HK v Secretary of State for the Home Department*, op. cit., fn. 407, para. 28.

⁽⁴¹¹⁾ High Court (Ireland), *IR v Minister for Justice Equality & Law Reform & anor*, op. cit., fn. 292., para. 11, Principle 5.





important to examine the reasons behind a finding of plausibility or 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 ⁽⁴¹²⁾.

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 (see [Part 6. Multidisciplinary approach to the assessment of evidence and credibility](#)).

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* [...]* ⁽⁴¹³⁾.

⁽⁴¹²⁾ High Court (Ireland), judgment of 22 September 2015, *IFO v Refugee Appeals Tribunal & ors* [2015] IEHC 586, para. 41.

⁽⁴¹³⁾ Court of Appeal (England and Wales, United Kingdom), *Y v Secretary of State for the Home Department*, op. cit., fn. 397, para. 256. See Bingham, T., ‘The Judge as Juror: The Judicial Determination of Factual Issues’, in *Current Legal Problems*, Vol. 38, OUP, 1985, 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.’





Similarly, in *MM (DRC – plausibility) Democratic Republic of 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 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 ⁽⁴¹⁴⁾.

4.5.5. Demeanour

Demeanour has been described as ‘the sum of a witness’s conduct, manner, behaviour, delivery, inflexion [...] In short, anything which characterises his mode of giving evidence but does not appear in a transcript of what he actually said’ ⁽⁴¹⁵⁾.

Using demeanour as a basis for credibility assessments in the context of international protection claims should be avoided in virtually all situations ⁽⁴¹⁶⁾. Demeanour is considered a poor indicator of credibility. If used as a negative factor, the judge or tribunal member 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 ⁽⁴¹⁷⁾. 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’ ⁽⁴¹⁸⁾. Accordingly, demeanour may have some impact in

⁽⁴¹⁴⁾ UK Immigration Appeal Tribunal, judgment of 27 January 2005, *MM (DRC-plausibility) DR Congo* [2005] UKIAT 00019, para. 15. La Corte Suprema di Cassazione (Supreme Court of Cassation) (Italy), judgment No 6738/2021., said that the assessment of plausibility cannot be based on the subjective convictions of what the judge considers to be true, reasonable or likely, but must be objective.

⁽⁴¹⁵⁾ Bingham, T., *The Business of Judging: Selected Essays and Speeches*, OUP, August 2000, p. 5.

⁽⁴¹⁶⁾ IARLJ, *Assessment of Credibility*, CREDO project, op. cit., fn. 36, 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., *Tatsachenfeststellung vor Gericht: Glaubhaftigkeits- und Beweislehre Vernehmungslehre*, C. H. Beck, 4th edn, 2014, 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).

⁽⁴¹⁷⁾ IARLJ, *Assessment of Credibility*, CREDO project, op. cit., fn. 36, p. 41.

⁽⁴¹⁸⁾ See e.g. ECtHR, *RC v Sweden*, op. cit., fn. 259, para. 52; ECtHR, judgment of 26 June 2014, *ME v Sweden*, No 71398/12, ECLI:CE:ECHR:2014:0626JUD007139812, para. 78; ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 84; ECtHR, judgment of 10 April 2022, *Shenturk and Others v Azerbaijan*, Nos 41326/17 and 3 others, ECLI:CE:ECHR:2022:0310JUD004132617, para. 112.





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 ⁽⁴¹⁹⁾.

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) or to anxiety about the potential outcome of the application for international protection ⁽⁴²⁰⁾.

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 the evidence in the round when deciding how the credibility indicators ought to be balanced in a particular application ⁽⁴²¹⁾.

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 ⁽⁴²²⁾, objectively

⁽⁴¹⁹⁾ 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.298, para. 24.

⁽⁴²⁰⁾ One study has shown that the behaviours commonly associated with lying (not necessarily correctly) overlap with the behaviours of someone with the extreme anxiety symptoms of PTSD and thus care must be taken that anxiety is not confused with deception. Rogers, H., Fox, S., and Herlihy, J., 'The importance of looking credible: the impact of the behavioural sequelae of post-traumatic stress disorder on the credibility of asylum seekers', *Psychology, Crime & Law*, 2014.

⁽⁴²¹⁾ In *La Corte Suprema di Cassazione* (Supreme Court of Cassation) (Italy), judgment No 10908/20, the court said the credibility assessment must always be based on an overall assessment of all elements and that it cannot, therefore, be based on isolated and secondary elements.

⁽⁴²²⁾ Court of Session, (Inner House, Scotland, United Kingdom), 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'.



and impartially to avoid either an ill-considered and simplistic rejection, or a naïve and unquestioning acceptance, of an account ⁽⁴²³⁾.

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 APD (recast) be accelerated and/or conducted at the border or in transit zones in accordance with Article 43 in ten 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 examination of the application in a procedure which is accelerated and/or conducted at the border 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 16](#).

Table 16. 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]. [...]’

⁽⁴²³⁾ For further exploration of these matters, see [Part 6. Multidisciplinary approach to the assessment of evidence and credibility of the judicial analysis](#).



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 EU Charter and to Article 46 APD (recast). 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 they were 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 the context of applications for international protection, these standards are given effect in the APD (recast), which sets out basic principles and guarantees in its Chapter II (see Section 4.3). The importance of complying with these procedures is, in particular, to ensure that an applicant's right to be heard is guaranteed. In *M.M.*, 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' ⁽⁴²⁴⁾. In his opinion in *M.M.* 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 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 ⁽⁴²⁵⁾.

The issue of the scope of the right to be heard in EU law was also considered by the CJEU in the case of *M* ⁽⁴²⁶⁾. The court stated the following:

[I]t is apparent from Article 4 of [QD] that the elements which the competent authority must take into account include statements and documentation regarding the applicant's age, background, identity, nationality or nationalities, countries of previous residence, previous asylum applications, travel routes and reasons for applying and, more broadly, the serious harm to which he has been or may be subject. 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

⁽⁴²⁴⁾ CJEU, 2012, *M.M.*, op. cit., fn. 31, para. 87.

⁽⁴²⁵⁾ CJEU, Opinion of Advocate General Bot of 26 April 2012, *M.M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, EU:C:2012:253, para. 43.

⁽⁴²⁶⁾ CJEU, 2017, *M*, op. cit., fn. 101.



out the individual assessment of the facts and circumstances that is provided for in Article 4 of Directive [QD] with full knowledge thereof, with a view to determining whether there would be a real risk of the applicant suffering serious harm, within the meaning of the directive, if he were returned to his country of origin ⁽⁴²⁷⁾.

It is also worth recalling here that CJEU jurisprudence concerning Article 46(3) APD (recast) has emphasised the importance of procedural fairness. For example, in *Alheto*, the CJEU held as follows:

Article 46(3) of [ADP (recast)], read in conjunction with Article 47 of the Charter, must be interpreted as meaning that the requirement for a full and ex nunc examination of the facts and points of law may also concern the grounds of inadmissibility of the application for international protection referred to in Article 33(2) of that directive, where permitted under national law, and that, in the event that the court or tribunal hearing the appeal plans to examine a ground of inadmissibility which has not been examined by the determining authority, it must conduct a hearing of the applicant in order to allow that individual to express his or her point of view in person concerning the applicability of that ground to his or her particular circumstances ⁽⁴²⁸⁾.

It follows from the CJEU jurisprudence referred to above that 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 their claim and supporting evidence in as full a manner as fairly and reasonably possible (see Section 4.2.6) ⁽⁴²⁹⁾.

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) QD (recast). 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 and/or social media articles showing or purporting to show that the applicant is of adverse interest to the authorities or non-state actors ⁽⁴³⁰⁾. Documents must be considered in 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).

⁽⁴²⁷⁾ Ibid., paras 36-37.

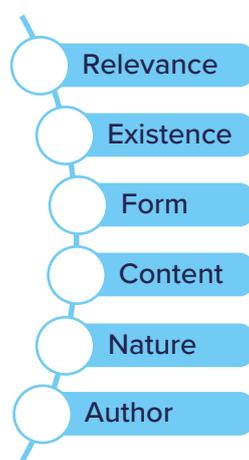
⁽⁴²⁸⁾ CJEU (GC), 2018, *Alheto*, op. cit., fn. 49, para. 130. More on the right to an effective remedy can be found in Section 3.1.1. Right to an effective remedy of the judicial analysis. More on the meaning of ex nunc examination can be found in Section 3.1.2. Fact-finding by courts and tribunals of the judicial analysis.

⁽⁴²⁹⁾ See EASO, *Asylum Procedures and the Principle of Non-Refoulement*, op. cit., fn. 7; See also IARLJ, *Assessment of Credibility*, CREDO project, op. cit., fn. 36, p. 44.

⁽⁴³⁰⁾ See Table 8 in Section 4.2.4. Evidence or elements to be submitted which provides examples of documentation.

According to the EUAA guidelines for determining authorities, documents can usefully be assessed according to the criteria laid down in [Figure 4](#) ⁽⁴³¹⁾ and set out in the subsections which follow.

Figure 4. 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, be given an opportunity to explain why, in their 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 ⁽⁴³²⁾. 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 ⁽⁴³³⁾. Ability to assess the authenticity of documents is a crucial and very difficult issue for decision-makers, including members of courts and tribunals ⁽⁴³⁴⁾. 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

⁽⁴³¹⁾ These steps are taken from the EASO, *Practical Guide: Evidence Assessment*, 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.

⁽⁴³²⁾ See EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7,

⁽⁴³³⁾ ECtHR, judgment of 2 October 2012, *Singh et autres c Belgique*, No 33210/11, ECLI:CE:ECHR:2012:1002JUD003321011 (in French only). For further details of this case, see the analysis at fn. [435-437](#). See also ECtHR, judgment of 7 January 2014, *AA v Switzerland*, No 58802/12, ECLI:CE:ECHR:2014:0107JUD005880212, paras 61-63.

⁽⁴³⁴⁾ 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.



host country. In certain circumstances, it may require investigations in the country of origin yet without jeopardising the confidentiality of the international protection application (see also Section [4.2.8](#)).

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 ⁽⁴³⁵⁾.*

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 ⁽⁴³⁶⁾. 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 ⁽⁴³⁷⁾. 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 ⁽⁴³⁸⁾.

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

⁽⁴³⁵⁾ Court of Appeal (Ireland), judgment of 27 February 2017, *AO v Refugee Appeals Tribunal & ors*, [2017] IECA 51, para. 45.

⁽⁴³⁶⁾ *Ibid.*, para. 76.

⁽⁴³⁷⁾ *Ibid.*, paras 87 and 88. See also ECtHR, *MA v Switzerland*, op. cit., fn. 386, paras 62-68.

⁽⁴³⁸⁾ See ECtHR, *AA v Switzerland*, op. cit., fn. 433, 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.





assessed. This also applies to issues about who the author is, what their qualifications are, the reliability of the information on which the document is based and the purpose for which the document was prepared.

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 ⁽⁴³⁹⁾.

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 apply not only to statements, whether oral or written, but also to all the documentation submitted in support of the application ⁽⁴⁴⁰⁾. Documents must not be assessed in isolation but in the light of the evidence as a whole. Assessment of the authenticity of social media evidence requires consideration of a number of indicators, some specific to its form ⁽⁴⁴¹⁾. 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 them 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

⁽⁴³⁹⁾ Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 23 February 2011, No [56.584](#), para. 4.2 (unofficial translation) (see also [EDAL English summary](#)).

⁽⁴⁴⁰⁾ 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.

⁽⁴⁴¹⁾ For further consideration of this issue, see EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, Section 1.10.3.4. See also Upper Tribunal (Immigration and Asylum Chamber (IAC)), (United Kingdom), judgment of 20 January 2022, *XX (PJAK – sur place activities – Facebook) Iran CG* [2022] UKUT 23 (IAC).





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.

In *F.*, the CJEU held that:

Article 4 of [QD (recast)] must be interpreted as meaning that it does not preclude the authority responsible for examining applications for international protection, or, where an action has been brought against a decision of that authority, the court or tribunal seised, from ordering that an expert’s report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant, provided that the procedures for such a report are consistent with the fundamental rights guaranteed by the Charter, that that authority and those courts or tribunals do not base their decision solely on the conclusions of the expert’s report and that they are not bound by those conclusions when assessing the applicant’s statements relating to his sexual orientation ⁽⁴⁴²⁾.

The process for determining the value of expert evidence 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 evidence, it includes the expertise of the expert, the degree of certainty attributed by the expert to the findings and the presence of potential conflicting expert opinions ⁽⁴⁴³⁾.

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 ⁽⁴⁴⁴⁾. 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 ⁽⁴⁴⁵⁾. 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

⁽⁴⁴²⁾ CJEU, 2018, *F.*, op. cit. fn.20, para. 46.

⁽⁴⁴³⁾ See IARMJ working party guidelines on expert witnesses: IARLJ, *Guidelines on the Judicial Approach to Expert Medical Evidence*, June 2010.

⁽⁴⁴⁴⁾ Note Article 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 (RVV/CCE, Belgium), decision of 13 July 2015, No [149559](#).

⁽⁴⁴⁵⁾ Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 23 January 2017, No [181122](#); Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 27 February 2017, No [183047](#).





Court of Session where a linguistic expert analysed the applicant's knowledge of the country and culture ⁽⁴⁴⁶⁾.

The duties of an expert were summarised by the UKUT ⁽⁴⁴⁷⁾ and reproduced in [Table 17](#).

Table 17. 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 them 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' ⁽⁴⁴⁸⁾. 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 they 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 ⁽⁴⁴⁹⁾.

Some national jurisdictions have determined that a court or tribunal should not discount or reject an expert report or witness without giving reasons ⁽⁴⁵⁰⁾. Just as the expert witness must

⁽⁴⁴⁶⁾ Court of Session (Inner House, Scotland, United Kingdom), 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.

⁽⁴⁴⁷⁾ Upper Tribunal (IAC, United Kingdom), judgment of 3 October 2014, *MOJ and others (return to Mogadishu) Somalia CG* [2014] UKUT 442, para. 25.

⁽⁴⁴⁸⁾ Upper Tribunal (IAC, United Kingdom), judgment of 5 November 2015, *AAW (expert evidence – weight) Somalia* [2015] UKUT 00673, para. 25. See also Upper Tribunal (Immigration and Asylum Chamber (IAC)), (United Kingdom), judgment of 25 March 2022, *HA (expert evidence, mental health) Sri Lanka* [2022] UKUT 111 (IAC).

⁽⁴⁴⁹⁾ Upper Tribunal (IAC, 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 and Supreme Court (United Kingdom), judgment of 6 March 2019, *KV (Sri Lanka) v Secretary of State for the Home Department*, [2019] UKSC 10.

⁽⁴⁵⁰⁾ This requirement was clearly underlined by the Council of State (Conseil d'État, France), decision of 10 April 2015, *M. B.*, application No [372864 B](#).





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.

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 ⁽⁴⁵¹⁾.

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 ⁽⁴⁵²⁾. 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 ⁽⁴⁵³⁾.

Expert evidence is not to be treated in isolation but must be considered as part of the evidence as a whole ⁽⁴⁵⁴⁾.

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](#)).

In the case of *F.*, which considered the extent to which a psychologist's report could be admissible in the context of an international protection application, the CJEU held that 'it cannot be ruled out that, in the specific context of the assessment of statements made by an

⁽⁴⁵¹⁾ Ibid.

⁽⁴⁵²⁾ ECtHR, *I v Sweden*, op. cit., fn. 259, paras 59-69.

⁽⁴⁵³⁾ ECtHR, *RJ c France*, op. cit., fn. 259, paras 41-43.

⁽⁴⁵⁴⁾ Court of Appeal (England and Wales, United Kingdom), *Mibanga v Secretary of State for the Home Department*, op. cit., fn. 299; 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 UK Upper Tribunal, *KV (Scarring – medical evidence) Sri Lanka*, op. cit., fn. 449, para. 211. See also National Asylum Court (Cour nationale du droit d'asile, France), judgment of 27 September 2016, M. AB, No 11022527; Council of State (Raad van State, Netherlands), judgment of 21 September 2016, [201601111/1/V3](#), ECLI:NL:RVS:2016:2589.





applicant for international protection relating to his sexual orientation, certain forms of expert reports may prove useful for the assessment of the facts and circumstances and may be prepared without prejudicing the fundamental rights of that applicant' ⁽⁴⁵⁵⁾.

In the same case, the CJEU stated that, in relation to the reliability of such evidence, '[...] it should be noted that the suitability of an expert's report such as that at issue in the main proceedings may be accepted only if it is based on sufficiently reliable methods and principles in the light of the standards recognised by the international scientific community' ⁽⁴⁵⁶⁾. The CJEU also noted the need to have regard to an applicant's right to private life under Article 7 EU Charter. It stated that 'the interference with the private life of the applicant for international protection arising from the preparation and use of an expert's report, such as that at issue in the main proceedings, is, in view of its nature and subject matter, particularly serious' ⁽⁴⁵⁷⁾. In that regard, the CJEU continued, '[s]uch an expert's report is based in particular on the fact that the person concerned undergoes a series of psychological tests intended to establish an essential element of his identity that concerns his personal sphere in that it relates to intimate aspects of his life' ⁽⁴⁵⁸⁾.

The CJEU further held:

It is also necessary to take account, in order to assess the seriousness of the interference arising from the preparation and use of a psychologist's expert report, such as that at issue in the main proceedings, of Principle 18 of the Yogyakarta principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, to which the French and Netherlands Governments have referred, which states, inter alia, that no person may be forced to undergo any form of psychological test on account of his sexual orientation or gender identity ⁽⁴⁵⁹⁾.

The CJEU continued:

When those elements are looked at together, it is apparent that the seriousness of the interference with private life entailed by the preparation and use of an expert's report, such as that at issue in the main proceedings, exceeds that entailed by an assessment of the statements of the applicant for international protection relating to a fear of persecution on grounds of his sexual orientation or recourse to a psychologist's expert report having a purpose other than that of establishing the applicant's sexual orientation ⁽⁴⁶⁰⁾.

⁽⁴⁵⁵⁾ CJEU, 2018, *F.*, op. cit. fn.20, para. 37.

⁽⁴⁵⁶⁾ *Ibid.*, para. 58.

⁽⁴⁵⁷⁾ *Ibid.*, para. 60.

⁽⁴⁵⁸⁾ *Ibid.*, para. 61.

⁽⁴⁵⁹⁾ *Ibid.*, para. 62.

⁽⁴⁶⁰⁾ *Ibid.*, para. 63.



Concerning the weight to be ascribed to such evidence, the CJEU stated the following:

Furthermore, even assuming that an expert's report based on projective personality tests, such as that at issue in the main proceedings, may contribute to identifying with a degree of reliability the sexual orientation of the person concerned, it follows from the statements of the referring court that the conclusions of such an expert's report are only capable of giving an indication of that sexual orientation. Accordingly, those conclusions are, in any event, approximate in nature and are therefore of only limited interest for the purpose of assessing the statements of an applicant for international protection, in particular where, as in the case at issue in the main proceedings, those statements are not contradictory⁽⁴⁶¹⁾.

Of relevance to medical evidence bearing on the claim that an applicant has already been subjected 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).

The Istanbul Protocol (hereinafter 'the Protocol') is very relevant, although it is not legally binding on Member States⁽⁴⁶²⁾. The Protocol 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'⁽⁴⁶³⁾. It sets out principles which 'outline minimum standards for States in order to ensure the effective documentation of torture'⁽⁴⁶⁴⁾. 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

⁽⁴⁶¹⁾ Ibid., para. 69.

⁽⁴⁶²⁾ For consideration of the status of the Protocol, see Upper Tribunal (IAC, United Kingdom), *KV (Scarring – medical evidence) Sri Lanka*, op. cit., fn. 449, 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, *Hugo Juárez Cruzat et al. v Peru*, case 11.015, No 43/01; ECtHR, judgment of 3 June 2004, *Bati and Others v Turkey*, Nos 33097/96 and 57834/00, ECLI:CE:ECHR:2004:0603JUD003309796; and African Commission on Human and Peoples' Rights, judgment of 2 May 2012, *Gabriel Shumba v Republic of Zimbabwe*, communication No 288/2004. The Protocol'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*, A/RES/55/89, 22 February 2001, Resolution adopting the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

⁽⁴⁶³⁾ 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*, Professional Training Series No 8/Rev. 1, 2004 (hereafter OHCHR, *Istanbul Protocol*), p. 1.

⁽⁴⁶⁴⁾ Ibid., p. 2.



protocol. Rather, ‘they represent minimum standards based on the principles and should be used taking into account available resources’ ⁽⁴⁶⁵⁾.

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, the Protocol 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’ ⁽⁴⁶⁶⁾. These are reproduced in [Table 18](#).

Table 18. Six important questions in formulating a clinical impression for reporting physical and psychological evidence of torture as set out in the Istanbul Protocol ⁽⁴⁶⁷⁾

(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?

The Protocol 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 [Table 19](#) generally be used ⁽⁴⁶⁸⁾.

⁽⁴⁶⁵⁾ Ibid., p. 2.

⁽⁴⁶⁶⁾ Ibid., para. 105.

⁽⁴⁶⁷⁾ Ibid., para. 286.

⁽⁴⁶⁸⁾ Ibid., para. 187.



Table 19. Five-fold hierarchy of degrees of consistency as set out in the Istanbul Protocol ⁽⁴⁶⁹⁾

(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' ⁽⁴⁷⁰⁾.

According to existing national case-law, as with any other expert, a medical expert must establish their credentials ⁽⁴⁷¹⁾, including their qualifications, education and training, membership of professional bodies and experience, and show that they are familiar with the Istanbul Protocol and that its guidelines inform their medical opinion ⁽⁴⁷²⁾. 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 their case. The medical expert should set out the facts as informed and/or gathered by them. 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,

⁽⁴⁶⁹⁾ Ibid., para. 187 (emphases added). See also IARLJ, *Guidelines on the Judicial Approach to Expert Medical Evidence*, June 2010.

⁽⁴⁷⁰⁾ Ibid., para. 188.

⁽⁴⁷¹⁾ See e.g. Supreme Court (Tribunal Supremo, Spain), judgment of 24 February 2012, appeal No [2476/2011](#), STS 1197/2012, p. 8 (see [EDAL English summary](#)), where a medical report from 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.

⁽⁴⁷²⁾ Article 18(1) [APD \(recast\)](#) provides: 'The medical examinations referred to in the first subparagraph shall be carried out by qualified medical professionals' and Article 25(5) that any medical examination [...] shall be carried out by qualified medical professionals.'



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 ⁽⁴⁷³⁾.

One of the particularities of medico-legal reports conducted according to the Protocol 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 ⁽⁴⁷⁴⁾.

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 ⁽⁴⁷⁵⁾. Where a medical report contains diagnostic conclusions which are wholly dependent upon the history or symptoms asserted by the applicant, but the judge or tribunal member 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 ⁽⁴⁷⁶⁾. The expert report should inform the credibility assessment and, when assessing expert evidence, the judge or tribunal member 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' ⁽⁴⁷⁷⁾.

According to the jurisprudence of the German Federal Administrative Court, an applicant who claims to suffer post-traumatic stress disorder (PTSD) should substantiate their claim by presenting a professional medical certificate of a certain minimum standard of expertise ⁽⁴⁷⁸⁾. It must explain on what basis the medical specialist has developed their diagnosis and the characteristics of the disorder in the specific case. This includes information regarding how

⁽⁴⁷³⁾ Thomas, R., *Administrative Justice and Asylum Appeals*, op. cit., fn. 132, p. 154 and ff. See also Reneman, M., *EU Asylum Procedures and the Right to an Effective Remedy*, Hart Publishing, 2014, under 8.5.3.

⁽⁴⁷⁴⁾ Kjærum, A., 'Combating Torture with Medical Evidence: The Use of Medical Evidence and Expert Opinions in International and Regional Human Rights Tribunals', *Torture Journal*, 2010, 119-186.

⁽⁴⁷⁵⁾ 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.

⁽⁴⁷⁶⁾ 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.

⁽⁴⁷⁷⁾ High Court (Ireland), judgment of 10 March 2015, *MM v Refugee Appeals Tribunal & Anor* [2015] IEHC 158, para. 28.

⁽⁴⁷⁸⁾ Federal Administrative Court (BVerwG, Germany), judgment of 11 September 2007, No 10 C 8.07, para. 15, in *Neue Zeitschrift für Verwaltungsrecht* 2008, 142.



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) ⁽⁴⁷⁹⁾. If the presence of PTSD is said to be based on traumatic experiences of the applicant in their 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 ⁽⁴⁸⁰⁾ 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’ ⁽⁴⁸¹⁾.

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, EUAA, UNHCR, international or national non-governmental organisations (NGOs), research institutions and the media but also from expert witnesses ⁽⁴⁸²⁾. The general standards for the assessment of evidence apply equally to the analysis of expert evidence (see Section 4.6) ⁽⁴⁸³⁾.

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.

⁽⁴⁷⁹⁾ See e.g. Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 21 March 2013, No [99_380](#), para. 4.5 (see [EDAL English summary](#)).

⁽⁴⁸⁰⁾ Germany, [Aufenthaltsgesetz](#) of 25 February 2008, including in [English](#).

⁽⁴⁸¹⁾ 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 being more prescriptive than required.

⁽⁴⁸²⁾ Upper Tribunal (IAC, United Kingdom), judgment of 18 May 2012, [AK \(Article 15\(c\) Afghanistan CG](#) [2012] UKUT 00163, 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)).

⁽⁴⁸³⁾ In this context, IARLJ, ‘[Judicial Criteria for Assessing COI: a Checklist and Explanation](#)’ op. cit., fn. 202, provides a useful checklist which can assist in evaluating other forms of expert evidence.



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 Supreme Administrative Court of Finland 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' ⁽⁴⁸⁴⁾. In this case, expert analysis was undertaken by a private company specialised in determining an individual's region of origin on the basis of a linguistic analysis and by assessing the individual's knowledge of the region's topography ⁽⁴⁸⁵⁾. 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 ⁽⁴⁸⁶⁾.

Such reports have also been accepted by the UK 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 ⁽⁴⁸⁷⁾. It was further emphasised that it was 'not the function of an expert in the language to offer an opinion on general credibility' ⁽⁴⁸⁸⁾.

4.8. Standards for assessing country of origin information

The definition of country of origin information (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

⁽⁴⁸⁴⁾ Refugee Board (Rada do Spraw Uchodźców, 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 (Korkein hallinto-oikeus, 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 their region of origin (south Somalia).

⁽⁴⁸⁵⁾ Refugee Board (Rada do Spraw Uchodźców, Poland), *RdU-246-1/S/13*, op. cit., fn. 161. as per [EDAL English summary](#).

⁽⁴⁸⁶⁾ *Ibid.*, as per [EDAL English summary](#).

⁽⁴⁸⁷⁾ Supreme Court (United Kingdom), *MN and KY*, op. cit., fn. 446, 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. 446, the court was very critical of Sprakab at para. 59 onwards.

⁽⁴⁸⁸⁾ Supreme Court (United Kingdom), *MN and KY*, op. cit., fn. 446, 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.*



4.8.2). 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). For a comprehensive consideration of issues relating to COI, it is advisable to consult the practical guide of the EUAA judicial publications entitled *Judicial Practical Guide on Country of Origin Information* ⁽⁴⁸⁹⁾.

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 ⁽⁴⁹⁰⁾. 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’ ⁽⁴⁹¹⁾. 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 ⁽⁴⁹²⁾.

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

⁽⁴⁸⁹⁾ EASO, *Judicial Practical Guide on Country of Origin Information*, 2018.

⁽⁴⁹⁰⁾ Article 11(3) of the [EUAA regulation](#) provides that ‘Member States shall take into account the common analysis and guidance notes when examining applications for international protection, without prejudice to their competence to decide on individual applications for international protection’.

⁽⁴⁹¹⁾ *UNHCR Handbook*, op. cit., fn. 37, para. 42.

⁽⁴⁹²⁾ In CJEU, 2012, *M.M.*, op. cit., fn. 31, the CJEU held that: ‘Under Article 4(1) of Directive 2004/83, 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’ (para. 65). The CJEU went on to state that: ‘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. A Member State may also be better placed than an applicant to gain access to certain types of documents’ (para. 66).

secondary EU law in both substantive and procedural respects, notably in the provisions set out in

This obligation flows directly from the wording of Article 4(3)(a) QD (recast), a mandatory provision, which provides that '[t]he 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;' 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 4(5)(c) QD (recast)). Article 8(2) APD (recast) sets out the COI standards applicable in the context of assessing the possibility of an internal protection alternative.

The requirements of Article 10(3)(b) APD (recast) are as follows:



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;

The requirements reflect an 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.

It is also possible to infer from Article 10(3)(a) APD (recast), which requires Member States to ensure that applications are examined, and decisions are taken individually, objectively and impartially, that decision-makers are obliged to assess COI objectively and impartially.

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 UK Upper Tribunal in *AA (Article 15(c)) Iraq* ⁽⁴⁹³⁾.

Applied to the subject matter of COI, compliance with Article 10(3) APD (recast), which is a 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 and 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).

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’ (see [Table 20. CEAS norms relevant to the use of COI](#)). 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’ ⁽⁴⁹⁴⁾, 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.

Article 11(3) EUAA regulation requires Member States ‘to take into account the EUAA common analysis and guidance notes when examining applications for international protection, without prejudice to their competence to decide on individual applications for international protection’ (see [Table 20. CEAS norms relevant to the use of COI](#)) ⁽⁴⁹⁵⁾.

⁽⁴⁹³⁾ Upper Tribunal (IAC, United Kingdom), *AA (Article 15(c)) Iraq CG*, op. cit., fn. 228.

⁽⁴⁹⁴⁾ See generally Section 3.11..

⁽⁴⁹⁵⁾ It is to be noted that, with regard to guidance notes, EASO, *Judicial Practical Guide on Country of Origin Information*, 2018 states that ‘It is important to note the difference between evidence and policy advice’ (p.9) and that ‘[t]he policies determined in the documents should not form part of the COI evidence, nor be relied upon in considering the country conditions’ (p.10).





Table 20. CEAS norms relevant to the use of COI

Article 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;
Article 4(5)(c) 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: [...] (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;
Article 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.
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 <i>ex nunc</i> examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to [QD (recast)], at least in appeals procedures before a court or tribunal of first instance.
Article 2 EUAA regulation	<p>1. For the purposes of Article 1, the Agency shall perform the following tasks:</p> <p>[...]</p> <p>(e) draw up and regularly update reports and other documents providing information on the situation in relevant third countries, including countries of origin, at Union level;</p> <p>(f) set up and coordinate European networks on third-country information;</p> <p>(g) organise activities and coordinate efforts among Member States to develop common analysis on the situation in countries of origin and guidance notes;</p> <p>(h) provide information and analysis on third countries regarding the concept of safe country of origin and the concept of safe third country (the 'safe country concepts');</p>

**Article 9 EUAA regulation**

1. The Agency shall be a centre for gathering relevant, reliable, objective, accurate and up-to date information on relevant third countries in a transparent and impartial manner, making use of relevant information, including child-specific and gender-specific information, and targeted information on persons belonging to vulnerable and minority groups. The Agency shall draw up and regularly update reports and other documents providing information on relevant third countries at Union level, including on thematic issues specific to relevant third countries.

2. The Agency shall, in particular:

(a) make use of all relevant sources of information, including information gathered from international organisations, in particular the UNHCR and other relevant organisations, including members of the Consultative Forum referred to in Article 50, Union institutions, bodies, offices and agencies and the EEAS, and through the networks referred to in Article 10 and fact-finding missions;

(b) manage and further develop a web portal for gathering and sharing information on relevant third countries, which shall include a public section for general users and a restricted section for users who are employees of the national authorities responsible for asylum and immigration or any other body mandated by a Member State to carry out research on third-country information;

(c) develop a common format and a common methodology including terms of reference, in accordance with the requirements of Union law on asylum, for developing reports and other documents with information on relevant third countries at Union level.



Article 11 EUAA regulation

1. To foster convergence in applying the assessment criteria established in [QD (recast)], the Agency shall coordinate efforts among Member States to develop a common analysis on the situation in specific countries of origin (the ‘common analysis’) and guidance notes to assist Member States in the assessment of relevant applications for international protection.

In the development of the common analysis and guidance notes, the Agency shall take note of the most recent UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from specific countries of origin.

2. The Executive Director shall, after consulting the Commission, submit guidance notes to the Management Board for endorsement. Guidance notes shall be accompanied by the common analysis.

3. Member States shall take into account the common analysis and guidance notes when examining applications for international protection, without prejudice to their competence to decide on individual applications for international protection.

4. The Agency shall ensure that the common analysis and guidance notes are regularly reviewed and are updated as necessary. Such a review and update shall be carried out where there is a change in the situation in a country of origin or where there are objective indications that the common analysis and guidance notes are not being used. Any review or update of the common analysis and guidance notes shall require consultation of the Commission and endorsement by the Management Board as referred to in paragraph 2.

5. Member States shall submit to the Agency any relevant information indicating that a review or an update of the common analysis and guidance notes is necessary.

Article 12 EUAA regulation

1. The Agency may assist the Member States in applying the safe country concepts in accordance with [APD (recast)], by providing information and analysis.

2. The Agency shall assist the Commission in the context of its tasks regarding the safe country concepts in accordance with [APD (recast)], by providing information and analysis.

3. When providing the information and analysis under paragraphs 1 and 2 of this Article, the Agency shall follow the general principles provided for in Article 9.

4. The Agency shall submit the information and analyses it provides under paragraphs 1 and 2 to the European Parliament and to the Council, both on a regular basis and upon request.



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 ⁽⁴⁹⁶⁾.

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’ ⁽⁴⁹⁷⁾.

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 ⁽⁴⁹⁸⁾.

4.8.2. Types and sources 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 specific (for example, embassy checks) or issue specific. The QD (recast) distinguishes between specific and general information relevant to the applicant’s case (Article 4(5)(c)). A distinction is to be drawn between country of origin information and guidance notes which seek to converge the assessment of country situations by decision-makers. Guidance notes generally contain a mixture of COI and policy. The EASO Judicial practical guide on country of origin information counsels caution

⁽⁴⁹⁶⁾ ECtHR (GC), judgment of 4 February 2005, *Mamatkulov and Askarov v Turkey*, Nos 46827/99 and 46951/99, ECLI:CE:ECHR:2005:0204JUD004682799, para. 67. For more recent authorities, see ECtHR (GC), judgment of 23 February 2012, *Hirsi Jamaa and Others v Italy*, No 27765/09, ECLI:CE:ECHR:2012:0223JUD002776509, paras 114 and 115; and ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28 para. 79.

⁽⁴⁹⁷⁾ ECtHR, 2008, *NA v United Kingdom*, op. cit., fn. 281, para. 110.

⁽⁴⁹⁸⁾ ECtHR, 2007, *Salah Sheekh v the Netherlands*, op. cit., fn. 67, para. 136; ECtHR (GC), 2008, *Saadi v Italy*, op. cit. fn. 281, para. 133; ECtHR, 2008, *NA v United Kingdom*, op. cit., fn. 281, para. 112; ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 83.



around the use that is made of such notes ⁽⁴⁹⁹⁾. It is important to note, however, that the EUAA regulation requires the EUAA to produce guidance notes and obliges Member States to take them into account. Hence the note of caution struck in the EASO, *Judicial Practical Guide on Country of Origin Information*, is best seen as applicable to COI and guidance notes not specified in either the APD (recast) or the EUAA regulation.

The explicit reference in the QD (recast) and APD (recast) to EASO (now EUAA) and UNHCR, 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 ⁽⁵⁰⁰⁾, e.g. national COI units ⁽⁵⁰¹⁾ and consulting a variety of sources including reports from civil society/international and local NGOs/ research institutions as well as the media, academia, social media sources and where relevant, country experts ⁽⁵⁰²⁾.

Article 2(e) EUAA regulation requires the EUAA to ‘draw up and regularly update reports and other documents providing information on the situation in relevant third countries, including countries of origin, at Union level’.

Article 9(1) of the EUAA regulation states that:

The Agency shall be a centre for gathering relevant, reliable, objective, accurate and up-to date information on relevant third countries in a transparent and impartial manner, making use of relevant information, including child-specific and gender-specific information, and targeted information on persons belonging to vulnerable and minority groups. The Agency shall draw up and regularly update reports and other documents providing information on relevant third countries at Union level, including on thematic issues specific to relevant third countries.

Article 9(2)(a) of the EUAA regulation provides that the EUAA shall, in particular:

[M]ake use of all relevant sources of information, including information gathered from international organisations, in particular the UNHCR and other relevant organisations, including members of the Consultative Forum referred to in Article 50, Union institutions, bodies, offices and agencies and the EEAS, and through the networks referred to in Article 10 and fact-finding missions.

[Table 21](#) provides illustrations of different types of COI. It does not, however, entail any hierarchy between these different types of COI.

⁽⁴⁹⁹⁾ EASO, *Judicial Practical Guide on Country of Origin Information*, 2018, states that ‘[i]t is important to note the difference between evidence and policy advice’ (p.9) and that ‘[t]he policies determined in the documents should not form part of the COI evidence, nor be relied upon in considering the country conditions’ (p.10).

⁽⁵⁰⁰⁾ For example, EASO, *Judicial Practical Guide on Country of Origin Information*, 2018, notes that some national courts conduct or participate in fact-finding missions (p.12).

⁽⁵⁰¹⁾ The COI emanating from such units must be clearly distinguished from policy guidance issued by these bodies.

⁽⁵⁰²⁾ In addition, the role of country of origin analysts/consultants in country guidance cases is specifically addressed in Upper Tribunal (IAC, United Kingdom), *AK (Article 15(c)) Afghanistan CG*, op. cit., fn. 482.

**Table 21. Types of COI**

1	Maps, encyclopaedias, yearbooks
2	Reports from international bodies (UNHCR and other UN-related bodies, European Union, Council of Europe, EUAA)
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 published after joint fact-finding missions in the countries of origin
9	Social media sources

Some databases, such as [EUAA 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⁽⁵⁰³⁾. However, such reports may be of limited value if they do not adopt and apply a sound methodology⁽⁵⁰⁴⁾. The methodology set out in the [EASO Country of Origin Information Report Methodology](#)⁽⁵⁰⁵⁾ is equally applicable to fact-finding missions and is based both on the

⁽⁵⁰³⁾ EU, [EU Common Guidelines for \(Joint\) Fact Finding Missions](#), November 2010.

⁽⁵⁰⁴⁾ In Upper Tribunal (IAC, 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 UK 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. The ECtHR judgment of 20 June 2017, [M.O. v Switzerland](#), No 41282/16, ECLI:CE:ECHR:2017:0620JUD004128216, (Judgment: No violation of Article 3 – Prohibition of torture (Article 3 – Expulsion) (Conditional) (Eritrea)) [2017] ECHR 573 (20 June 2017), paras 52-53, 79, 90 drew heavily on the MST decision.

⁽⁵⁰⁵⁾ EASO, [Country of Origin Information \(COI\) Report Methodology](#), June 2019.





Common EU Guidelines for Processing Country of Origin Information (COI) ⁽⁵⁰⁶⁾ as well as on the *EU Common Guidelines for (Joint) Fact-Finding Missions* ⁽⁵⁰⁷⁾.

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 ⁽⁵⁰⁸⁾.

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.

With regard to the criterion that information which is obtained by Member States be up-to-date, it should be noted that Article 11(4) EUAA regulation requires the EUAA to ensure that its common analysis and guidance notes, which Member States are required to take into account in accordance with Article 11(3) EUAA regulation, are ‘regularly reviewed and are updated as necessary’.

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 ⁽⁵⁰⁹⁾. 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 ⁽⁵¹⁰⁾. These criteria, to which the court regularly refers in an identical wording, are reproduced in [Table 22](#).

⁽⁵⁰⁶⁾ EU, *Common EU Guidelines for Processing Country of Origin Information (COI)*, April 2008.

⁽⁵⁰⁷⁾ EU, *EU Common Guidelines for (Joint) Fact-Finding Missions*, op. cit., fn. 503.

⁽⁵⁰⁸⁾ See Asylum Research Consultancy/Dutch Council for Refugees, *Comment on the EASO COI report methodology*, November 2012.

⁽⁵⁰⁹⁾ In addition, the role of country of origin analysts/consultants in country guidance cases is specifically addressed in Upper Tribunal (IAC, United Kingdom), 2012, *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 163 (IAC), op. cit., fn. 482.

⁽⁵¹⁰⁾ ECtHR (GC), 2008, *Saadi v Italy*, op. cit. fn. 281, para. 143; ECtHR, 2008, *NA v United Kingdom*, op. cit., fn. 281, para. 120; ECtHR, judgment of 28 June 2011, *Sufi and Elmi v United Kingdom*, Nos 8319/07 and 11449/07, ECLI:CE:ECHR:2011:0628JUD000831907, para. 230; ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 88; ECtHR, judgment of 14 November 2019, *N.A. v Finland*, No 25244/18, ECLI:CE:ECHR:2021:0713JUD002524418, para. 75.



**Table 22. 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 risk of ill-treatment in the case before the court' ⁽⁵¹¹⁾. 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 ⁽⁵¹²⁾.

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 ⁽⁵¹³⁾.

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

⁽⁵¹¹⁾ ECtHR, 2008, *NA v United Kingdom*, op. cit., fn. 281, para. 122.

⁽⁵¹²⁾ ECtHR, Judgment of 20 January 2009, *FH v Sweden*, No 32621/06, ECLI:CE:ECHR:2009:0120JUD003262106, para. 92; Court of Appeal (England and Wales, United Kingdom), *CM (Zimbabwe) v Secretary of State for the Home Department*, op. cit., fn. 289; Supreme Administrative Court (Nejvyšší správní soud, Czech Republic), judgment of 4 February 2009, *ÖS v Ministry of Interior*, 1 Azs 105/2008-81 (EDAL English summary).

⁽⁵¹³⁾ ECtHR, 2008, *NA v United Kingdom*, op. cit., fn. 281, para. 121; ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 88.





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 ⁽⁵¹⁴⁾.

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’ ⁽⁵¹⁵⁾. 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’ ⁽⁵¹⁶⁾. There may be cases where there are legitimate security concerns and sources that 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’ ⁽⁵¹⁷⁾.

Consequently, ‘the approach taken by the Court will depend on the consistency of the sources’ conclusions with the remainder of the available information’ ⁽⁵¹⁸⁾. When information emanating from an anonymous source is unsupported or contradictory, ‘the Court is unable to attach substantial weight to it’ ⁽⁵¹⁹⁾.

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

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 ⁽⁵²⁰⁾.

In its judgment in *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 Contacting 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

⁽⁵¹⁴⁾ ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 89, referring to *Sufi and Elmi v UK*, op. cit., fn. 510, para. 232); ECtHR (GC), 2022, *Khasanov and Rakhmanov v Russia*, op. cit., fn. 67, paras 114-115.

⁽⁵¹⁵⁾ ECtHR, *Sufi and Elmi v UK*, op. cit., fn. 510, para. 232.

⁽⁵¹⁶⁾ *Ibid.*, para. 233.

⁽⁵¹⁷⁾ *Ibid.*

⁽⁵¹⁸⁾ *Ibid.*

⁽⁵¹⁹⁾ *Ibid.*, para. 234.

⁽⁵²⁰⁾ Court of Appeal (England and Wales, United Kingdom), *CM (Zimbabwe) v Secretary of State for the Home Department*, op. cit., fn. 289, para. 17.





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 ⁽⁵²¹⁾.

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 ⁽⁵²²⁾. With regard to ECtHR judgments setting out general country conditions in asylum-related cases, the UK Upper Tribunal held that it was not bound to reach the same findings even if such judgment is recent and based on comprehensive COI ⁽⁵²³⁾.

4.8.3.3. The IARMJ judicial checklist

In 2006, building on efforts aimed at developing proper criteria for the assessment of COI undertaken by several national and international stakeholders ⁽⁵²⁴⁾, the IARMJ 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 or reference ⁽⁵²⁵⁾. The initial version of 2006 has since been updated and was last revised in 2017 ⁽⁵²⁶⁾. 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 for the evaluation of COI. [Table 23](#) reproduces this list of questions with short explanations extracted from the Explanatory Memorandum.

⁽⁵²¹⁾ ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 90 (citations omitted).

⁽⁵²²⁾ Upper Tribunal (IAC, United Kingdom), judgment of 25 November 2011, *AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG* [2011] UKUT 00445, paras 97-103.

⁽⁵²³⁾ See Upper Tribunal (IAC, United Kingdom), *AK (Article 15(c)) Afghanistan CG*, op. cit., fn. 482.

⁽⁵²⁴⁾ Among which the EU, UNHCR, the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), and Hungarian Helsinki Committee are mentioned.

⁽⁵²⁵⁾ 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 country of origin information based on this checklist. See Administrative Court (Upravno sodišče, Slovenia), judgment of 20 September 2006, *U 2073/2006-10*.

⁽⁵²⁶⁾ 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. 202, p. 33.



Table 23. IARMJ'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?	<p>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.</p> <p>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.</p>
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.



	Criterion	Explanation
6	How current or temporally relevant is the COI presented?	<p>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.</p> <p>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 US 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).</p>
7	Is the COI material sourced and/or multi-sourced?	<p>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.</p> <p>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.</p> <p>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.</p>



	Criterion	Explanation
8	<p>Has the COI been prepared on an empirical basis using sound methodology?</p>	<p>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.</p> <p>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.</p>



	Criterion	Explanation
9	Does the COI exhibit impartiality and independence?	<p>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, US 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.</p> <p>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.</p> <p>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 themselves to a particular political group in exile. One of the reasons why they may have come to be regarded as an expert is that they have ‘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.</p> <p>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.</p>
10	Is the COI balanced and not overly selective?	<p>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.</p>



	Criterion	Explanation
11	<p>Has there been judicial scrutiny by other national courts of the COI in question?</p>	<p>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.</p> <p>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.</p>

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 ⁽⁵²⁷⁾.

4.8.4. The use of COI by courts and tribunals

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 ⁽⁵²⁸⁾. 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 ⁽⁵²⁹⁾.

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

⁽⁵²⁷⁾ IARLJ, *Due Process Standards for the Use of Country of Origin Information (COI) in Administrative and Judicial Procedures*, 10th World Conference, 2014.

⁽⁵²⁸⁾ 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).

⁽⁵²⁹⁾ Gyulai, *Country Information in Asylum Procedures*, op. cit., fn. 203, 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.



In a strict adversarial setting, a court or tribunal will be primarily tasked with assessing the entirety of evidence – including COI – submitted by the parties. Even so, the judge or tribunal member has to ensure that COI is precise and up-to-date and can request this from the parties.

When the court or tribunal decides to rely on COI 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’⁽⁵³⁰⁾. 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 their account so long as the parties have been afforded the opportunity to discuss it⁽⁵³¹⁾.

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 COI 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).

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

⁽⁵³⁰⁾ Council of State (Conseil d’État, France), *M. C.*, No 328265, op. cit., fn. 76 (unofficial English translation). This procedural requirement is now codified in French law ([Code on the entry and stay of foreigners and asylum law](#), Article R.733-16). In CNDA, Grand Chamber, 19 November 2021, *M.M.*, No 18054661 R, the National Court of Asylum in France held that, in the context of an application for subsidiary protection based on indiscriminate violence, the assessment of the level of violence is based on quantitative and qualitative criteria to be determined in the light of relevant COI sources at the date of assessment. The court further held that the choice of these sources must comply with the requirements of CEAS directives and also taken into account the recommendation of EASO (now EUAA).

⁽⁵³¹⁾ Ibid.



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 ⁽⁵³²⁾.

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. The EUAA regulation created a new legal category of ‘guidance notes’ and Article 11(3) of the EUAA regulation provides that ‘Member States shall take into account the common analysis and guidance notes when examining applications for international protection, without prejudice to their competence to decide on individual applications for international protection.’ It is also possible depending on national procedural rules for a court or tribunal to provide guidance ⁽⁵³³⁾.

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 ⁽⁵³⁴⁾. This situation may arise through different factors such as 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 their 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.

⁽⁵³²⁾ This is in line with obligations arising in connection with Article 46(3) that were outlined by the CJEU in a number of cases, including CJEU, 2019, *Torubarov*, op. cit., fn. 53; CJEU, 2020, *P.G.*, op. cit., fn. 49; and CJEU, 2020, *L.H.*, op. cit., fn. 49.

⁽⁵³³⁾ See e.g. the UKUT system of country guidance judgments, listed most recently in UKUT, *Country Guidelines Determinations*, 26 June 2017.

⁽⁵³⁴⁾ See IARLJ, *Assessment of Credibility*, CREDO project, op. cit., fn. 36, Section III.A.14 ‘Use of COI’.



4.8.4.3. Reference to sources in the decision

Sources of information used by a court or tribunal must always be transparent in the decision⁽⁵³⁵⁾. The only possible exceptions to this rule relate to the above-mentioned security concerns (see Section 4.3.4).

The increasing requirement that the decisions of courts and tribunals on applications for international protection 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⁽⁵³⁶⁾.

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 QD (recast) 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⁽⁵³⁷⁾. 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.

⁽⁵³⁵⁾ The term 'judgment' is used to describe judicial and quasi-judicial decisions.

⁽⁵³⁶⁾ La Corte Suprema di Cassazione (Supreme Court of Cassation) (Italy), judgment No 2462/21, where the court said the judge must fully indicate the updated sources on which the decision is based. The courts stated that a failure to indicate the COI means it cannot be assumed that the decision is based on relevant and updated sources.

⁽⁵³⁷⁾ CJEU (GC), 2010, *Abdulla and Others*, op. cit., fn. 272, para. 94.





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⁽⁵³⁸⁾. 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 of such persecution or harm. The CJEU in *M.P.* set forth circumstances in which an applicant’s medical condition may give rise to a successful claim for subsidiary protection⁽⁵³⁹⁾. For further information see the EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022⁽⁵⁴⁰⁾.

The evaluation of past persecution and serious harm, and of threats of such, is carried out within the wider frame of the assessment of facts and circumstances, at the first stage of the examination of an application. The assessment of future risk – whether of persecution or serious harm – takes place in the second stage 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](#).

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 or direct threats of 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

⁽⁵³⁸⁾ CJEU (GC), *Y and Z*, op. cit., fn. 31, para. 76.

⁽⁵³⁹⁾ CJEU (GC), judgment of 24 April 2018, *MP v Secretary of State for Home Department*, C-353/16, EU:C:2018:276 (hereafter CJEU, 2018, *MP v Secretary of State for Home Department*).

⁽⁵⁴⁰⁾ EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, Sections 1.5.3 and 2.5.2.





infliction of past persecution or serious harm on persons similarly situated may be accepted as relevant evidence of a future risk⁽⁵⁴¹⁾. 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’⁽⁵⁴²⁾.

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⁽⁵⁴³⁾. The Federal Administrative Court in Germany has held that there is no need for clarification by the CJEU that the establishment of a general change of the internal political situation in a country of origin can be seen as a ‘good reason’ in the sense of Article 4(4) for the purposes of rebuttal of the assumption of persecution, so long as the permanence of the change is established. In the same judgment, the court held that a court deciding such a matter can dismiss an application on the part of an applicant to adduce expert evidence on the issue by referring to its own knowledge so long as the proof of such knowledge is displayed in a plausible and comprehensive way⁽⁵⁴⁴⁾.

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 a significant and non-temporary nature that beneficiaries of international protection no longer face persecution or serious harm, offers, by analogy, 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’⁽⁵⁴⁵⁾.

⁽⁵⁴¹⁾ Ibid., Section 1.5.4.

⁽⁵⁴²⁾ In CJEU, 2018, *Ahmedbekova*, op. cit., fn. 55; the CJEU held that although ‘an application for international protection cannot be granted as such on the ground that one of the applicant’s family members has a well-founded fear of being persecuted or faces a real risk of suffering serious harm, by contrast, as the Advocate General stated in point 32 of his Opinion, account must be taken of such threats in respect of one of the applicant’s family members for the purpose of determining whether the applicant is, because of his family tie to the person at risk, himself exposed to the threat of persecution or serious harm. In that regard, as stated in recital 36 of Directive 2011/95, family members of a person at risk will also normally be in a vulnerable situation themselves’ (para. 50). The position outlined in *Ahmedbekova*, was reaffirmed by the CJEU in CJEU (GC), judgment of 9 November 2021, *LW v Bundesrepublik Deutschland*, C-91/20, EU:C:2021:898 (hereafter CJEU (GC), 2021, *LW*), para. 35.

⁽⁵⁴³⁾ See e.g. Migration Court (Sweden), judgment of 2 December 2010, UM 10296-10 (see [EDAL English summary](#)).

⁽⁵⁴⁴⁾ Federal Administrative Court, (Bundesverwaltungsgericht), judgment of 17 September 2019, 1 B 43.19 (ECLI: DE:BVVerwG:2019:170919B1B43.19.0).

⁽⁵⁴⁵⁾ CJEU (GC), 2010, *Abdulla and Others*, op. cit., fn. 272, para. 73.



In *M.P.*, the CJEU ruled that:

Articles 2(e) and 15(b) [QD], read in the light of Article 4 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a third country national who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country, but whose physical and psychological health could, if so returned, seriously deteriorate, leading to a serious risk of him committing suicide on account of trauma resulting from the torture he was subjected to, is eligible for subsidiary protection if there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture, that being a matter for the national court to determine ⁽⁵⁴⁶⁾.

It can be derived, *a fortiori*, from 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' ⁽⁵⁴⁷⁾.

The CJEU has also held:

The evidential value attached by Article 4(4) [QD] to such earlier acts or threats will be taken into account by the competent authorities on the condition, stemming from Article 9(3) [QD], that those acts and threats are connected with the same reason for persecution relied on by the person applying for protection ⁽⁵⁴⁸⁾.

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 remains 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 ⁽⁵⁴⁹⁾.

⁽⁵⁴⁶⁾ CJEU, 2018, *MP v Secretary of State for Home Department*, op. cit., fn. 539, para. 59.

⁽⁵⁴⁷⁾ CJEU (GC), *Y and Z*, op. cit., fn. 31, paras 73-80. For further consideration of the issue of concealment, see EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, Section 1.5.5.

⁽⁵⁴⁸⁾ CJEU (GC), 2010, *Abdulla and Others*, op. cit., fn. 272, para. 94.

⁽⁵⁴⁹⁾ Note, however, CJEU, 2018, *MP v Secretary of State for Home Department*, op. cit., fn. 539, which makes clear that an applicant may be eligible for subsidiary protection even if they no longer face a serious risk of harm of the kind that they experienced in the past.



It is interesting to note that the Grand Chamber of the ECtHR has 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 ⁽⁵⁵⁰⁾.

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 the 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:

[S]olely the responsibility of the competent national authority; accordingly at that stage in the procedure, a requirement that the authority cooperate with the applicant – as laid down in the second sentence of Article 4(1) of [QD] – is of no relevance ⁽⁵⁵¹⁾.

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 their country of origin. This forward-looking evaluation is one of the most notable features of the determination of international protection applications ⁽⁵⁵²⁾.

⁽⁵⁵⁰⁾ ECtHR (GC), 2016, *JK and Others v Sweden*, op. cit., fn. 28, para. 102. See also: ECtHR, judgment of 25 February 2020, *A.S.N. and Others v the Netherlands*, Nos 68377/17 and 530/18, ECLI:CE:ECHR:2020:0225JUD006837717, para. 114.

⁽⁵⁵¹⁾ CJEU, 2012, *M.M.*, op. cit., fn. 31, para. 70.

⁽⁵⁵²⁾ See EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7.





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 some of 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 their statelessness as a definitional element of qualification for international protection. As detailed in *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)* ⁽⁵⁵³⁾, determination of the applicant's nationality or lack thereof forms an essential part of the assessment of an application for international protection ⁽⁵⁵⁴⁾. 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 themselves 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 their **country of origin** or in the case of a stateless person, their **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)) ⁽⁵⁵⁵⁾.

⁽⁵⁵³⁾ EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, Section 1.3.3.

⁽⁵⁵⁴⁾ See also UK Immigration Appeal Tribunal, judgment of 9 June 2000, *Smith v Secretary of State for the Home Department (Liberia)* [2000] OOTH02130, para. 9.

⁽⁵⁵⁵⁾ 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 their 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.





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 they are a national for the purposes of such an application ⁽⁵⁵⁶⁾.

As explained in *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)* ⁽⁵⁵⁷⁾, 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 a significant number of 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 ⁽⁵⁵⁸⁾.

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 or level of conviction as is applied to other elements of their application (i.e. 'well-founded fear of being persecuted' for refugee protection; 'substantial grounds for believing there is a real risk' for subsidiary protection). The principle of procedural autonomy leaves this matter to individual Member States (see Section [4.3.9](#)).

Disputed nationality cases fall into at least three categories reproduced in [Table 24](#).

⁽⁵⁵⁶⁾ Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 25 October 2021 No [262 862](#).

⁽⁵⁵⁷⁾ EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. [7](#), Section 1.3.1, *UNHCR Handbook*, op. cit., fn. [37](#), states, at para. 74, that: 'The term 'nationality' in this context is not to be understood only as 'citizenship'. It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term 'race'. Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution.'

⁽⁵⁵⁸⁾ UNHCR has addressed this concept in the context of child applicants: UNHCR, [Guidelines on Statelessness No 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness](#) (21 December 2012) UN Doc HCR/GS/12/04, paras 22-23: 'This term is used here as an umbrella expression for the classification of the nationality status as 'unknown', 'undetermined' or 'under investigation'. The term also covers cases where states do not classify a person as 'stateless', but rather use a specific term based on their domestic law.'



Table 24. Examples of disputed nationality cases

1	Those where the applicant claims to be stateless, but the determining authority assesses that they have a nationality.
2	Those where the applicant claims to have the nationality of country X, but the determining authority assesses that they do not have the nationality of country X.
3	Those where the applicant claims to have one nationality, but the determining authority considers they have 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 they qualify for international protection must be undertaken by reference to their country of former habitual residence. In broad terms, much the same types of evidence probative of nationality will be probative of habitual residence. Of course, if a determining authority assesses that an applicant has a particular nationality, then consideration of any country of former habitual residence is irrelevant.

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 their 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 ⁽⁵⁵⁹⁾.

It is to be noted that there are differing approaches amongst the Member States where a determining authority does not accept the country of nationality claimed by an applicant. For example, in Belgium, France, Ireland and the Netherlands (and in Norway amongst EU+ countries), such a finding will result in the rejection of an application for international protection.

As regards the approach taken in the latter countries, a distinction can be drawn between a situation where the determining authority does not have sufficient evidence of the asserted nationality of an applicant and a situation where the determining authority has some evidence that the applicant is a national of a country other than that claimed. In Belgium and the Netherlands, for example, the starting position is that the asylum procedure is not a procedure for determining nationality. Rather, an application is assessed on the basis of the claimed nationality and is rejected if there is insufficient evidence of the asserted nationality. If the determining authority has evidence of another nationality (like a passport or ID found in their belongings), the applicant will be confronted with this. The applicant will then have the opportunity to persuade the decision-maker that the evidence is not reliable. If, however, they continue to insist on the first asserted nationality, the claim in principle will be rejected ⁽⁵⁶⁰⁾. Additionally in Belgium, if a person is considered to be de facto stateless then the claim will

⁽⁵⁵⁹⁾ Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 19 January 2022 No [266 957](#).

⁽⁵⁶⁰⁾ Raad van State/Conseil d'État (Council of State) (Belgium), decision of 18 January 2021, No [A 247 597](#), paras 11, 13 and 14.



be considered on the basis of the country of habitual residence. However, just the lack of a plausible nationality does not suffice to consider the person as stateless.

In Ireland an application will be rejected if there is insufficient evidence of the asserted nationality or any other nationality/statelessness. However, if it is accepted that there is sufficient evidence of another nationality or statelessness, that nationality and or statelessness will be the basis for the consideration of the appeal with reference to the relevant country of nationality or former habitual residence.

In Norway, if a stated nationality is not considered credible, it will be determined that the nationality of the applicant is not known and thus it cannot be known that the applicant has a well-founded fear of persecution or a risk of serious harm. The application is rejected on this basis and there is no further consideration of whether another nationality or statelessness can be ascribed to the applicant⁽⁵⁶¹⁾.

In Greece, if a decision-maker takes a view that nationality cannot be determined, the application for protection is examined on the basis that the applicant is stateless⁽⁵⁶²⁾.

Finally, cases where the applicant claims to have one nationality, but the determining authority considers they have 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, subject to them being able to establish valid reasons for not availing themselves of the protection of the other country(ies) of nationality⁽⁵⁶³⁾.

Where the applicant accepts that they presented false information regarding their nationality, they will only qualify as a refugee or beneficiary of subsidiary protection if able to substantiate their nationality of another country and that they have a well-founded fear of persecution or substantial grounds for believing they are at real risk of serious harm in that other country⁽⁵⁶⁴⁾.

⁽⁵⁶¹⁾ Norges Høyesterett (Norwegian Supreme Court), judgment of 14 December 2020, [HR-2020-2408-A](#), paras 5, 8, and 67-69.

⁽⁵⁶²⁾ Guidelines of the Greek Asylum Service. This approach is in line with 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 2011, para. 89, where the following is stated in relation to an application for international protection: 'Where his nationality cannot be clearly established, his refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account.'

⁽⁵⁶³⁾ See EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, Section 1.3.1, pp. 46-47. In CJEU (GC), 2021, [LW](#), op. cit., fn. 542, the CJEU ruled that, although Article 2(d) does not expressly include the provision in the Article 1A(2) definition dealing with persons of multiple nationality, 'it nevertheless follows from Article 2(n) of that directive that each country of which an applicant is, as the case may be, a national must be regarded as his or her 'country of origin' for the purposes of that directive', para. 32.

⁽⁵⁶⁴⁾ CJEU, 2019, [Bilali](#), op. cit., fn. 302, that international protection should only be granted to those who meet the qualifying conditions and can be negated if material facts were false or falsified.





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 their nationality. In accordance with Article 4(2) QD (recast) the applicant must submit as soon as possible all the documentation at their disposal regarding, inter alia, their 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 their 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)).

The nationality (or statelessness) of an applicant may not be in dispute where it has been substantiated by way of the applicant's statements and/or production of documentary evidence such as a passport or identity card ⁽⁵⁶⁵⁾.

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 includes not just documentation which is in the applicant's present possession, but which also appears to include documentation which is within the power of the applicant to obtain ⁽⁵⁶⁶⁾.

Article 4(1) QD (recast) prescribes that the Member State has a duty to cooperate with the applicant to assess the relevant element of nationality and this becomes all the more pertinent when an applicant's efforts to substantiate their nationality leave the determining authority in doubt about this element of the application ⁽⁵⁶⁷⁾. 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'.

Article 4(3)(e) QD (recast) provides that the assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: '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'.

⁽⁵⁶⁵⁾ In *AA v Switzerland* (op. cit., fn. 433, 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*, No 28774/09, ECLI:CE:ECHR:2012:1218JUD002877409, para. 72]'.

⁽⁵⁶⁶⁾ Upper Tribunal (IAC, United Kingdom), *MW (Nationality; Art 4 QD; duty to substantiate)*, op. cit., fn. 189, para. 9. Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 28 September 2021 No 261 258.

⁽⁵⁶⁷⁾ The UK Home Office considers that in such circumstances the burden will shift to the competent authority in case of doubt. See, UK Visas and Immigration, *Nationality: Doubtful, Disputed and Other Cases*, 26 October 2013, p. 5.





The obligation on the Member State under Article 4(3)e) to take into account whether the applicant could get protection in another country where they could assert citizenship is indicative that an applicant's duty to substantiate their nationality includes that they should submit elements on other countries of which they are not nationals at the time of their application, but they might be able to assert citizenship.

The CJEU relied on the wording of Article 4(3)e) in its ruling in *LW* where it stated:

It thus follows from a combined reading of Article 2(d) and Article 2(n) [QD (recast)] that an applicant who is a national of more than one third country is considered to be deprived of protection only if he or she cannot or, because of the fear of being persecuted, does not wish to avail himself or herself of the protection of any of those countries. That reading is, moreover, confirmed by Article 4(3)(e) of that directive, under which, among the factors which must be taken into account in the individual assessment of an application for international protection, is the fact that it is reasonable to believe that the applicant could rely on the protection of another country where he or she could assert citizenship ⁽⁵⁶⁸⁾.

Evidence relating to the way in which the country concerned applies its nationality laws in practice may be relevant ⁽⁵⁶⁹⁾. As the UK Upper Tribunal has noted:

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 ⁽⁵⁷⁰⁾.

The UK Immigration Appeal Tribunal provided a useful (non-exhaustive) list of elements that may support a finding regarding the nationality of an applicant ⁽⁵⁷¹⁾. As suitably adapted, these are listed in [Table 25](#).

⁽⁵⁶⁸⁾ CJEU (GC), 2021, *LW*, op. cit., fn. 542, para. 33.

⁽⁵⁶⁹⁾ EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, 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 their 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'.

⁽⁵⁷⁰⁾ Upper Tribunal (IAC, United Kingdom), judgment of 21 February 2011, *KK and Others (Nationality: North Korea) Korea CG* [2011] UKUT 92, para. 60.

⁽⁵⁷¹⁾ UK Immigration Appeal Tribunal, *Smith v SSHD (Liberia)*, op. cit., fn. 554, para. 45. Similar elements were identified in UKIAT, judgment of 17 April 2008, *MA (Disputed Nationality) Ethiopia* [2008] UKIAT 32, para. 85.



**Table 25. 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

The following observations regarding some of the elements listed in this table are pertinent.

Relevant documentation includes passports and other travel documents which constitute a strong presumption of nationality⁽⁵⁷²⁾, 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⁽⁵⁷³⁾. 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 documents should, however, be reliable: they may not be reliable if forged or inauthentic⁽⁵⁷⁴⁾. However, proof that a document, such as a passport, is not fraudulent is not required in order to find such a document to be reliable (see Section 4.6 on assessing documentary evidence).

Evidence from the applicant, or from relatives or persons acquainted with the applicant, is central in case of a lack of relevant documentation, but also when the documents submitted are not authentic or forged⁽⁵⁷⁵⁾. In this regard, questioning during the personal interview may provide evidence of the applicant's nationality⁽⁵⁷⁶⁾. 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 their statements (see Article 16 APD (recast)). In the context of a dual nationality case, the French Council of State has ruled that, when the applicant asserts that they have a nationality, but the administrative authorities (the French Office for the Protection of Refugees and Stateless Persons) do not

⁽⁵⁷²⁾ UK Immigration Appeal Tribunal, *Smith v SSHD (Liberia)*, op. cit., fn. 554, para. 45. See also *UNHCR Handbook*, op. cit., fn. 37, para. 93.

⁽⁵⁷³⁾ UK Immigration Appeal Tribunal, *Smith v SSHD (Liberia)*, op. cit., fn. 554, para. 45.

⁽⁵⁷⁴⁾ UK Visas and Immigration, *Nationality*, op. cit., fn. 567, pp. 5 and 6.

⁽⁵⁷⁵⁾ See National Asylum Court (Cour nationale du droit d'asile, 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 UK Immigration Appeal Tribunal, *Smith v SSHD (Liberia)*, op. cit., fn. 554, para. 45.

⁽⁵⁷⁶⁾ UK Visas and Immigration, *Nationality*, op. cit., fn. 567, pp. 5 and 6.





accept this, the judge cannot proceed to find that they have another nationality without giving the applicant the opportunity to make a submission on the issue ⁽⁵⁷⁷⁾.

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 their 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 ⁽⁵⁷⁸⁾.

As previously noted (see 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 ⁽⁵⁷⁹⁾. 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 ⁽⁵⁸⁰⁾. In order to check the authenticity of the foreigner's document or identity, according to German law ⁽⁵⁸¹⁾ 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 decision-maker.

⁽⁵⁷⁷⁾ Council of State (Conseil d'État, 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 Article R.733-16 the Code on the Entry and Stay of Foreigners and Asylum Law.

⁽⁵⁷⁸⁾ *Ibid.*, para. 18.

⁽⁵⁷⁹⁾ Refugee Board (Rada do Spraw Uchodźców, Poland), [RdU-246-1/S/13](#), *op. cit.*, fn. 161. as per [EDAL English summary](#).

⁽⁵⁸⁰⁾ UK Visas and Immigration, *Nationality*, *op. cit.*, fn. 567, pp. 6 and 7. Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 19 January 2022 No [266 960](#).

⁽⁵⁸¹⁾ German Asylum Law, Article 16(1)(a); see also Bundesamt für Migration und Flüchtlinge, *Das deutsche Asylverfahren ausführlich erläutert*, 2014, pp. 8 and ff.



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 ⁽⁵⁸²⁾.

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*) ⁽⁵⁸³⁾, the identification of the relevant mode can be material for establishing the evidentiary value of a birth certificate ⁽⁵⁸⁴⁾. If the country concerned applies a *ius soli* approach, the birth certificate of the applicant (if considered reliable) is then to be considered evidence of nationality ⁽⁵⁸⁵⁾. 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 they could seek to acquire, they 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 ⁽⁵⁸⁶⁾.

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 ⁽⁵⁸⁷⁾.

When assessing evidence and credibility in the case of applicants who are minors ⁽⁵⁸⁸⁾, 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 ⁽⁵⁸⁹⁾.

⁽⁵⁸²⁾ UK Immigration Appeal Tribunal, *Smith v SSHD (Liberia)*, op. cit., fn. 554, paras 46-49.

⁽⁵⁸³⁾ Ibid., paras 51 and 52. See also UKAIT, *MA (Disputed Nationality) Ethiopia*, op. cit., fn. 571, para. 83.

⁽⁵⁸⁴⁾ EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, Section 1.3.1.

⁽⁵⁸⁵⁾ UK Immigration Appeal Tribunal, *Smith v SSHD (Liberia)*, op. cit., fn. 554, paras 15 and 45.

⁽⁵⁸⁶⁾ See Upper Tribunal (IAC, United Kingdom), *KK and Others (Nationality: North Korea) Korea CG*, op. cit., fn. 570, paras 79-82.

⁽⁵⁸⁷⁾ For further consideration of this area, see: EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, op. cit., fn. 7, particularly Part 6.

⁽⁵⁸⁸⁾ 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' (Article 2(k) *QD (recast)* and Article 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).

⁽⁵⁸⁹⁾ See EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, op. cit., fn. 7, particularly Sections 6.2 and 6.8.1.1.



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’⁽⁵⁹⁰⁾. 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)⁽⁵⁹¹⁾.

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⁽⁵⁹²⁾, they give specific attention to unaccompanied minors who are defined as:

[...] 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⁽⁵⁹³⁾.

According to the CJEU, unaccompanied minors ‘form a category of particularly vulnerable persons’⁽⁵⁹⁴⁾.

Section 5.2.1 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’⁽⁵⁹⁵⁾. This is also expressly recognised in the CEAS legislation. Recital 33 APD (recast) identifies:

⁽⁵⁹⁰⁾ The UK 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 (IAC, United Kingdom), judgment of 29 August 2013, *JS (Former Unaccompanied Child – Durable Solution) Afghanistan* [2013] UKUT 00568, para. 35.

⁽⁵⁹¹⁾ Upper Tribunal (IAC, United Kingdom), *KS (benefit of the doubt)*, op. cit., fn. 332, paras 88 and 89.

⁽⁵⁹²⁾ Article 7(3) APD (recast).

⁽⁵⁹³⁾ Article 2(l) QD (recast). See also Article 2(m) APD (recast) directly referring to the definition laid down in Article 2(l) QD (recast).

⁽⁵⁹⁴⁾ CJEU, judgment of 6 June 2013, C-648/11, *MA, BT and DA v Secretary of State for the Home Department*, EU:C:2013:367, para. 55.

⁽⁵⁹⁵⁾ *Ibid.*, para. 57 (emphasis added).





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 ⁽⁵⁹⁶⁾, the decision-maker will need to make a decision establishing their chronological age. The issue usually arises in the case of unaccompanied minors ⁽⁵⁹⁷⁾ and is a decision of 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 ⁽⁵⁹⁸⁾ but may also bring additional benefits ⁽⁵⁹⁹⁾. 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 they 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 ⁽⁶⁰⁰⁾.

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

⁽⁵⁹⁶⁾ Article 2(k) QD (recast) defines a minor as a third-country national or a stateless person below the age of 18 years (as does Article 2(l) APD (recast)).

⁽⁵⁹⁷⁾ Defined in Article 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'.

⁽⁵⁹⁸⁾ See e.g. the procedural guarantees in Article 25 APD (recast).

⁽⁵⁹⁹⁾ See e.g. Articles 27 and 31 QD (recast) relating to access to education, suitable placements and training and tracing obligations.

⁽⁶⁰⁰⁾ Supreme Court (United Kingdom), judgment of 30 July 2021, *BF (Eritrea) v Secretary of State for the Home Department*, [2021] UKSC 38.



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 ⁽⁶⁰¹⁾. Member States have relied on a number of different methods of carrying out the assessment ⁽⁶⁰²⁾.

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, the EUAA recommends that consideration should first be given to documentary and other available sources of evidence before resorting to a medical examination ⁽⁶⁰³⁾. Medical examinations, which impliedly may be by any method ⁽⁶⁰⁴⁾, are subject to the following safeguards set out in Article 25(5) APD (recast).

⁽⁶⁰¹⁾ EASO, *Practical Guide on Age Assessment*, 2nd edition, 2018, pp. 38-56.

⁽⁶⁰²⁾ See EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, op. cit., fn. 7, Section 3.4.2.

⁽⁶⁰³⁾ EASO, *Practical Guide on Age Assessment*, op. cit., fn. 601. 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. As examples of other sources of evidence, EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, op. cit., fn. 7, cites, at p.52, 'passports, identity documents of various types an – birth certificates – and other sources of evidence such as statements from other family members present in the Member State. See also CRC Committee, views adopted 31 May 2019, *A.L. v Spain*, communication No 16/2107, CRC/C/81/D/16/2017, para. 12.10; and CRC Committee, views adopted 31 May 2019, *J.A.B. v Spain*, communication No 22/2017, CRC/C/81/D/22/2017, paras 13.9 and 13.10.

⁽⁶⁰⁴⁾ EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, op. cit., fn. 7, states, at p.54, '[i]n terms of the types of medical evidence that can be used for age assessments, the only rule – resulting from the principle of proportionality – that can be drawn from the *APD (recast)* is that the examination shall provide, as far as possible, a reliable result.' The judicial analysis also provides guidance from national case law, CRC Committee, 2018, *N.B.F. v Spain*, on use of x-rays to examine bone maturity and Upper Tribunal (United Kingdom), *R (ZM and SK) v Croydon London Borough Council (dental age assessment)*, [2016] UKUT 559 (IAC). See also Upper Tribunal (United Kingdom), *R (AS (by his litigation friend Francesco Jeff)) v Kent County Council (age assessment; dental evidence)*, [2017] UKUT 446, which considered the utility of dental examination to assess age to be highly debatable.



**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.

Article 25(5) must be implemented with full respect for human dignity in accordance with Article 1 EU Charter, the right to integrity of the person (Article 7 EU Charter) and the protection of personal data (Article 8 EU Charter); and the best interests of the child must be a primary consideration (Article 24(2) of the EU Charter and Article 25(6) APD (recast)). According to Article 52(1) of the EU Charter, the principle of proportionality applies to any limitation on the exercise of the rights and freedoms recognised by the EU Charter ⁽⁶⁰⁵⁾.

An overview of the different age assessment methods currently in use is provided in the EUAA's report *Age Assessment Practice in Europe* ⁽⁶⁰⁶⁾. As illustrated in [Table 26](#) the evidence falls into two categories: non-medical and medical evidence.

⁽⁶⁰⁵⁾ EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, op. cit., fn. 7, p.51.

⁽⁶⁰⁶⁾ *Ibid.*, pp. 24-42. See also Unicef and UNHCR, *Safe & Sound* and Unicef, *Age Assessment: A Technical Note*, op. cit., fn. 603.

**Table 26. Types of evidence for age assessment**

1. Non-medical sources of evidence	1.1 Evidence obtained by interview ⁽⁶⁰⁷⁾
	An interview by appropriately qualified personnel to obtain evidence from the applicant including evidence about matters such as their background and personal history, their 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 ⁽⁶⁰⁸⁾
	The applicant may produce documents to support their 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 ⁽⁶⁰⁹⁾
2. Medical evidence ⁽⁶¹⁰⁾	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 ⁽⁶¹¹⁾ . 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 ⁽⁶¹²⁾. In accordance with Article 8(4)(k) EUAA regulation, as part of the EUAA European asylum curriculum, the training offered by the EUAA shall cover age assessment techniques.

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 their 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 their statements in respect of the need for international protection. Furthermore, the fact that the text of Article 25 APD (recast) entitles an applicant to exercise their right not to consent to a medical assessment means that any

⁽⁶⁰⁷⁾ EASO, *Practical Guide on Age Assessment*, op. cit., fn. 601, pp. 25 and 26.

⁽⁶⁰⁸⁾ Ibid., p. 27.

⁽⁶⁰⁹⁾ Ibid., p. 28.

⁽⁶¹⁰⁾ See Article 25(5) APD (recast).

⁽⁶¹¹⁾ EASO, *Practical Guide on Age Assessment*, op. cit., fn. 601, p. 29.

⁽⁶¹²⁾ Ibid., pp. 26-41.





exercise of that right should not be seen as a failure on the part of an applicant to comply with the Article 4(1) QD (recast) duty on them to substantiate their application.

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 their 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. However, in respect of the temporal requirement 'as soon as possible' in Article 4(1), the CJEU in *A, B and C* stated that it 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] [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 ⁽⁶¹³⁾.

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.

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 ⁽⁶¹⁴⁾. 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 their account or having it made on their 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) ⁽⁶¹⁵⁾. [Table 27](#) 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.

⁽⁶¹³⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 70.

⁽⁶¹⁴⁾ See also UNHCR, *The Heart of the Matter*, op. cit., fn. 379, p. 91.

⁽⁶¹⁵⁾ See further EASO, *Asylum Procedures and the Principle of Non-Refoulement*, op. cit., fn., 7. Subsections 4.2.7 and 4.2.8.





Table 27. Selected procedural guarantees for minor applicants in APD (recast)

Minors	Article 10(3)(d) APD (recast)	<p>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: [...]</p> <p>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]</p>
	Article 15(3)(e) APD (recast)	<p>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: [...]</p> <p>ensure that interviews with minors are conducted in a child-appropriate manner.</p>
Unaccompanied minors	Article 25 APD (recast)	<p>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:</p> <p>(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. [...]</p> <p>(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.</p> <p>[...]</p> <p>3. Member States shall ensure that:</p> <p>(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;</p> <p>(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.</p> <p>4.3 Unaccompanied minors and their representatives shall be provided, free of charge, with legal and procedural information [...] ⁽⁶¹⁶⁾.</p>

⁽⁶¹⁶⁾ Article 25(5) is quoted in full early in Section 5.2.2.





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’⁽⁶¹⁷⁾ 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⁽⁶¹⁸⁾. 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 they were 10-12 years old⁽⁶¹⁹⁾.

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⁽⁶²⁰⁾. For courts or tribunals reviewing decisions of lower courts or tribunals, it will be important to consider whether such standards have been adhered to⁽⁶²¹⁾.

The procedural safeguards set out in the APD (recast) focus on ensuring the applicant’s personal position and circumstances are sufficiently taken into account. 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

⁽⁶¹⁷⁾ Emphasis added.

⁽⁶¹⁸⁾ UNHCR, *The Heart of the Matter*, op. cit., fn. 379, pp. 105-110.

⁽⁶¹⁹⁾ Supreme Court (Vrhovno sodišče, Slovenia), I Up 471/2012, op. cit., fn. 95 (see EDAL English summary). In Verfassungsgerichtshof (Austrian Constitutional Court) (Austria), judgment of 23 March 2021, VfGH E 1223/2020, the court held that the rejection of the appeal of an Afghan asylum-seeker, who was a minor, led to a violation in the right to equal treatment of non-nationals relative to one another (Article I Federal Constitutional Law Implementing the International Convention on the Elimination of all Forms of Racial Discrimination) as the Federal Administrative Court did not, inter alia, give proper consideration to the fact that the appellant had been a minor at the time of the interviews, neither during its own hearing nor in its written assessment in the verdict.

⁽⁶²⁰⁾ See in the United Kingdom, *Joint Presidential Guidance Note No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance*, op. cit., fn. 256. In Verfassungsgerichtshof (Austrian Constitutional Court) (Austria), judgment of 29 November 2021, VfGH E 2865/2021, the court held that the female appellant, an asylum-seeker who was also a minor, did not have her right to a fair trial before a lawful judge (Article 83 para. 2 B-VG) vindicated when a male judge at the Federal Administrative Court decided her appeal even though § 20 para. 2 Asylum Code 2005 was applicable and the appellant had not requested a male judge.

⁽⁶²¹⁾ Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 24 January 2022 No 267 099.





minor's familial, tribal, and cultural connections⁽⁶²²⁾. 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'⁽⁶²³⁾. This may entail, for example, attaching more weight to documentary evidence⁽⁶²⁴⁾. Subsequent UNHCR Guidelines 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)⁽⁶²⁵⁾. One implication of an 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 the applicant's statements are not supported by documentary or other evidence (see Section 4.3.7). 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⁽⁶²⁶⁾. 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 their 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⁽⁶²⁷⁾.

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⁽⁶²⁸⁾.

⁽⁶²²⁾ Note, with regard to unaccompanied minors, that Article 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.'

⁽⁶²³⁾ *UNHCR Handbook*, op. cit., fn. 37, para. 217. See, however, Section 1.5.1 of the EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, concerning the concept of well-founded fear, where criticisms are outlined of the UNHCR bipartite approach, which underpins the UNHCR's treatment of minors and credibility.

⁽⁶²⁴⁾ Reflecting UNHCR guidelines, the *UK 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'.

⁽⁶²⁵⁾ 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*, HCR/GIP/09/08, 22 December 2009, paras 11 and 12.

⁽⁶²⁶⁾ *UNHCR Handbook*, op. cit., fn. 37, paras 215 and 216.

⁽⁶²⁷⁾ 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'.

⁽⁶²⁸⁾ In the United Kingdom, see e.g. Upper Tribunal (IAC, United Kingdom), judgment of 6 January 2012, *AA (unattended children) Afghanistan CG* [2012] UKUT 00016; and Upper Tribunal (IAC, United Kingdom), judgment of 31 May 2013, *ST (Child asylum seekers) Sri Lanka* [2013] UKUT 00292.



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 ⁽⁶²⁹⁾. A number of factors specific to minor applicants should be taken into account.

One obvious factor is development. During their 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 ⁽⁶³⁰⁾. 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’ ⁽⁶³¹⁾. 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 ⁽⁶³²⁾, 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 ⁽⁶³³⁾.

Adolescence is also a time of emerging identity, including gender identity and sexual orientation (for more on this, see Section 6.6).

⁽⁶²⁹⁾ See e.g. Asylum Court (Asylgerichtshof, 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’. In *Verwaltungsgerichtshof (Austrian Supreme Administrative Court) (Austria)*, judgment of 11 February 2022, [VwGH Ra 2021/18/0388](#), the court held that to assess the credibility of a person, who at the time of the events leading to him seeking international protection was a minor, a particularly thorough assessment of evidence has to be carried out where the credibility of the person’s statement and any inconsistencies have to be assessed with specific attention to the person’s age. The ruling itself must show that those circumstances have been observed in the assessment of evidence, and that consideration has been given to the fact that a minor has given the statement.

⁽⁶³⁰⁾ The UK 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’ (UK Home Office, *Processing Children’s Asylum Claims*, 12 July 2016, pp. 39 and 40).

⁽⁶³¹⁾ *UNHCR Handbook*, op. cit., fn. 37, paras 217-219. On ‘well-founded fear’, see Section 1.5.1 of the EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7.

⁽⁶³²⁾ UNHCR, *The Heart of the Matter*, op. cit., fn. 379, p. 59.

⁽⁶³³⁾ *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 their maturity. Given their age and maturity, a minor may thus have more difficulties concerning time perception and calculation of risk⁽⁶³⁴⁾. 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⁽⁶³⁵⁾ and affect their ability to present a coherent account⁽⁶³⁶⁾. 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 healthcare, or faced sexual exploitation and other abuses⁽⁶³⁷⁾.

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⁽⁶³⁸⁾. 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

⁽⁶³⁴⁾ See e.g. Supreme Court (Vrhovno sodišče, Slovenia), I Up 471/2012, op. cit., fn. 95, (see EDAL English summary); UNHCR, *The Heart of the Matter*, op. cit., fn. 379.

⁽⁶³⁵⁾ E.g. Mirabolfathi, V., Schweizer, S., Moradi, A., & Jobson, L. (2020). *Affective working memory capacity in refugee adolescents. Psychological Trauma: Theory, Research, Practice, and Policy*. Advance online publication, which shows that trauma exposed adolescents with high levels of PTSD had impaired working memory with respect to with trauma-related (but not neutral) material.

⁽⁶³⁶⁾ Further the UK 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 UK Home Office, *Processing Children's Asylum Claims*, op. cit., fn. 630, p. 32.

⁽⁶³⁷⁾ UNHCR, *The Heart of the Matter*, op. cit., fn. 379, p. 61.

⁽⁶³⁸⁾ *Ibid.*, p. 63.





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 ⁽⁶³⁹⁾.

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:

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 ⁽⁶⁴⁰⁾.*

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' ⁽⁶⁴¹⁾. UNHCR also recognises that assessment of the credibility of a minor may 'call for a liberal application of the benefit of the doubt' ⁽⁶⁴²⁾. 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.

⁽⁶³⁹⁾ Ibid., p. 64.

⁽⁶⁴⁰⁾ Hungarian Helsinki Committee, *Credibility Assessment Training Manual, Vol. 2*, op. cit., fn. 36, p. 114.

⁽⁶⁴¹⁾ *UNHCR Handbook*, op. cit., fn. 37, para. 196.

⁽⁶⁴²⁾ UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1993, p. 101.





5.3. SOGI and religious conversion applications

International protection applications arising from sexual orientation or gender identity ('SOGI') and applications arising from asserted religious conversion pose particular challenges for both applicants and decision-makers because they arise from 'inner' or 'hidden' thoughts, outlooks and states of being⁽⁶⁴³⁾. This can make it difficult for an international protection applicant to substantiate that they genuinely, for example, have a particular sexual orientation or hold a particular religious belief. Such an applicant will face difficulties supporting their statements with documentary or other evidence. A decision-maker tasked with adjudicating upon such an application is often left with little, if anything, other than the assertions of an applicant that they have a particular sexual orientation, gender identity or religious faith and the decision-maker may feel less confident about accepting an applicant's statements than would be the case in an application where the core facts are manifestly supported by documentary or other evidence.

Nevertheless, it is important for decision-makers not to lose sight of the fact that the approach to decision-making where such applications are concerned does not need to depart and, indeed, should not depart from the approach taken to evidence and credibility assessment in any other kind of international protection claim. The tools and mechanisms for dealing with such claims have been outlined elsewhere in this judicial analysis⁽⁶⁴⁴⁾. The decision-maker ought to start by examining the asserted sexual orientation, gender identity or religious faith and apply the usual credibility indicators to those assertions. For example, in the case of an asserted sexual orientation, CJEU jurisprudence is clear that an assertion of a particular sexual orientation is only a starting point and that it is appropriate for a decision-maker to explore that assertion with an applicant, so long as the exploration of the asserted orientation respects the dignity and private life of the applicant. In that regard, the CJEU stated the following in *A, B and C*:

[I]t should be noted at the outset that, contrary to the submissions made by the applicants in the main proceedings, according to which the competent authorities examining an application for asylum based on a fear of persecution on grounds of the sexual orientation of the applicant for asylum must hold the declared sexual orientation to be an established fact on the basis solely of the declarations of the applicant, 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]⁽⁶⁴⁵⁾.

Later in the same judgment the CJEU 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

⁽⁶⁴³⁾ For analysis of some of the issues involved, see: Berlit, U., Dörig, H., and Storey, H., '*Credibility Assessment in Claims Based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach*', *IJRL*, 2015, 649-666.

⁽⁶⁴⁴⁾ See, in particular, Parts 4.1. [Introduction to Article 4 QD \(recast\)](#) – 4.5. [Credibility indicators](#)

⁽⁶⁴⁵⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 49.



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 ⁽⁶⁴⁶⁾.

Occasionally with a 'SOGI' or 'religious conversion' application, there may be supporting documentary or other evidence, in which case placing sole reliance on the assertions of an applicant will not be necessary to find that the core material facts of the claim have been established ⁽⁶⁴⁷⁾. If, as may perhaps more likely be the case with such an application compared to other forms of international protection application, there is no documentary or other evidence to support this aspect of the applicant's statements, decision-makers should recall that EU law has a provision to deal with such a situation in the form of Article 4(5) QD (recast) ⁽⁶⁴⁸⁾. An application of that provision should give a decision-maker the confidence to make a decision on the credibility of the core material facts of the application, whether that be positive or negative.

The kinds of applications referred to in this section can pose challenges for decision-makers because they are often left feeling a sense of uncertainty about 'the truth' of such applications. However, it is this very fact that should, perhaps, remind decision-makers that evidence and credibility assessment in international protection applications is not about achieving absolute certainty and attainment of 'the truth' as regards the material facts and circumstances of a particular application. Rather, it is about applying the accepted tools and approaches to find whether asserted facts can be accepted, or rejected, as the case may be ⁽⁶⁴⁹⁾.

5.4. 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'. Recital 27 QD (recast) states that '[w]here the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant'. While these material requirements are

⁽⁶⁴⁶⁾ Ibid., para. 64.

⁽⁶⁴⁷⁾ It should be noted, however, that certain forms of evidence will be deemed inadmissible in this context. In CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 73, the CJEU held that 'evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or, yet, the production by him of films of such acts' could not be accepted. In CJEU, 2018, *F*, op. cit. fn.20, para. 72(2), the CJEU ruled that 'a psychologist's expert report, such as that at issue in the main proceedings, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant' was not acceptable evidence in an international protection application.

⁽⁶⁴⁸⁾ See Part 4.3.7. Evidence assessment and confirmation of statements (Article 4(5) QD (recast)) of this judicial analysis.

⁽⁶⁴⁹⁾ Court of Appeal (England and Wales, United Kingdom), 2006, *HK v Secretary of State for the Home Department*, op. cit., fn. 407, para. 28.



analysed in detail in *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)* ⁽⁶⁵⁰⁾, 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 applicant is expected to relocate and support any finding that it is sufficiently safe to remove them in light of the criteria of Article 8(1) QD (recast) ⁽⁶⁵¹⁾.

Article 8(1) QD (recast) provides:



Article 8(1) QD (recast)

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she:
 - (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or
 - (b) has access to protection against persecution or serious harm as defined in Article 7; and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.

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](#).

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 ⁽⁶⁵²⁾. This is clearly laid down in Article 8(2), which requires Member States to ‘have regard to the

⁽⁶⁵⁰⁾ EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, Section 2.8.

⁽⁶⁵¹⁾ Ibid. See e.g. Refugee Board (Rada do Spraw Uchodźców, 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 (Conseil d’État, France), decision of 11 February 2015, *Mme CA*, application No [374167](#), ECLI:FR:CESJS:2015:374167.20150211, para. 3 (see [EDAL English summary](#)).

⁽⁶⁵²⁾ See e.g. Supreme Administrative Court (Nejvyšší správní soud, Czech Republic), judgment of 30 September 2013, *IJ v Ministry of Interior*, 4 Azs 24/2013-34 (see [EDAL English summary](#)).





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’⁽⁶⁵³⁾ 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 [EUAA]’⁽⁶⁵⁴⁾. 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 their country of origin and can be reasonably expected to settle there. The UK 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⁽⁶⁵⁵⁾.

Section 4.8 deals more specifically with the criteria for evaluating COI which have particular relevance for the application of internal protection.

⁽⁶⁵³⁾ As e.g. reaffirmed by the Federal Administrative Court (BVerwG, Germany), judgment of 19 January 2009, No 10 C 52.07, BVerwG: 2009:190109U10C52.07.0, para. 29, including in [English](#).

⁽⁶⁵⁴⁾ This echoes Article 4(3)(a) [QD \(recast\)](#) examined in Section 4.8. See e.g. Court of The Hague (Rechtbank Den Haag, Netherlands), judgment of 7 April 2016, [NL16.6](#), ECLI:NL:RBDHA:2016:3710, para. 17 (see [EDAL English summary](#)).

⁽⁶⁵⁵⁾ UK Home Office, [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 ⁽⁶⁵⁶⁾. What this demands in terms of the assessment of evidence and credibility is examined in [Part 4](#) ⁽⁶⁵⁷⁾.

As it rests on the competent authority to determine the availability of internal protection, the applicant should have the opportunity to establish that they cannot benefit from such protection, given the significant consequences for them and with due respect to 'basic rules of procedural fairness' ⁽⁶⁵⁸⁾. 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 ⁽⁶⁵⁹⁾.

5.5. Family relationships and evidence assessment

The notion of family unity and issues related to family relationships are addressed in more detail in *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)* ⁽⁶⁶⁰⁾. This section focuses on those aspects bearing on evidence and credibility assessment in the context of applications for international protection.

⁽⁶⁵⁶⁾ In CNDA, 12 February 2021, Mrs B and Children, No 20034127 C+, the National Court of Asylum in France ruled on a case involving an applicant and her five minor children from DRC. Noting that the fears of persecution on ethnic grounds expressed by the applicant were well-founded, the court also considered that, owing to her personal and family vulnerability, she could not settle without danger in another region of her country of origin. The applicant and her children, whose situation was deemed inseparable from hers because they were minors, were therefore placed under international protection. In CNDA, 15 June 2021, M.S., No 20029676 R, the National Court of Asylum in France held, in the context of an application by a Malian national, that it is necessary to consider the cumulative impact of individual factors which have to be taken into account when assessing the reasonableness of internal relocation. The court further held that a mere decrease of economic status in the relocation zone does not preclude internal relocation.

⁽⁶⁵⁷⁾ See e.g. High Court (Ireland), judgment of 17 April 2015, *AO v Refugee Applications Commissioner & Ors*, [2015] IEHC 253, 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 (Raad van State/Conseil d'État, Belgium), decision of 5 July 2013, No [224.276](#), para. 71 (see [EDAL English summary](#)).

⁽⁶⁵⁸⁾ 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*, HCR/GIP/03/04, 23 July 2003, para. 35. See also Council of State (Conseil d'État, France), *Mme CA*, No [374167 C](#), op. cit., fn. [651](#), 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.

⁽⁶⁵⁹⁾ High Court (Ireland), judgment of 1 November 2013, *KD (Nigeria) v Refugee Appeals Tribunal & ors*, [2013] IEHC 481, para. 28, principle 11.

⁽⁶⁶⁰⁾ EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. [7](#), Sections 4.1.2 and 4.2.2.



Neither the QD (recast) nor the APD (recast) contain specific criteria applicable to the assessment of whether or not there is a family relationship. Given the absence in the CEAS legislation of specific standards applicable to the 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 ⁽⁶⁶¹⁾. 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 ⁽⁶⁶²⁾. It does not, however, apply to beneficiaries of subsidiary protection ⁽⁶⁶³⁾.

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 may ‘carry out interviews with the sponsor and their family members and conduct other investigations that are found to be necessary’. Concerning the unmarried partner of the sponsor, their 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 ⁽⁶⁶⁴⁾. 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’ ⁽⁶⁶⁵⁾. Consistent with this is the further requirement that ‘[a]

⁽⁶⁶¹⁾ [Family reunification directive](#), op. cit., fn. 41.

⁽⁶⁶²⁾ [Family reunification directive](#), op. cit., fn. 41.

⁽⁶⁶³⁾ See, however, Council of Europe, April 2020, [Family Reunification for Refugee and Migrant Children, Standards and Promising Practices](#), Chapter 6, 5.2.

⁽⁶⁶⁴⁾ The directive does not, however, apply to beneficiaries of subsidiary protection (Article 3(2)(c)). It should be noted, however, that in CJEU, 13 March 2019, C-635/17, [E.](#), EU:C:2019:192, para. 43, the CJEU held that it has jurisdiction, on the basis of Article 267 TFEU, to interpret Article 11(2) of Council Directive 2003/86 in a situation where a national court is called upon to rule on an application for family reunification lodged by a beneficiary of subsidiary protection, if that provision was made directly and unconditionally applicable to such a situation under national law.

⁽⁶⁶⁵⁾ Article 5(2) of the directive, permits the Member States 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.



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 their 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 *E.*, the CJEU held that:

Article 11(2) must be interpreted as precluding, in circumstances such as those at issue in the main proceedings, in which an application for family reunification has been lodged by a sponsor benefiting from subsidiary protection in favour of a minor of whom they are the second-degree relative and allegedly the guardian, and who resides as a refugee and without family ties in a third country, that application from being rejected solely on the ground that the sponsor has not provided official documentary evidence of the death of the minor’s biological parents and, consequently, that they have an actual family relationship with them, and that the explanation given by the sponsor to justify their inability to provide such evidence has been deemed implausible by the competent authorities solely on the basis of the general information available concerning the situation in the country of origin, without taking into consideration the specific circumstances of the sponsor and the minor and the particular difficulties they have encountered, according to their testimony, before and after fleeing their country of origin ⁽⁶⁶⁶⁾.

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, where there were consistent declarations of the refugee since the outset of their asylum application about their relationship with their spouse and children, the burden of demonstrating the fraudulent character of the documentation submitted rested with the defendant administration ⁽⁶⁶⁷⁾.

5.6. Exclusion and the assessment of evidence

5.6.1. Definitions

The subject of exclusion is addressed in detail in *Exclusion: Articles 12 and 17 Qualification Directive – Judicial analysis*, 2nd edition, 2020 ⁽⁶⁶⁸⁾. This judicial analysis will concentrate on matters concerning evidence and credibility assessment in the context of cases concerning exclusion under Articles 12 and 17 QD (recast).

⁽⁶⁶⁶⁾ CJEU, 2019, *E.*, op. cit., fn. 664, para. 81.

⁽⁶⁶⁷⁾ Council of State (Conseil d’État, France), decision of 24 November 2010, *Mme M*, application No 333913.

⁽⁶⁶⁸⁾ EASO, *Exclusion: Articles 12 and 17 Qualification Directive – Judicial analysis*, 2nd edition, 2020., op. cit., fn.7.



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.

Article 12 QD (recast) provides:



Article 12 QD (recast)

1. A third-country national or a stateless person is excluded from being a refugee if:
 - (a) he or she falls within the scope of Article 1(D) of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, those persons shall *ipso facto* be entitled to the benefits of this Directive;
 - (b) he or she is recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations which are attached to the possession of the nationality of that country, or rights and obligations equivalent to those.
2. A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:
 - (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
 - (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
 - (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.
3. Paragraph 2 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.



Article 17 QD (recast) provides:



Article 17 QD (recast)

1. A third-country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:
 - (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
 - (b) he or she has committed a serious crime;
 - (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
 - (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.
2. Paragraph 1 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein.
3. Member States may exclude a third-country national or a stateless person from being eligible for 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 which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes.

It should be noted that Article 17(3) QD (recast) contains a non-mandatory provision allowing a Member State to exclude a person from subsidiary protection.

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) ⁽⁶⁶⁹⁾.

5.6.2. 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 ⁽⁶⁷⁰⁾.

⁽⁶⁶⁹⁾ EASO, *Exclusion: Articles 12 and 17 Qualification Directive – Judicial analysis*, 2nd edition, 2020, op. cit., fn. 7.

⁽⁶⁷⁰⁾ CJEU, 2022, *NB and AB*, op. cit., fn. 148, para. 85, attaches a caveat to this general principle. Although Article 12(1)(a) is an exclusion clause, the CJEU accepted in that case that it contains an inclusionary element.





Articles 12 and 17 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 or who would face a real risk of suffering serious harm 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 ⁽⁶⁷¹⁾.

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) ⁽⁶⁷²⁾, provisions which the CJEU in *B and D* has seen as analogous ⁽⁶⁷³⁾. 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* judgment, 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 ⁽⁶⁷⁴⁾.

In its decision in *Mostafa Lounani*, the CJEU stated:

For 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

⁽⁶⁷¹⁾ CJEU, Opinion of Advocate General Mengozzi of 1 June 2010, *Federal Republic of Germany v B and D*, joined cases C-57/09 and C-101/09, EU:C:2010:302, para. 46.

⁽⁶⁷²⁾ 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.

⁽⁶⁷³⁾ CJEU (GC), judgment of 9 November 2010, *Bundesrepublik Deutschland v B and D*, joined cases C-57/09 and C-101/09, EU:C:2010:661, para. 102.

⁽⁶⁷⁴⁾ *Ibid.*, para. 98.





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 ⁽⁶⁷⁵⁾.

In *AB (Afghanistan)*, the Irish High Court has observed:

The 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 ⁽⁶⁷⁶⁾.

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 concerned in the perpetration of the excludable acts, their position within the organisation, the extent of knowledge they had, or was deemed to have, of its activities, the possible pressure to which they were exposed or other factors likely to have influenced their conduct ⁽⁶⁷⁷⁾.

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 ⁽⁶⁷⁸⁾.

⁽⁶⁷⁵⁾ CJEU (GC), judgment of 31 January 2017, *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani*, C-573/14, ECLI:EU:C:2017:71, para. 79.

⁽⁶⁷⁶⁾ 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.

⁽⁶⁷⁷⁾ CJEU, *B and D*, op. cit., fn. 673, para. 97.

⁽⁶⁷⁸⁾ *Ibid.*, para. 87.





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 ⁽⁶⁷⁹⁾.

5.6.3. 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).

The CJEU has yet to give specific 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 ⁽⁶⁸⁰⁾. 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 UK 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’.

⁽⁶⁷⁹⁾ EASO, *Exclusion: Articles 12 and 17 Qualification Directive – Judicial analysis*, 2nd edition, 2020.op. cit., fn. 7, Section 4.1.1, p. 41.

⁽⁶⁸⁰⁾ In CJEU, 13 September 2018, C-369/17, *Shajin Ahmed*, EU:C:2018:713, the CJEU held that Article 17(1)(b) must be interpreted as precluding legislation of a Member State pursuant to which the applicant for subsidiary protection is deemed to have ‘committed a serious crime’ within the meaning of that provision, which may exclude him from that protection, on the basis of the sole criterion of the penalty provided for a specific crime under the law of that Member State. It is for the authority or competent national court ruling on the application for subsidiary protection to assess the seriousness of the crime at issue, by carrying out a full investigation into all the circumstances of the individual case concerned.





(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 Directive) in the particular case ⁽⁶⁸¹⁾.

In a 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 they are 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 them an author of, or an accomplice in, acts falling within the scope of Article 1F of the Refugee Convention ⁽⁶⁸²⁾.

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’ ⁽⁶⁸³⁾.

⁽⁶⁸¹⁾ Supreme Court (United Kingdom), *Al-Sirri and DD (Afghanistan) v Secretary of State for the Home Department*, op. cit., fn. 672, para. 75.

⁽⁶⁸²⁾ Among others, see Council of State (Conseil d’État, France), judgment of 14 June 2010, *M. K.*, No 320630 A, in *Contentieux des réfugiés, Jurisprudence du Conseil d’État et de la Cour nationale du droit d’asile, Année 2010*, 2011, pp. 134 and 135; Council of State (Conseil d’État, France), judgment of 17 January 2011 *M. A.* No 316678 C, in *Contentieux des réfugiés, Jurisprudence du Conseil d’État et de la Cour nationale du droit d’asile, Année 2011*, p. 141; Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 13 July 2015, No 149555; as well as Council for Aliens Law Litigation (RVV/CCE, Belgium), decisions of 6 February 2015, No 138035; of 19 June 2012, No 83281; of 18 June 2013, No 105239.

⁽⁶⁸³⁾ EASO, *Exclusion: Articles 12 and 17 Qualification Directive – Judicial analysis*, 2nd edition, 2020. op. cit., fn. 7, Section 4.1.1.



5.7. 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 28](#).

Table 28. Summary of grounds for withdrawal of international protection

Grounds	Refugee status QD (recast) provision	Subsidiary protection status QD (recast) provision
Cessation	Article 14(1) together with Article 11	Article 19(1) together with Article 16
Exclusion	Article 14(3)(a) together with Article 12	Articles 19(2) together with Article 17(3) and 19(3)(a) together with Article 17(1) and (2)
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 – Judicial analysis*, 2021, and, in relation to exclusion, *Exclusion: Articles 12 and 17 Qualification Directive – Judicial analysis*, 2nd edition, 2020.

5.7.1. 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 ⁽⁶⁸⁴⁾.

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 ⁽⁶⁸⁵⁾. 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 ⁽⁶⁸⁶⁾.

Article 14(3) makes it clear that the grounds for revoking, ending or refusing to renew refugee status in sub-sections (a) and (b) must be ‘established’. There must, therefore, be evidence on which a decision to end, revoke or refuse to renew refugee status is based. The onus to show that the relevant criteria are met lies with the Member State.

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 ⁽⁶⁸⁷⁾.

⁽⁶⁸⁴⁾ Emphasis added.

⁽⁶⁸⁵⁾ 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)*, HCR/GIP/03/03, 10 February 2003.

⁽⁶⁸⁶⁾ Emphasis added.

⁽⁶⁸⁷⁾ Emphasis added.

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 ⁽⁶⁸⁸⁾.

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](#)).

5.7.2. 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 ⁽⁶⁸⁹⁾:

⁽⁶⁸⁸⁾ Kraft, I., in Hailbronner and Thym, *EU Immigration and Asylum Law, A Commentary*, op. cit., fn. 143, pp. 1193 and 1228; National Asylum Court (Cour nationale du droit d’asile, France), judgment of 7 May 2013, OFPRA v A A, application No 12021083. Nevertheless, the beneficiary of international protection is expected to explain an applicant’s behaviour as required by the 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. 37, para. 121.

⁽⁶⁸⁹⁾ 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.’

**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 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.

5.7.3. Specific features affecting evidence and credibility assessment

5.7.3.1. Cessation clauses

A full analysis of the cessation clauses is to be found in *Ending International Protection – Judicial analysis*, 2021⁽⁶⁹⁰⁾. The cessation clauses are encompassed in Articles 11(1) and 16(1) QD (recast).

Article 11(1) QD (recast) provides:



Article 11(1) QD (recast)

1. A third-country national or a stateless person shall cease to be a refugee if he or she:
 - (a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or he or she has committed a serious crime;
 - (b) having lost his or her nationality, has voluntarily re-acquired it; or
 - (c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or
 - (d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or
 - (e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality; or
 - (f) being a stateless person, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.

Article 16(1) QD (recast) provides:



Article 16(1) QD (recast)

A third-country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

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

⁽⁶⁹⁰⁾ EASO, *Ending International Protection – Judicial analysis*, 2021, op. cit., fn. 7



facts and circumstances suffice to demonstrate that the person concerned no longer fears persecution in their country of nationality or former habitual residence.

Although the assessment must be an objective one, the testimony of the applicant when ascertaining the voluntariness and intent of their actions will be of particular importance.

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⁽⁶⁹¹⁾. 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 they have voluntarily re-availed themselves of the protection of the country of nationality⁽⁶⁹²⁾. 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⁽⁶⁹³⁾.

The German Federal Administrative Court took the view that acceptance or renewal of a national passport does not necessarily mean that refugee status is automatically terminated in every case. The court found that, while this behaviour was an indication that the person concerned wished to place himself under the protection of his home country again, this inference can be invalidated by the circumstances of the individual case. The court emphasised that the individual circumstances of the case must be considered and that it must be questioned whether the behaviour of the person entitled to asylum can be evidence that the issue of the passport was not intended as a means of regaining full diplomatic protection. The court stated that 'the mere use of a service provided by the diplomatic mission of the home country to overcome bureaucratic obstacles cannot be sufficient to cause the loss of rights. Determinations on the associated purpose and the individual circumstances have to be made'⁽⁶⁹⁴⁾.

Steps taken by a refugee may have been motivated by necessity or because the refugee was required to take such steps by the host Member State (such as a requirement by the state of refuge that the refugee obtain travel documents)⁽⁶⁹⁵⁾. UNHCR, interpreting Article 1C (1)

⁽⁶⁹¹⁾ See EASO, *Ending International Protection – Judicial analysis*, 2021, op. cit., fn. 7, Section 2.1, for a comprehensive consideration of this provision.

⁽⁶⁹²⁾ Council of State (Conseil d'État, France), decision of 13 January 1989, application No 78055, cited in Kraft, op. cit., fn. 688, p. 1194; Migration Court of Appeal (Migrationsöverdomstolen, 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. 688, para. 30. See also *UNHCR Handbook*, op. cit., fn. 37, para. 121.

⁽⁶⁹³⁾ High Administrative Court (Verwaltungsgerichtshof, Austria), judgment of 15 May 2003, VWGH 2001/01/0499.

⁽⁶⁹⁴⁾ Unofficial translation of Federal Administrative Court (*Bundesverwaltungsgericht*, Germany), judgment of 27 July 2017, 1 C 28.16, DE:BVerwG:2017:270717 U1C28:16.0.

⁽⁶⁹⁵⁾ *UNHCR Handbook*, op. cit., fn. 37, para. 119, sets out a framework for the consideration of such cases, identifying three essential factors for analysis of cases arising under Article 1(C)(1): voluntariness, intent and actual re-availment.





Refugee Convention, which is reflected in Article 11(1)(a) QD (recast), clarifies that the refugee may:

[B]e constrained, by circumstances beyond his control, to have recourse to a measure of protection from his country of nationality. He may, for instance, need to apply for a divorce in his home country because no other divorce may have the necessary international recognition. Such an act cannot be considered to be a ‘voluntary re-avilment of protection’ and will not deprive a person of refugee status (696).

In such cases, an assessment should be made of whether the interaction with the ‘country of nationality’ was merely to fulfil a requirement imposed upon the refugee by the regulations and procedures of the host state, and ‘attention to the facts of each particular case is vital’ (697).

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 (698).

When carrying out the assessment of whether someone has ‘re-established himself or herself’ in the country of origin or not, the authorities should look at the objective facts on a case-by-case basis (699). Although there are no definite accepted criteria for when a person can be considered as having ‘re-established himself or herself’, Member States’ courts and tribunals have given some indications of how the provision might be interpreted.

For instance, the Irish High Court found that there was clearly a voluntary re-establishment on a permanent basis when an individual returned to Nigeria and benefited from the protection of state institutions such as the police and judicial system. He also then obtained a passport from the Nigerian authorities while resident there (700).

A case before the Refugee Appeals Commission in France concerned a Kurdish Iraqi refugee, who returned to the autonomous region of Kurdistan (which had since come under the control of the international community) and had no evident intention of leaving. The commission found that settlement on this more permanent basis could constitute re-establishment. It found that he had returned voluntarily, and had lived, worked, married and had children there, for a number of years (701).

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

(696) *UNHCR Handbook*, op. cit., fn. 37, para. 120.

(697) E. Fripp, *Nationality and statelessness in the international law of refugee status*, Bloomsbury, 2016 (hereafter Fripp, *Nationality and Statelessness*), p. 335.

(698) Kraft, op. cit., fn. 688, p. 1195.

(699) *Ibid.*, para. 14

(700) High Court (Ireland), judgment of 1 November 2012, *Adegbuyi v Minister for Justice and Law Reform*, [2012] IEHC 484, para. 51.

(701) Refugee Appeals Commission (*Commission des recours des réfugiés*, France), decision of 17 February 2006, M. O., No 02008530/406325 R.





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 a serious indication that a refugee has sought protection from their country of origin⁽⁷⁰²⁾. 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 themselves of the protection of the country of nationality when they returned to the country of origin⁽⁷⁰³⁾. 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 them were not sufficient to outweigh an official document establishing their presence in their country of origin after their recognition as a refugee⁽⁷⁰⁴⁾.

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 UK House of Lords' judgment in *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⁽⁷⁰⁵⁾. The assessment must be carried out with vigilance and care. In this regard, the CJEU ruled in *Abdulla* that 'the assessment of the extent of the risk must, in all cases, be carried out with vigilance and care, since what is at issue are matters relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union'⁽⁷⁰⁶⁾. This normally necessitates a longer period of observation during which the situation can consolidate⁽⁷⁰⁷⁾.

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 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*

⁽⁷⁰²⁾ See EASO, *Ending International Protection – Judicial analysis*, 2021.op. cit., fn. 7, Section 2.4.

⁽⁷⁰³⁾ Council of State (Conseil d'État, France), judgment of 31 March 1999, *M. X.*, No 177013.

⁽⁷⁰⁴⁾ Council of State (Conseil d'État, France), judgment of 11 October 1991, *M. X.*, No 96492 C.

⁽⁷⁰⁵⁾ House of Lords (United Kingdom), judgment of 10 March 2005, *In re B, Regina v Special Adjudicator, ex parte Hoxha* [2005] UKHL 19.

⁽⁷⁰⁶⁾ CJEU (GC), 2010, *Abdulla and Others*, op. cit., fn. 272, para. 89. See also Federal Administrative Court (*Bundesverwaltungsgericht*, Germany), judgment of 01 June 201, 10 C 25.10, para. 24.

⁽⁷⁰⁷⁾ See EASO, *Ending International Protection – Judicial analysis*, 2021.op. cit., fn. 7, Section 4.





on *International Protection No 3* concerning cessation of refugee status under Articles 1C(5) and 1C(6) of the Refugee Convention ⁽⁷⁰⁸⁾.

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) [QD] 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 ⁽⁷⁰⁹⁾.

In *OA*, the CJEU held that:

*Article 11(1)(e) [QD] in the same way as Article 1(C)(5) of the Geneva Convention, provides that a person is to cease to be classified as a refugee when the circumstances as a result of which he or she was recognised as such have ceased to exist, that is to say, in other words, when the conditions for the grant of refugee status are no longer met. In so far as Article 11(1)(e) [QD] provides that the third country national can 'no longer continue to refuse' to avail himself or herself of the protection of the country of his or her nationality, that article implies that the 'protection' in question is the same as that which was up to that point lacking, namely protection from acts of persecution for at least one of the five reasons specified in Article 2(c) [QD] (see, to that effect, judgment of 2 March 2010, *Salahadin Abdulla and Others*, C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, paragraphs 65 and 67) ⁽⁷¹⁰⁾.*

The CJEU further held that:

*In order to arrive at the conclusion that the fear of persecution of the refugee concerned is no longer well founded, the competent authorities, in the light of Article 7(2) [QD], must verify, having regard to that refugee's individual situation, that the actor or actors in question who are providing protection, within the meaning of Article 7(1), 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 third country national concerned will, if he or she ceases to have refugee status, have access to that protection (see, to that effect, judgment of 2 March 2010, *Salahadin Abdulla and Others*, C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, paragraphs 70 and 74) ⁽⁷¹¹⁾.*

⁽⁷⁰⁸⁾ UNHCR, *Guidelines on International Protection No 3: Cessation of Refugee Status*, op. cit., fn. 685.

⁽⁷⁰⁹⁾ CJEU (GC), 2010, *Abdulla and Others*, op. cit., fn. 272, para. 76.

⁽⁷¹⁰⁾ CJEU, judgment of 20 January 2021, *Secretary of State for the Home Department v OA*, C-255/19, EU:C:2021:36 (hereafter CJEU, 2021, *OA*), para. 34.

⁽⁷¹¹⁾ *Ibid.*, para. 38.





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]’⁽⁷¹²⁾. 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)⁽⁷¹³⁾.

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’⁽⁷¹⁴⁾.

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 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⁽⁷¹⁵⁾.

Article 11(3) QD (recast) provides for an exception to the application of the provisions in Article 11(1)(e)-(f). It is mandatory and states that Article 11(1)(e)-(f) ‘shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality or, being a stateless person, of the country of former habitual residence’. Refugee status will thus be retained if the refugee can invoke compelling reasons arising out of previous persecution. The provision is modelled on Article 1C (5) and (6) of the Refugee Convention.

⁽⁷¹²⁾ CJEU (GC), 2010, *Abdulla and Others*, op. cit., fn. 272; Article 2(c) QD is now Article 2(d) QD (recast).

⁽⁷¹³⁾ See also EASO, *Ending International Protection – Judicial analysis*, 2021, op. cit., fn. 7, Section 4.1.8.

⁽⁷¹⁴⁾ CJEU (GC), 2010, *Abdulla and Others*, op. cit., fn. 272, paras 96 and 97.

⁽⁷¹⁵⁾ 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 find 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.



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 themselves of the protection of their 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 themselves 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⁽⁷¹⁶⁾. 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 they still fear being persecuted/subjected to serious harm, the consideration that they are not able to invoke compelling reasons arising out of previous persecution or serious harm is irrelevant to the assessment of the question submitted⁽⁷¹⁷⁾.

5.7.3.2. Revocation, ending or refusal to renew international protection status as a result of exclusion, misrepresentation or omission of facts

Article 14(3)(a)-(b) is a mandatory provision which deals with the revocation of, ending of or refusal to renew the refugee status of a third-country national or a stateless person on exclusion grounds or due to misrepresentation or omission of facts which were decisive for the granting of refugee status.

⁽⁷¹⁶⁾ 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. For further consideration of relevant case law, see *Ending International Protection – Judicial analysis*, 2021, op. cit., fn. 7, Section 3.3.

⁽⁷¹⁷⁾ Council of State (Conseil d'État, 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 14(3) QD (recast) provides:



Article 14(3) QD (recast)

Member States shall revoke, end or refuse to renew the refugee status of a third-country national or 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 ⁽⁷¹⁸⁾.

Article 19(3) makes the same provision in relation to subsidiary protection.



Article 19(3) QD (recast)

Member States shall revoke, end or refuse to renew the subsidiary protection status of a third-country national or a stateless person, if:

- (a) he or she, after having been granted subsidiary protection status, should have been or is excluded from being eligible for subsidiary protection in accordance with Article 17(1) and (2);
- (b) his or her misrepresentation or omission of facts, including the use of false documents, was decisive for the granting of subsidiary protection status.

Article 14(3)(a) QD (recast) and 19 (3)(a) QD (recast) 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, as well as EASO, *Ending International Protection – Judicial analysis*, 2021, Part 4.

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 ⁽⁷¹⁹⁾.

⁽⁷¹⁸⁾ For a comprehensive consideration of the law in this area, see *Ending International Protection – Judicial analysis*, 2021.op. cit., fn. 7, Part 4.

⁽⁷¹⁹⁾ Kraft, op. cit., fn. 688, p. 1229; High Court (Ireland), 12 January 2010, *Gashi v Minister for Justice, Equality and Law Reform* [2010] IEHC 436. Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 13 January 2022, No 266 573; Supreme Administrative Court (Nejvyšší správní soud, Czech Republic), judgment of 18 April 2013, No 1 Azs 3/2013-27, *V.P. v Ministry of the Interior*.





In *Bilali*, the CJEU stated that ‘it must be noted’ that Article 19(3)(b) QD (recast):

[P]rovides for the loss of subsidiary protection status only where there has been a misrepresentation or omission by the person concerned that was decisive for the granting of that status. Furthermore, no other provision of that directive expressly states that that status must or may be withdrawn if, as in the case at issue in the main proceedings, the decision granting that status was taken on the basis of incorrect information, without any misrepresentation or omission by the person concerned ⁽⁷²⁰⁾.

The CJEU further held in the same case that:

Article 19(1) of QD (recast), read in conjunction with Article 16, must be interpreted as meaning that a Member State must revoke subsidiary protection status if it granted that status when the conditions for granting it were not met, in reliance on facts which have subsequently been revealed to be incorrect, and notwithstanding the fact that the person concerned cannot be accused of having misled the Member State on that occasion ⁽⁷²¹⁾.

UNHCR states that where there are only minor omissions, particular care should be taken in deciding if they were decisive ⁽⁷²²⁾. It notes further:

In all cases evidence for the purpose of cancellation must be information that is related to elements which were material to the initial positive determination. Such information must establish the existence of a ground for rejection or exclusion at the time of the original assessment of the claim ⁽⁷²³⁾.

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 their statements in support of their application. The court decided that they were to be regarded as having knowingly attempted to mislead the court ⁽⁷²⁴⁾. The Irish High Court in *Gashi* held that concealing an asylum application in another country is capable of amounting to information which was false or misleading ⁽⁷²⁵⁾.

5.7.3.3. Danger to security or community of Member State

In contrast to Article 14(1)-(3) QD (recast) which is mandatory, Article 14(4) gives Member States **discretion** to ‘revoke, end or refuse to renew the status granted to a refugee [...] when there

⁽⁷²⁰⁾ CJEU, 2019, *Bilali*, op. cit., fn. 302, para. 41.

⁽⁷²¹⁾ Ibid., para. 65.

⁽⁷²²⁾ UNHCR, *Note on Burden and Standard of Proof*, op. cit., fn. 28, para. 9.

⁽⁷²³⁾ UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004, para. 31.

⁽⁷²⁴⁾ National Asylum Court (Cour nationale du droit d’asile, France), judgment of 8 October 2009, T, No 701681/09007100; Council for Aliens Law Litigation (RVV/CCE, Belgium), decision of 19 November 2014, No 133.423.

⁽⁷²⁵⁾ High Court (Ireland), *Gashi v Minister for Justice, Equality and Law Reform*, op. cit., fn. 719, para. 11.





are reasonable grounds for regarding [the refugee] 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' ⁽⁷²⁶⁾.

Article 14(4) QD (recast) provides:



Article 14(4) QD (recast)

Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

- (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;
- (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.

In *Commission v Poland, Hungary and Czech Republic*, which concerned relocation decisions under Decisions 2015/1523 and 2015/1601, the CJEU held as follows:

As to the so-called 'reasonable' grounds for regarding the applicant for international protection as a 'danger to national security or public order' in the territory of the Member State of relocation in question, which allow the latter under Article 5(4) of each of Decisions 2015/1523 and 2015/1601 not to approve the relocation of an applicant for international protection identified by the Hellenic Republic or the Italian Republic and, under Article 5(7) of each of those decisions, to refuse to relocate an applicant for international protection, those grounds, since they must be 'reasonable' and not 'serious' and do not necessarily relate to a serious crime already committed or a serious non-political crime committed outside the country of refuge before the person concerned was admitted as a refugee but only require evidence of a 'danger to national security or public order', clearly leave a wider margin of discretion to the Member States of relocation than the serious reasons for applying the exclusion provisions contained in Articles 12 and 17 of [QD (recast)] ⁽⁷²⁷⁾.

On the basis of this judgment, it would appear that Member States have a wider margin of discretion in determining whether an individual poses a 'danger to the national security' of the country, including under Article 14(4), than would apply if the Member State were deciding whether there were serious reasons for applying the exclusion provisions. According to the German Federal Administrative Court, 'reasonable grounds' referred to in Article 14(4) provide

⁽⁷²⁶⁾ For a comprehensive consideration of the law in this area, see *Ending International Protection – Judicial analysis*, 2021, Part 5.

⁽⁷²⁷⁾ CJEU, judgment of 2 April 2020, *Commission v Poland, Hungary and Czech Republic*, joined Cases C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257, para.156.



for a somewhat lower threshold than ‘serious grounds’ (see Section 4.3.9) but in assessing the facts the standard of evidence remains unaffected ⁽⁷²⁸⁾.

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 they constitute a danger to the community requires a forward-looking assessment based on the correlation between the probability and the possible extent of the danger ⁽⁷²⁹⁾. In Judgment No 428140B of 19 June 2020, the Conseil d’État in France held that, in order to assess whether a refugee constitutes a danger to the community pursuant to Article 14(4)(b), it is necessary to determine if their presence affects a fundamental interest of society, having regard the criminal offences committed, the circumstances of their commission, the that has elapsed, as well as the behaviour of the person since conviction. The criminal offences do not constitute, as such, a sufficient ground to deny or revoke refugee status in compliance with this provision.

In *M.a.o.*, the CJEU held that consideration of Article 14(4) to (6) of the QD (recast) disclosed no factor of such a kind as to affect the validity of those provisions in the light of Article 78(1) TFEU and Article 18 of the EU Charter ⁽⁷³⁰⁾.

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 they are present. (See also Section 5.5.3, 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.)

⁽⁷²⁸⁾ Federal Administrative Court (BVerwG, Germany), judgment of 22 May 2012, No 1 C 8.11, BVerwG:2012:220512U1C8.11.0, para. 27 (concerning equivalent Article 21(3) and (2)), cited in Kraft, op. cit., fn. 688, p. 1231. For guidance on the meaning of the terms ‘danger to the security’ and ‘danger to the community’, see EASO, *Exclusion: Articles 12 and 17 Qualification Directive – Judicial analysis*, 2nd edition, 2020, op. cit., fn. 7. See also: CJEU, 2020, *Commission v Poland, Hungary and Czech Republic*, op. cit. fn. 727, para.156. See also Section 5.2 of the, *Exclusion: Articles 12 and 17 Qualification Directive – Judicial analysis*, 2nd edition, 2020, op. cit., fn. 7, which comments on the latter judgment as follows: ‘On the basis of this judgment, it would appear that Member States have a wider margin of discretion in determining whether an individual poses a ‘danger to the national security’ of the country, including under Article 14(4), than would apply if the Member State were deciding whether there were serious reasons for applying the exclusion provisions.’

⁽⁷²⁹⁾ Kraft, op. cit., fn. 688, p. 1231.

⁽⁷³⁰⁾ CJEU, judgment of 14 May 2019, C-391/16, *M.a.o.*, joined Cases C-391/16, C-77/17 and C-78/17, ECLI:EU:C:2019:403.



5.8. Subsequent applications and assessment of new evidence

Subsequent applications are addressed in *Asylum Procedures and the Principle of Non-refoulement – Judicial analysis*, 2018 ⁽⁷³¹⁾, 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 ⁽⁷³²⁾.

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 ⁽⁷³³⁾.

⁽⁷³¹⁾ EASO, *Asylum Procedures and the Principle of Non-Refoulement*, op. cit., fn. 7, Subsections 4.1.3 and 5.2.2.4.

⁽⁷³²⁾ 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 (Cour nationale du droit d'asile, France), judgment of 7 January 2016, *Mme M & MM*, nos 15025487 and 15025488 R (unofficial translation).

⁽⁷³³⁾ See, among others, ECtHR, judgment of 6 June 2013, *Mohammed v Austria*, No 2283/12, ECLI:CE:ECHR:2013:0606JUD000228312, para. 80; ECtHR, *Singh et autres c Belgique*, op. cit., fn. 433, para. 103; ECtHR, judgment of 19 January 2016, *MD et MA c Belgique*, No 58689/12, ECLI:CE:ECHR:2016:0119JUD005868912, paras 56 and 66.



5.8.1. Admissibility of a subsequent application: new elements or findings

Section IV APD (recast) sets out provisions, most of which are not mandatory ⁽⁷³⁴⁾, concerning subsequent applications ⁽⁷³⁵⁾. It is underpinned by the principle that someone making a subsequent application does not have an absolute right to a new full examination of their application, since they were not deemed to be in need of international protection at the time of the decision of the determining authority 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 [...].

⁽⁷³⁴⁾ 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 Article 33 [APD \(recast\)](#), a non-mandatory provision.

⁽⁷³⁵⁾ See Section [5.7](#) for definition of a ‘subsequent application’ provided in Article 2(q) [APD \(recast\)](#).



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 submit them again in a subsequent application. New elements or findings may nevertheless encompass new evidence related to facts and circumstances previously asserted ⁽⁷³⁶⁾.

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 their application for international protection ⁽⁷³⁷⁾. 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 their nationality and which was considered by the Council as new and crucial evidence ⁽⁷³⁸⁾.

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 ⁽⁷³⁹⁾. 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 ⁽⁷⁴⁰⁾.

⁽⁷³⁶⁾ 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.

⁽⁷³⁷⁾ See e.g. National Asylum Court (Cour nationale du droit d'asile, France) judgment of 7 January 2016 *Mme M & MM*, op. cit., fn. 732, 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).

⁽⁷³⁸⁾ Council of State (Συμβούλιο της Επικρατείας, Greece), decision of 25 October 2011, application No 3328/2011 per [EDAL English summary](#).

⁽⁷³⁹⁾ Article 5(3) QD (recast) is of relevance here. See e.g. Regional Administrative Court in Warsaw (Wojewódzki Sąd Administracyjny w Warszawie, Poland), judgment of 13 June 2012, *SB v Rady do Spraw Uchodźców*, V SA/Wa 2332/11 (see [EDAL English summary](#)).

⁽⁷⁴⁰⁾ Council of State (Conseil d'État, France) judgment of 10 February 2016 *M. A* No 373529 (see [EDAL English summary](#)).





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 their own fault⁽⁷⁴¹⁾. The applicant's failure to disclose elements or findings in the previous procedure is intimately linked to their credibility as examined in Section 4.2.3 and 4.3.7.1. 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*⁽⁷⁴²⁾.

The fact that an applicant has failed to disclose elements or findings during the first procedure may be due to their particular vulnerability. This is highlighted by the CJEU in its 2014 *A, 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 their late disclosure of elements in light of 'the sensitive nature of questions relating to a person's personal identity'⁽⁷⁴³⁾ – 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, their vulnerability, to be taken into account⁽⁷⁴⁴⁾.

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 their particular circumstances, including their vulnerability⁽⁷⁴⁵⁾. 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⁽⁷⁴⁶⁾.

⁽⁷⁴¹⁾ See e.g. Supreme Administrative Court (Nejvyšší správní soud, Czech Republic), judgment of 6 March 2012, *JJ v Ministry of Interior*, 3 Azs 6/2011-96 (see [EDAL English summary](#)).

⁽⁷⁴²⁾ 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.

⁽⁷⁴³⁾ CJEU (GC), 2014, *A, B and C*, op. cit., fn. 18, para. 69.

⁽⁷⁴⁴⁾ *Ibid.*, para. 70.

⁽⁷⁴⁵⁾ See e.g. National Asylum Court (Cour nationale du droit d'asile, France), *Mme M & MM*, op. cit., fn. 732, 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).

⁽⁷⁴⁶⁾ EASO, *Practical Guide: Evidence Assessment*, op. cit., fn. 431, p. 16.





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).

5.8.2. 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 ⁽⁷⁴⁷⁾.

In some instances, acceptance of new facts or findings will not run counter to the previous negative determination because these facts or findings are not connected with the previous 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.

In *LH v Staatssecretaris van Justitie en Veiligheid*, the CJEU held that:

Article 40(2) [APD (recast)] read in conjunction with Article 4(2) [QD (recast)], must be interpreted as precluding national legislation under which any document submitted by an applicant for international protection in support of a subsequent application is automatically considered not to constitute a ‘new element or finding’, within the meaning of that provision, when the authenticity of that document cannot be established or its source objectively verified ⁽⁷⁴⁸⁾.

⁽⁷⁴⁷⁾ Supreme Administrative Court (Naczelny Sąd Administracyjny, 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.

⁽⁷⁴⁸⁾ CJEU, judgment of 10 June 2021, *LH v Staatssecretaris van Justitie en Veiligheid*, C-921/19, EU:C:2021:478, para. 54.





The CJEU further held in that case:

Article 40 [APD (recast)], read in conjunction with Article 4(1) and (2) [QD (recast)], must be interpreted as meaning, first, that the assessment of the evidence submitted in support of an application for international protection cannot vary according to whether the application is a first application or a subsequent application and, second, that a Member State is required to cooperate with an applicant for the purpose of assessing the relevant elements of his or her subsequent application, when that applicant submits, in support of that application, documents the authenticity of which cannot be established ⁽⁷⁴⁹⁾.

5.8.3. 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)) ⁽⁷⁵⁰⁾.

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 their 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 ⁽⁷⁵¹⁾.

⁽⁷⁴⁹⁾ Ibid, para. 63.

⁽⁷⁵⁰⁾ See Court of Appeal (Ireland), judgment of 14 July 2016, *NM (DRC) v The Minister for Justice, Equality and Law Reform* [2016] IECA 217.

⁽⁷⁵¹⁾ National Asylum Court (Cour nationale du droit d’asile, France), judgment of 27 July 2016, *MD*, No 16011925 C. Article 40(3) APD (recast) being transposed into national law in Article L.723-16 of the Code on the entry and stay of foreigners and asylum law.





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 into account posterior elements or findings (having arisen or been made available to the applicant after the administrative determination) and the oral statements of the applicant in order to make a full and *ex nunc* assessment of international protection needs ⁽⁷⁵²⁾.
- 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) ⁽⁷⁵³⁾ 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 ⁽⁷⁵⁴⁾.

5.9. Dublin III regulation and the assessment of evidence

The Dublin III regulation ⁽⁷⁵⁵⁾ 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 *Asylum Procedures and the Principle of Non-refoulement* (Judicial analysis), 2018 ⁽⁷⁵⁶⁾.

⁽⁷⁵²⁾ ECtHR, *MD et MA c Belgique*, op. cit., fn. 733, para. 64.

⁽⁷⁵³⁾ ‘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’.

⁽⁷⁵⁴⁾ See National Asylum Court (Cour nationale du droit d’asile, France), *Mme M & MM*, op. cit., fn. 732.

⁽⁷⁵⁵⁾ *Dublin III regulation*, op. cit., fn. 14.

⁽⁷⁵⁶⁾ EASO, *Asylum Procedures and the Principle of Non-refoulement – Judicial analysis*, 2018, op. cit., fn. 7, Part 3.





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 [5.9.1](#)); 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 [5.9.2](#)).

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. Issues regarding obtaining and assessment of evidence specific to other provisions of the Dublin III regulation, for example Article 29 are not specifically addressed in this analysis.

5.9.1. 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 [5.9.1.1](#)), the evidentiary regime that applies (Section [5.9.1.2](#)), and how the credibility of such information gathered is to be assessed (Section [5.9.1.3](#)).

5.9.1.1. 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 'making the necessary improvements, in the light of experience, to the effectiveness of the Dublin system and the protection granted to applicants under that 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 *Asylum Procedures and the Principle 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 29](#).





Table 29. 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).





Article 5 Dublin III regulation

[...]

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 advisor 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 ⁽⁷⁵⁷⁾.

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 ⁽⁷⁵⁸⁾.

⁽⁷⁵⁷⁾ Article 5(2) provides that: '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).'

⁽⁷⁵⁸⁾ CJEU (GC), judgment of 7 June 2016, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheids Justitie*, C-63/15, EU:C:2016:409, para. 51.



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⁽⁷⁵⁹⁾.

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, they were not told during the interview of doubts concerning the information they 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)).

5.9.1.2. 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 determining authority in charge of assessing their application (see Section 4.2), the determination of the Member State responsible under the Dublin III regulation is a task incumbent on the national authority designated by the Member 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⁽⁷⁶⁰⁾. 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

⁽⁷⁵⁹⁾ *Ibid.*, para. 53.

⁽⁷⁶⁰⁾ See EASO, *An Introduction to the Common European Asylum System for Courts and Tribunals – A Judicial analysis*, August 2016, op. cit., fn. 7, Section 2.2.1, p. 36; EASO, op. cit., fn. 7, Subsection 3.6.2.



procedure for 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. [...]' ⁽⁷⁶¹⁾. 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 –

⁽⁷⁶¹⁾ Recital 33 [Dublin III regulation](#), op. cit., fn. 14, 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 Article 5 of [Regulation \(EU\) No 182/2011 \(OJ L 55, 28.02.2011\)](#).



or absence of obligation – of the designated Member State to re-admit or take back an applicant for international protection ⁽⁷⁶²⁾.

These lists attribute to each criterion, following their order of appearance in the Regulation, a specific set of means of proof and circumstantial evidence ⁽⁷⁶³⁾. 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 30](#).

⁽⁷⁶²⁾ [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 lodged in one of the Member States by a third-country national \(OJ L 39, 08.02.2014\)](#).

⁽⁷⁶³⁾ The criteria for which a specific set of means of proof and circumstantial evidence are provided are to be found in: Article 8, Article 9, Article 10, Article 12, Article 14, Article 18, Article 19 and Article 20.



Table 30. 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 ⁽⁷⁶⁴⁾ .
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 ⁽⁷⁶⁵⁾ .

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’.

5.9.1.3. 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)).

While the Regulation does not specify how the credibility of such information gathered is to be assessed ⁽⁷⁶⁶⁾, 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 5.9.1.1.

⁽⁷⁶⁴⁾ [Regulation \(EU\) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’, op. cit., fn. 190.](#)

⁽⁷⁶⁵⁾ [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 \(VIS Regulation\) \(OJ L 218, 13.08.2008\).](#)

⁽⁷⁶⁶⁾ Indeed, Article 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).



5.9.2. 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’ ⁽⁷⁶⁷⁾.

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* ⁽⁷⁶⁸⁾ ‘enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks’ ⁽⁷⁶⁹⁾. As such, it can be deduced

⁽⁷⁶⁷⁾ CJEU (GC), Judgment of 21 December 2011, *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, joined cases C-411/10 and C-493/10, EU:C:2011:865, para. 94.

⁽⁷⁶⁸⁾ ECtHR, *MSS v Belgium and Greece*, op. cit., fn. 84, 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.

⁽⁷⁶⁹⁾ CJEU, *NS, ME and Others*, op. cit., fn. 568, paras 90 and 91.



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 ⁽⁷⁷⁰⁾.

In *Jawo*, the CJEU addressed the question of evidence assessment in the context of Article 4 EU Charter and the CJEU's analysis has applicability, mutatis mutandis, to Article 3(2) Dublin III regulation ⁽⁷⁷¹⁾. The CJEU held that:

[W]here the court or tribunal hearing an action challenging a transfer decision has available to it evidence provided by the person concerned for the purposes of establishing the existence of such a risk, that court or tribunal is obliged to assess, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, whether there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people ⁽⁷⁷²⁾.

The CJEU further ruled that:

EU law must be interpreted as meaning that the question whether Article 4 of the EU Charter precludes the transfer, pursuant to Article 29 of the Dublin III Regulation, of an applicant for international protection to the Member State which, in accordance with that regulation, is normally responsible for examining their application for international protection, where, in the event of such protection being granted in that Member State, the applicant would be exposed to a substantial risk of suffering inhuman or degrading treatment within the meaning of Article 4 of the EU Charter, on account of the living conditions that they could be expected to encounter as a beneficiary of international protection in that Member State, falls within its scope ⁽⁷⁷³⁾.

The CJEU also ruled that:

Article 4 of the EU Charter must be interpreted as not precluding such a transfer of an applicant for international protection, unless the court hearing an action challenging the transfer decision finds, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, that that risk is real for that applicant, on account of

⁽⁷⁷⁰⁾ It is to be noted that Article 33 of the Dublin Regulation provides for an early warning, preparedness and crisis management mechanism. However, the mechanism has not, as yet, been implemented. Article 5 of the [EUAA regulation](#) tasks the EUAA with gathering and analysing information on the situation of asylum in the Union.

⁽⁷⁷¹⁾ CJEU (GC), judgment of 19 March 2019, *Abubacarr Jawo v Bundesrepublik Deutschland*, C-163/17, EU:C:2019:218 (hereafter CJEU (GC), 2019, *Jawo*).

⁽⁷⁷²⁾ *Ibid.*, para. 90.

⁽⁷⁷³⁾ *Ibid.*, para. 98.



the fact that, should they be transferred, they would find himself, irrespective of their wishes and personal choices, in a situation of extreme material poverty ⁽⁷⁷⁴⁾.

The CJEU has also ruled that Article 4 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’ ⁽⁷⁷⁵⁾. 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 ⁽⁷⁷⁶⁾. 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 ⁽⁷⁷⁷⁾.

5.10. Evidence assessment in the application of safe country concepts

Article 31(8)(b) APD (recast) provides that ‘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 if: [...] the applicant is from a safe country of origin within the meaning of this Directive’.

⁽⁷⁷⁴⁾ Ibid., para. 98. An application of the test in *Jawo* by the Administrative Supreme Court in Portugal in Case No 01357/19.5BELSB, 27 May 2021, resulted in a finding that there were no valid reasons to believe that there were systemic flaws in the asylum procedure and in the reception conditions of applicants in Italy and that such flaws, if they exist, ‘involve the risk of inhuman or degrading treatment’ mentioned in Article 3(2) of the [Dublin III regulation](#), within the meaning of Article 4 of the Charter of Fundamental Rights.

⁽⁷⁷⁵⁾ CJEU, judgment of 16 February 2017, C-578/16 PPU, *CK and Others v Republika Slovenija*, EU:C:2017:127.

⁽⁷⁷⁶⁾ Ibid.

⁽⁷⁷⁷⁾ Ibid., para. 75.



Article 33(2)(b) APD (recast) states that ‘Member States may consider an application for international protection as inadmissible only if: [...] a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35’.

Article 35 APD (recast) provides as follows:



Article 35 APD (recast)

A country can be considered to be a first country of asylum for a particular applicant if:

(a) he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or

(b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of nonrefoulement,

provided that he or she will be readmitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant, Member States may take into account Article 38(1). The applicant shall be allowed to challenge the application of the first country of asylum concept to his or her particular circumstances.

Article 33(2)(c) APD (recast) provides that ‘Member States may consider an application for international protection as inadmissible only if: [...] a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38’⁽⁷⁷⁸⁾.

While analysed in detail in the *Asylum Procedures and the Principle of Non-refoulement – Judicial analysis, 2018*⁽⁷⁷⁹⁾, 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.

5.10.1. 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

⁽⁷⁷⁸⁾ Article 38(1) *APD (recast)* reads as follows: ‘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 following principles in the third country concerned: (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/EU; (c) the principle of non-refoulement in accordance with the Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.’

⁽⁷⁷⁹⁾ EASO, *Asylum Procedures and the Principle of Non-refoulement – Judicial analysis, 2018*, op. cit., fn. 7, Sections 5.2, 5.3, and 5.4.



is sufficiently safe to remove the applicant⁽⁷⁸⁰⁾. This is clear from the provisions of the APD (recast) on the safe country concepts.

In *Mirza*, the CJEU held that:

Article 3(3) of the Dublin III Regulation must be interpreted as meaning that the right to send an applicant for international protection to a safe third country may also be exercised by a Member State after that Member State has accepted that it is responsible, pursuant to that regulation and within the context of the take-back procedure, for examining an application for international protection submitted by an applicant who left that Member State before a decision on the substance of his first application for international protection has been taken⁽⁷⁸¹⁾.

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⁽⁷⁸²⁾. 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

⁽⁷⁸⁰⁾ Concerning the concept of ‘safe country of origin’, see EASO, *Practical Guide: Evidence Assessment*, March 2015, op. cit., fn. 431, p. 6. In a 2015 judgment, the UK 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.

⁽⁷⁸¹⁾ CJEU, judgment of 17 March 2016, *Mirza*, C-695/15 (PPU), ECLI:EU:C:2016:188, para. 53.

⁽⁷⁸²⁾ 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](#).



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 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 ⁽⁷⁸³⁾. Recital 46 APD (recast) further provides:



Recital 46 APD (recast)

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.

A number of provisions of the EUAA regulation have relevance here. Of principal relevance are Article 2(1)(h) and Article 12, but Article 9(1) and Article 8(4)(i) also have relevance.

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 therefrom ⁽⁷⁸⁴⁾. 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 ⁽⁷⁸⁵⁾. 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

⁽⁷⁸³⁾ This was e.g. recalled by the Court of The Hague (Rechtbank Den Haag, Netherlands), judgment of 13 June 2016, [AWB 16/10406](#), ECLI:NL:RBDHA:2016:6624, paras 6.2 and 7.2 (see [EDAL English summary](#)).

⁽⁷⁸⁴⁾ Council of State (Conseil d'État, France), judgment of 10 October 2014, *Associations Elena, Forum Réfugiés, Così*, 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.

⁽⁷⁸⁵⁾ 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]'.

for refugee status and, if recognised, to receive protection in accordance with the Refugee Convention and be protected from *refoulement* ⁽⁷⁸⁶⁾.

The principles for the assessment of evidence analysed in Section 4.3 thus apply as well when applying the safe country concepts. See Section 4.8 for more on the standards for evaluating COI.

5.10.2. 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.

Concerning the **safe country of origin** concept ⁽⁷⁸⁷⁾, 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)].

⁽⁷⁸⁶⁾ Court of The Hague (Rechtbank Den Haag, Netherlands), [AWB 16/10406](#), op. cit., fn. 783, para. 7.2 (see [EDAL English summary](#)). This is also affirmed by the ECtHR in its jurisprudence. See most notably: ECtHR (GC), 2008, [Saadi v Italy](#), op. cit. fn. 281, para. 147. See also Council of State (Συμβούλιο της Επικρατείας, Greece), 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).

⁽⁷⁸⁷⁾ See also EASO, [Practical Guide: Evidence Assessment](#), op. cit., fn. 431, p. 6.

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 State – was a safe third country for him ⁽⁷⁸⁸⁾. 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 their own case ⁽⁷⁸⁹⁾.

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.’

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) ⁽⁷⁹⁰⁾.

5.10.3. Standard of proof and the safe country concepts

As seen in Section 4.3.9, 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 they will be persecuted. The same standard of proof applies in determining whether applicants risk persecution or serious harm in a third country ⁽⁷⁹¹⁾.

⁽⁷⁸⁸⁾ Supreme Court (Vrhovno sodišče, Slovenia), judgment of 16 December 2009, *I Up 63/2011*, per [EDAL English summary](#).

⁽⁷⁸⁹⁾ Council of State (Conseil d’État, France), nos 375474 and 375920, op. cit., fn. 784, para. 10 (see [EDAL English summary](#)). The applications were brought by various NGOs contesting the addition of Albania, Georgia and Kosovo in the national list of safe countries of origin.

⁽⁷⁹⁰⁾ As reaffirmed, e.g. by the Constitutional Court (Ustavno sodišče, Slovenia), judgment of 18 December 2013, *U-I-155/11* (see [EDAL English summary](#)).

⁽⁷⁹¹⁾ 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 (IAC, United Kingdom), judgment of 5 January 2010, *RR (Refugee – Safe Third Country) Syria* [2010] UKUT 442, para. 31.



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 ⁽⁷⁹²⁾. 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 following principles in the third country concerned [...]’ ⁽⁷⁹³⁾.

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 who had been expelled from Saudi Arabia following the expiry of the woman’s spouse’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’ ⁽⁷⁹⁴⁾. 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 ⁽⁷⁹⁵⁾.

⁽⁷⁹²⁾ In addition to the absence of persecution and serious harm, the sufficiency of protection is defined in Article 38(1) APD (recast) on the basis of respect for the *non-refoulement* principle under Article 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’. See also Section 1.8.1 (Actors of Protection) and Section 1.8.2 (Qualities of Protection), EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, where there is consideration of the notion that safety cannot be equated with mere security against physical harm.

⁽⁷⁹³⁾ Emphasis added.

⁽⁷⁹⁴⁾ Migration Court (Sweden), UM 1796, op. cit., fn. 791, as per EDAL English summary.

⁽⁷⁹⁵⁾ 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 ⁽⁷⁹⁶⁾, academic literature ⁽⁷⁹⁷⁾ and case-law ⁽⁷⁹⁸⁾. Assessing credibility needs to be

⁽⁷⁹⁶⁾ IARLJ, *Assessment of Credibility*, CREDO project, op. cit., fn. 36. See e.g. in the general guidance on the 'Treatment of Vulnerable Claimants', pp. 46-47. For further information on the CREDO Project see op. cit., fn. 36, other publications of the project being: UNHCR, *Beyond Proof*, op. cit., fn. 19; Hungarian Helsinki Committee, *Credibility Assessment Training Manual, Vol. 1*, and *Vol. 2*, op. cit., fn. 36.

⁽⁷⁹⁷⁾ e.g. Herlihy, J., Gleeson, K., and Turner, S., 'What Assumptions about Human Behaviour Underlie Asylum Judgments?', *International Journal of Refugee Law* Vol. 22 No 3, 2010, pp. 351-366; Dowd, R., Hunter, J., Liddell, B., McAdam, J., Nickerson, A., Bryant, R., 'Filling Gaps and Verifying Facts: Assumptions and Credibility Assessment in the Australian Refugee Review Tribunal', *International Journal of Refugee Law*, Vol. 30, No 1, 2018, pp. 71-103, Byrne, R., Gammeltoft-Hansen, T., 'International Refugee Law between Scholarship and Practice', *International Journal of Refugee Law*, Vol. 32, No 2, 2020, pp. 181-199.

⁽⁷⁹⁸⁾ The Administrative Court of Slovenia has introduced the so-called 'interdisciplinary approach' in asylum disputes, see fn. 98.



informed by knowledge of the scientific evidence on human behaviour and memory as this can be counter to common understanding. The UNHCR study, *Beyond Proof* observes that factors and circumstances relevant to individual claims:

[...] 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 ⁽⁷⁹⁹⁾.

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 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 they would not; sometimes it may lead to the opposite conclusion ⁽⁸⁰⁰⁾.

The most useful papers for decision-makers in this context are systematic reviews which collect together findings from a number of studies of a particular topic or question, allowing a balanced conclusion to be reached. Some topics do not yet have sufficient evidence for a systematic review. All the reviews and individual studies cited here have been subjected to peer review and scrutiny before publication in respected scientific journals and are proposed by experts in the field as possible resources for decision-making.

Finally, 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 some

⁽⁷⁹⁹⁾ UNHCR, *Beyond Proof*, op. cit., fn. 19, p. 56.

⁽⁸⁰⁰⁾ 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. 36, p. 61).





relevant sources of, knowledge ⁽⁸⁰¹⁾ 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 IARMJ-Europe or EUAA of their approaches or findings. They are simply an indication of some resources that are available.

The *Vulnerability in the Context of Applications for International Protection - Judicial analysis*, 2021, deals with the identification of particular individuals' needs with regard to special procedural guarantees. The following sections refer to psychological processes potentially applicable to any claimant.

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 is likely to know and remember. Memory is very personal and varies from one person to another. Moreover, it may vary depending on factors, including age or any traumatic events they may have previously experienced ⁽⁸⁰²⁾.

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).

⁽⁸⁰¹⁾ Mostly Section 6 draws on psychological science. There is for example no inclusion here of behavioural economics (for which see e.g. Cameron, H.E., *Refugee Law's Fact-Finding Crisis*, Cambridge: Cambridge University Press, 2018, pp.10-15), linguistics (see Smith-Khan, L. (2019) 'Why refugee visa credibility assessments lack credibility: A critical discourse analysis', *Griffith Law Review* 28(4): pp. 406–430), or anthropology (see work by Anthony Good).

⁽⁸⁰²⁾ See also Supreme Court (Najvyšší súd, 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'.





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⁽⁸⁰³⁾. As a result, it might be difficult for an applicant to remember a specific date, time, frequency, duration or sequence of events⁽⁸⁰⁴⁾.

Autobiographical memories are expressions of people's experiences of events; they are not a stable record, or recording of the events themselves⁽⁸⁰⁵⁾. 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)⁽⁸⁰⁶⁾. 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 they experienced rather than what they 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.

The effect of stress on memory (encoding memories at the time of an event, retrieving and recalling them later) is complex. However, a meta-analysis of 113 studies⁽⁸⁰⁷⁾ showed strong evidence for the effect of stress on *recalling* memories, stating that 'stress generally impaired memory retrieval, and these effects were largest for emotional materials'⁽⁸⁰⁸⁾. Thus, the effects of stress on memory are likely to be important at any stage of an asylum claim which addresses material emotionally relevant to the applicant.

Table 31 illustrates different types of memory reconstruction with explanations and illustrations.

⁽⁸⁰³⁾ Cameron, H. E., 'Refugee Status Determinations and the Limits of Memory', *IJRL*, 2010, 469-511.

⁽⁸⁰⁴⁾ See e.g. Szeged Administrative and Labour Court (Hungary), *7.K.27.145/2014/9*, op. cit., fn. 401.

⁽⁸⁰⁵⁾ Neisser, U., *Cognitive Psychology*, Classic Edition: Psychology Press & Routledge Classic Editions, 2014.

⁽⁸⁰⁶⁾ Roediger, H. L. and DeSoto, K. A., 'Reconstructive Memory, Psychology of,' in Wright, J.D. (ed.), *International Encyclopedia of the Social & Behavioral Sciences*, (Second Edition), Elsevier, 2015, pp.50-55. For an account specific to refugees, see Eastmond, M., 'Stories as Lived Experience: Narratives in Forced Migration Research', *Journal of Refugee Studies*, 2007, pp. 248-264 and Macklin, A., 'The Truth about Credibility', paper presented at the 10th IASFM Conference, Toronto, Canada, 21-24 June 2006.

⁽⁸⁰⁷⁾ Shields, G. S., Sazma, M. A., McCullough, A. M., and Yonelinas, A. P. *The effects of acute stress on episodic memory: A meta-analysis and integrative review*, *Psychological Bulletin*, 2017, Vol. 143, No 6, pp.636–675.

⁽⁸⁰⁸⁾ Ibid p.661. The authors also note that this finding is in line with a 2016 review, Gagnon, S.A. and Wagner, A.D, *Acute stress and episodic memory retrieval: neurobiological mechanisms and behavioral consequences*, *Annals of the New York Academy of Sciences*, 2016, Vol.1369, pp. 55-75.



Table 31. Why memories change

Memory process	Explanations	Illustrations
Forgetting and rehearsal	Following any event, memory naturally decays and details are forgotten ⁽⁸⁰⁹⁾ . 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 ⁽⁸¹⁰⁾ , 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 they have 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 ⁽⁸¹¹⁾ . 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, talk to others such as a housing officer or social worker, and recall more details. This may explain why an applicant might offer further details following a personal interview or at appeal.

⁽⁸⁰⁹⁾ Cameron, op. cit., fn. 803. 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., *Did It Really Happen? Testimonies before the International Criminal Tribunals and Refugee Status Determination*, dissertation, Charles University, 2010, p. 140.

⁽⁸¹⁰⁾ Marsh, E. J., Tversky, B., and Hutson, M., 'How Eyewitnesses Talk about Events: Implications for Memory' *Applied Cognitive Psychology*, Vol. 19, No 5, 2005, p. 531.

⁽⁸¹¹⁾ Payne, D. G., 'Hypermnnesia and Reminiscence in Recall: A Historical and Empirical Review', *Psychological Bulletin*, 1987, pp. 5-27.



Memory process	Explanations	Illustrations
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 ⁽⁸¹²⁾ .	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 ⁽⁸¹³⁾ . 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.

⁽⁸¹²⁾ Loftus, E. F., and Palmer, J. C. ‘*Reconstruction of automobile destruction: An example of the interaction between language and memory*’, *Journal of verbal learning and verbal behavior*, Vol. 13, No 5, 1974, pp. 585-589.

⁽⁸¹³⁾ Braun, K. A., Ellis, R., and Loftus, E. F., ‘*Make my Memory: How Advertising Can Change our Memories of the Past*’, *Psychology and Marketing*, 2002, pp. 1-23.



Memory process	Explanations	Illustrations
Suggestibility ⁽⁸¹⁴⁾	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 ⁽⁸¹⁵⁾ , a history of negative life events ⁽⁸¹⁶⁾ , low self-esteem ⁽⁸¹⁷⁾ , are anxious, suicidal, or children ⁽⁸¹⁸⁾ are all more likely to shift their answers to suit what they think is expected of them by the interviewer ⁽⁸¹⁹⁾ .	The attitude of the interviewer is important too. Scientists studying this effect have found that ‘simply repeating questions applies a form of ‘interrogative pressure’ ⁽⁸²⁰⁾ . 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 ⁽⁸²¹⁾ . This power distance is of course necessarily present between interviewers or decision-makers and applicants and should always be borne in mind. Suggestibility is especially present with children and young people and even more so with asylum seeking children ⁽⁸²²⁾ . Repeated questions may elicit different responses.

⁽⁸¹⁴⁾ See Herlihy, J., and Turner, S., ‘*The Psychology of Seeking Protection*’, *IJRL*, 2009, pp. 180-181 for further explanation of suggestibility.

⁽⁸¹⁵⁾ MacFarland, W. L., and Morris, S. J., ‘*Are Dysphoric Individuals More Suggestible or Less Suggestible than Nondysphoric Individuals?*’, *Journal of Counselling Psychology*, 1998, pp.225-229.

⁽⁸¹⁶⁾ Childs, S., Given-Wilson, Z., Butler, S., Memon, A., and Gudjonsson, G., ‘*Vulnerability to interrogative suggestibility from negative life events. A comparison of separated asylum-seeking youth and age-matched peers*’, *Personality and Individual Differences*, Vol. 173, 2021.

⁽⁸¹⁷⁾ Baxter, J. S., Boon, J. C. W., and Marley, C., ‘*Interrogative Pressure and Responses to Minimally Leading Questions*’, *Personality and Individual Differences*, 2006, p. 89, fn. 817.

⁽⁸¹⁸⁾ Sutherland, R., and Hayne, H., ‘*Age-Related Changes in the Misinformation Effect*’, *Journal of Experimental Child Psychology*, 2001, pp. 388-404.

⁽⁸¹⁹⁾ Turner, S. W., Bowie, C., Shapo, L., and Yule, W., ‘*Mental Health of Kosovan Albanian Refugees in the UK*’, *British Journal of Psychiatry*, 2003, pp. 444-448; 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*’, *British Journal of Psychiatry*, 1997, pp. 351-357; 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*’, *International Journal of Law and Psychiatry*, 2004, pp. 511-528.

⁽⁸²⁰⁾ Baxter, J. S., Boon, J. C. W., and Marley, C., op. cit., fn. 817, pp. 87-98.

⁽⁸²¹⁾ Baxter, J. S., Boon, J. C. W., and Marley, C., op. cit., fn. 817, pp. 87-98.

⁽⁸²²⁾ Childs, S., Given-Wilson, Z., Butler, S., Memon, A., and Gudjonsson, G., ‘*Vulnerability to interrogative suggestibility from negative life events. A comparison of separated asylum-seeking youth and age-matched peers*’, *Personality and Individual Differences*, Vol. 173, 2021.



Memory process	Explanations	Illustrations
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. A study comparing people’s memories for childhood abuse events – some happened once, some many times – found that if the abuse happened many times the person was less able to be specific about when, giving general answers, using the word ‘would’, such as ‘I would shower with him’ ⁽⁸²³⁾ .

Memory researchers investigating repeated events distinguish between ‘narrow accuracy’, where the person can attribute details to the correct instance, and ‘broad accuracy’, where the person remembers all the experienced details, regardless of during which instance they occurred⁽⁸²⁴⁾. Broad accuracy is of course more likely (i.e. similar to people remembering details of one event), but the presence of unpredictable unique details in an instance do tend to be better remembered. Such a ‘deviation event’ has been shown in children to improve ‘narrow accuracy’ for details of the other more typically occurring instances⁽⁸²⁵⁾, but this is as yet not well understood in adults⁽⁸²⁶⁾.

6.1.1. Cultural differences in memory

Cultural differences are also evident in adult and child⁽⁸²⁷⁾ autobiographical memories. One field of scholarship has shown evidence that people from ‘individualistic’ cultures have been shown to provide more specific, unique, self-focused, lengthy and emotionally elaborate memories about individual experiences, roles and emotions. Studies also show more individualistic people thinking or talking about their memories more frequently and perceiving

⁽⁸²³⁾ Memon, A., Connolly, D., Brewin, C.R., Meyer, T., Seidel, J., Anderson, S., Rijkeboer, M., and Arntz, A., ‘*How do adults with post-traumatic stress disorder from childhood trauma talk about single versus repeated traumas?*’, Applied Cognitive Psychology, 2021.

⁽⁸²⁴⁾ Dilevski, N., Paterson, H., Walker, S. and van Golde, C., *Adult memory for specific instances of a repeated event: a preliminary review*, Psychiatry Psychology and Law. 2020, pp. 1-22.

⁽⁸²⁵⁾ Connolly, D., Gordon, H., Woiwod, D., and Price, H., *What children recall about a repeated event when one instance is different from the others*, Developmental Psychology, 2016, Vol 52, No.7, pp.1038–1051.

⁽⁸²⁶⁾ Dilevski, N., Paterson, H., Walker, S. and van Golde, C., *Adult memory for specific instances of a repeated event: a preliminary review*, op. cit., fn. 824.

⁽⁸²⁷⁾ Chen, Y., McAnally, H.M., and Reese, E., ‘*Development in the organization of episodic memories in middle childhood and adolescence*’, Frontiers in Behavioral Neuroscience, Vol. 7, 2013, p.84.





their memories as more important compared to those from culturally ‘collectivist’⁽⁸²⁸⁾ cultures. Memories in the latter group tend to focus on collective activities, general routines, and emotionally neutral events. People can 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⁽⁸²⁹⁾.

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 culturally 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 indicate that their account lacks credence.

6.2. The impact of traumatic experiences

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⁽⁸³⁰⁾.

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’⁽⁸³¹⁾. 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. Evidence also indicates that there is a ‘dose

⁽⁸²⁸⁾ The term ‘collectivist’ is used here not in the political sense, but refers to cultural differences that are observed in terms of construal of the self, others and interdependence between the two (as described in Markus, H. R., & Kitayama, S. ‘*Culture and the self: Implications for cognition, emotion, and motivation*’, *Psychological Review*, Vol. 98, 1991, pp. 224–253); by this categorisation, Individualistic cultures are those where the self is understood as an independent, autonomous unit, in contrast to Collectivistic cultures, where the self is perceived as related and interdependent, noting that there are of course within-culture variations and that the categorisation of cultures is critiqued for being essentialised in a way that does not capture the interaction between individuals in each specific context. For example, Holliday calls this distinction ‘an ideological construction that represents a veiled demonisation of a non-Western Other by an idealised Western Self’, Holliday, A. *Culture, communication, context, and power*, in Jackson, J. (ed.) *The Routledge Handbook of Language and Intercultural Communication*, Routledge, 2020, p.43 (see also Section 6.4. Cultural differences).

⁽⁸²⁹⁾ See e.g. Wang, Q., and Conway, M. A., ‘*The Stories We Keep: Autobiographical Memory in American and Chinese Middle-Aged Adults*’, *Journal of Personality and Social Psychology*, 2004, pp. 911-938.

⁽⁸³⁰⁾ See High Court (Ireland), *JG (Ethiopia) v Refugee Appeals Tribunal & Ors*, op. cit., fn. 298, paras 25 and 26.

⁽⁸³¹⁾ World Health Organization, *ICD-10, Version: 2016*, 2016.





effect': the more traumatic events someone is exposed to, the more likely is it that they will develop severe posttraumatic stress disorder ⁽⁸³²⁾.

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 ⁽⁸³³⁾. The Protocol 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. It is also important to note that there are cultural variations in presentations of mental illness and responses to adversity, for example some people preferring to report somatic problems rather than emotional states.

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' ⁽⁸³⁴⁾. 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 ⁽⁸³⁵⁾. One small study in the United Kingdom has suggested that depression may be considered unimportant in applications for international protection ⁽⁸³⁶⁾. 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.

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 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

⁽⁸³²⁾ See e.g. Johnson, H., Thompson, A., 'The development and maintenance of post-traumatic stress disorder (PTSD) in civilian adult survivors of war trauma and torture: A review', *Clinical Psychology Review*, Vol. 28, No 1, 2008, pp. 36-47.

⁽⁸³³⁾ See e.g. *Istanbul Protocol Manual*, op. cit., fn. 463, paras 239-248.

⁽⁸³⁴⁾ O'Donnell, M. L., Creamer, M., and Pattison, P., 'Post-traumatic Stress Disorder and Depression Following Trauma: Understanding Comorbidity', *American Journal of Psychiatry*, 2004, p. 1390.

⁽⁸³⁵⁾ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, DSM-5*, 5th edn, 2013.

⁽⁸³⁶⁾ See 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', *European Journal of Psycho-Traumatology*, 2012.





happening again in the present, and remains fixed⁽⁸³⁷⁾. 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). 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⁽⁸³⁸⁾. 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⁽⁸³⁹⁾.

Both PTSD and depression are strongly associated with ‘overgeneral memory’⁽⁸⁴⁰⁾. Furthermore, a meta-analysis⁽⁸⁴¹⁾ has shown that exposure to traumatic events is important. Regardless of diagnosis, people with more exposure to traumatic events do significantly less well when the specificity of their memory is tested⁽⁸⁴²⁾.

The above effects apply to people who have traumatic memories – they may not reach diagnostic criteria for PTSD. A trauma history should give rise to caution and understanding of these effects.

A meta-analysis of 27 studies 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)⁽⁸⁴³⁾. Verbal memory is often what is required of an applicant giving an

⁽⁸³⁷⁾ See Brewin, C. R., Dalgleish, T., and Joseph, S., ‘A dual representation theory of posttraumatic stress disorder’, *Psychological Review*, Vol. 103, No 4, 1996, pp. 670–686.

⁽⁸³⁸⁾ Christianson, S.-A., ‘Emotional Stress and Eyewitness Memory: A Critical Review’, *Psychological Bulletin* 1992, pp. 284-309.

⁽⁸³⁹⁾ Herlihy, J., Scragg, P., and Turner, S., ‘Discrepancies in Autobiographical Memories – Implications for the Assessment of Asylum-Seekers: Repeated Interviews Study’, *British Medical Journal*, 2002, pp. 324-327.

⁽⁸⁴⁰⁾ 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. 36, pp. 67 and 68.

⁽⁸⁴¹⁾ Meta-analysis uses statistical methods to combine the findings of more than one study.

⁽⁸⁴²⁾ Barry, T.J., Lenaert B., Hermans D., Raes F., Griffith, J.W., *Meta-Analysis of the Association Between Autobiographical Memory Specificity and Exposure to Trauma*, *Journal of Traumatic Stress*, 2018, Vol.31, No.1, pp.35-46.

⁽⁸⁴³⁾ 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*’, *Journal of Abnormal Psychology*, 2007, 448-463.





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 ⁽⁸⁴⁴⁾.

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). The *Judicial Analysis on Vulnerability in the context of applications for international protection* also notes that 'special reception needs may only become apparent at a later stage in the asylum procedure. Indeed, they may only become apparent upon submission of a subsequent application or on appeal to a court or tribunal'.

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 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 they are 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. Avoidance of distressing memories is one of the core criteria for reaching a diagnosis of PTSD. 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.

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 ⁽⁸⁴⁵⁾. This may result in a vague or seemingly generic account.

⁽⁸⁴⁴⁾ For a review of memory research applied to the asylum process see Herlihy, J., Jobson, L., and Turner, S., 'Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum', *Applied Cognitive Psychology*, 2012, 661-676.

⁽⁸⁴⁵⁾ UNHCR, *The Heart of the Matter*, op. cit., fn. 379, p. 70; Henderson, D., Hargreaves, I., Gregory, S., and Williams, J.M.G., 'Autobiographical memory and emotion in a non-clinical sample of women with and without a reported history of childhood sexual abuse', *British Journal of Clinical Psychology*, Vol. 41, No 2, 2002, pp.129-141; Kuyken, W., and Brewin, C.R., 'Autobiographical memory functioning in depression and reports of early abuse', *Journal of Abnormal Psychology*, Vol. 104, No 4, 1995, p.585.





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’ ⁽⁸⁴⁶⁾. This disturbance of awareness is a common effect of past traumatic experiences, especially interpersonal trauma such as torture ⁽⁸⁴⁷⁾. 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, most strongly, dissociation ⁽⁸⁴⁸⁾. 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. Applicants may remain under the coercive or financial control (or both) of their traffickers. This may explain their unwillingness to disclose relevant material facts or submit certain documentary or other evidence. See also the *Judicial Analysis on Vulnerability in the context of applications for international protection* on victims of trafficking.

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 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** [...]’.

⁽⁸⁴⁶⁾ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 1994.

⁽⁸⁴⁷⁾ Schauer, M., and Elbert, T., ‘Dissociation following Traumatic Stress Etiology and Treatment’, *Zeitschrift für Psychologie/Journal of Psychology*, 2010, pp. 109-127.

⁽⁸⁴⁸⁾ Bögner, D., Herlihy, J., and Brewin, C., ‘The Impact of Sexual Violence on Disclosure during Home Office Interviews’, op. cit., fn. 166.





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 ⁽⁸⁴⁹⁾.

It is important to bear in mind that within any 'culture' there will always 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 3.3.4.2. Factors affecting the court or tribunal member). 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. Others can be verbalised, or explained, such as social values, norms and rules such as eating etiquette, or what is considered rude/polite. However, there are unconscious cultural rules and norms, which are less easily verbalised, but may nonetheless determine what we find funny, disgusting, appropriate, shameful, etc. See also Section 6.1 on the differences in individualistic or collectivist ways of remembering personal events.

It is also important for decision-makers to bear in mind that they too have a cultural context. It is the often unconscious, unarticulated rules of one's own culture that can allow assumptions or stereotypes to guide one's behaviour and which need careful attention. One's own culture may influence the kinds of questions asked as well as assumptions about the responses of the applicant. In the asylum hearing at least two cultures are meeting and interacting within a very specific context.

Anthropologists have identified the following common areas of differences between cultures (see [Table 32](#).)

⁽⁸⁴⁹⁾ Hungarian Helsinki Committee, *Credibility Assessment Training Manual, Vol. 1*, op. cit., fn. 36, p. 119. The decision-maker is referred to Chapter VII where these concepts are explained more fully.



Table 32. Common areas of differences between cultures

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) ⁽⁸⁵⁰⁾ .
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 potential areas of difference should be borne in mind by decision-makers when assessing an applicant's statements and other evidence.

More recent literature takes issue with the notion of essentialist 'large culture' boundaries, based on states and large areas of the world and 'us-them' narratives which usually entail the definition of one culture by another, usually more powerful one, and fails to take into account the context, relationships, and power imbalances in every encounter.

Instead, whilst starting from an awareness of the possible differences in people's responses and speech patterns, the decision-maker is advised to always be aware of the situation of

⁽⁸⁵⁰⁾ Early work by Hall (Hall, E. T., and Edward, T., *Beyond Culture*, Anchor Books, 1976, 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 lower context, and Asian, African, Arab and Latin American cultures are presumed to be higher 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., '*Beyond Culture or Beyond Control? Reviewing the Use of Hall's High-/Low-Context Concept*', *International Journal of Cross Cultural Management*, 2011, 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 they may be assuming that 'everyone knows' that it is necessary to change buses at a border.



power and authority in the hearing and what one scholar has called ‘the messiness and politics of interculturality’⁽⁸⁵¹⁾ as individuals try to navigate the situation⁽⁸⁵²⁾.

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*⁽⁸⁵³⁾ 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 Gender-Related Persecution* which emphasise that gender roles are socially constructed⁽⁸⁵⁴⁾. 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⁽⁸⁵⁵⁾.

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.

⁽⁸⁵¹⁾ Holliday, *Culture, communication, context, and power*, op. cit., fn. 828, p.49

⁽⁸⁵²⁾ For example, an interpreter interviewed by Gibb and Good in a study of intercultural communication and interpreters reports: ‘People are discouraged from talking, and the interpreter is always made the excuse for that; you know, that you need to give short answers so that the interpreter can translate? [...] people do not speak like that naturally, and they will lose track; they will say less than they mean to say simply because they have to break it down. I’ve seen it on their faces; they just give up, you know? They try to do it for a bit and then they give up. And let’s not forget, the interpreter has practice at doing this, so do the Presenting Officers, so do the judges, so do the lawyers, but the asylum applicant doesn’t. He’s the only one who comes to this all fresh and raw and natural, and the flow of speech, when it’s constrained like that, very often dries up.’ Gibb, R. & Good, A., *Interpretation, translation and intercultural communication in refugee status determination procedures in the UK and France*, Language and Intercultural Communication, 2014, Vol.14, No 3, 2014, pp.385-399.

⁽⁸⁵³⁾ CJEU, 1996, *P v S*, op. cit., fn. 244.

⁽⁸⁵⁴⁾ UNHCR, *Guidelines on International Protection No 1*, op. cit., fn. 243, para. 3.

⁽⁸⁵⁵⁾ UNHCR, *Beyond Proof*, op. cit., fn. 19, p. 69. Internal references originally in this excerpt refer to: UNHCR, *Sexual and Gender-Based Violence against Refugees: Returnees and Internally Displaced Persons, Guidelines for Prevention and Response*, May 2003, p. 11; UNHCR, *Guidelines on International Protection No 1*, op. cit., fn. 243, 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*.



Gender should not only be considered in cases of gender-based persecution (which is dealt with in the *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021⁽⁸⁵⁶⁾ and in the *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022⁽⁸⁵⁷⁾). Gender has a potential impact on access to documentary evidence and the application of credibility indicators in all cases⁽⁸⁵⁸⁾.

The late submission of new facts could be justified if, for example, the gender of the interviewer or interpreter constrained the applicant's ability to present their claim⁽⁸⁵⁹⁾.

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⁽⁸⁶⁰⁾.

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⁽⁸⁶¹⁾.

⁽⁸⁵⁶⁾ EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, op. cit., fn. 7, (Section 6.8.2).

⁽⁸⁵⁷⁾ EUAA, *Judicial analysis: Qualification for international protection: Directive (2011/95/EU)*, 2022, op. cit., fn. 7, (Section 1.4.4.7).

⁽⁸⁵⁸⁾ Hungarian Helsinki Committee, *Credibility Assessment Training Manual, Vol. 2*, op. cit., fn. 36, p. 40.

⁽⁸⁵⁹⁾ Constitutional Court (Ustavni soud Ceske republiky, Czechia), judgment of 12 April 2016, 1.ÚS 425/16., cited in EASO, *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, op. cit., fn. 7, Section 8.2.

⁽⁸⁶⁰⁾ UNHCR, *Beyond Proof*, op. cit., fn. 19, p. 70. An internal reference originally in this excerpt refers to Spijkerboer, T., 'Stereotyping and acceleration: gender procedural acceleration and marginalised judicial review in the Dutch asylum system', in Noll, G., *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Martinus Nijhoff, 2005.

⁽⁸⁶¹⁾ UNHCR, *Beyond Proof*, op. cit., fn. 19, p. 70. Internal references originally in this excerpt refer to: Refugee, Asylum and International Operations Directorate (RAIO), US 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*.



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)⁽⁸⁶²⁾. 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 interpreters (see Section 3.3.2. Translation and interpretation or family members. In this latter 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**⁽⁸⁶³⁾, 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⁽⁸⁶⁴⁾.

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⁽⁸⁶⁵⁾.

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 their 'sexual orientation' and 'gender identity' (SOGI)⁽⁸⁶⁶⁾. See also the *Judicial analysis: Vulnerability in the Context of Applications for International Protection*, 2021, (Section 7.5.5).

⁽⁸⁶²⁾ UNHCR, *Guidelines on International Protection No 1*, op. cit., fn. 243, para. 36 (viii) and (xi).

⁽⁸⁶³⁾ Concerning external consistency, see Section 4.4.3.2.

⁽⁸⁶⁴⁾ UNHCR, *Beyond Proof*, op. cit., fn. 19, pp. 69 and 70. An internal reference originally in this excerpt refers to: RAI0, *Asylum Officer Basic Training Module: Gender Related Claims*, op. cit., fn. 861, 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; RAI0, *Asylum Officer Basic Training Module: Gender Related Claims*, op. cit., fn. 861, para. 7.1.1.

⁽⁸⁶⁵⁾ UNHCR, *The Heart of the Matter*, op. cit., fn. 379, p. 74. An internal reference originally in this excerpt refers to: 'D/122/RUS/F/17'.

⁽⁸⁶⁶⁾ 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. 36, pp. 63-66.





The definitions of these terms as set out in the Yogyakarta Principles, now extended with Additional Principles ⁽⁸⁶⁷⁾, 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 ⁽⁸⁶⁸⁾.*

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 ⁽⁸⁶⁹⁾.

⁽⁸⁶⁷⁾ *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, op. cit., fn. 246, and *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, op. cit., fn. 247.

⁽⁸⁶⁸⁾ Hungarian Helsinki Committee, *Credibility Assessment Training Manual, Vol. 2*, op. cit., fn. 36, p. 64 (original emphasis).

⁽⁸⁶⁹⁾ *Ibid.*, p. 61 (original emphasis; internal reference omitted).





One model referred to in the literature and widely used the ‘Difference, Stigma, Shame, Harm’ (DSSH) model 2 ⁽⁸⁷⁰⁾, 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 33](#).

Table 33. 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 acknowledgments 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

⁽⁸⁷⁰⁾ The DSSH model 2 was created in 2011 by UK barrister S. Chelvan. This model is referred to by the UNHCR in its *Guidelines on International Protection No 9* (op. cit., fn. 246, 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 UK 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, paras 7.1-7.3. Following publication as Chapter XI of the *Credibility Assessment Training Manual, Vol. 2*, op. cit., fn. 36, the UK 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.





regarding their sexual orientation and/or gender identity within an asylum claim ⁽⁸⁷¹⁾. 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 ⁽⁸⁷²⁾.

Recent authors ⁽⁸⁷³⁾ continue to draw attention to ‘society’s growing recognition that SOGI are fluid and cannot be proved in an immigration interview or court of appeal’ ⁽⁸⁷⁴⁾.

Whilst the DSSH model offers timely guidance for a shift away from a search for behaviours that were thought to substantiate a claim, towards the development of a person’s identity,

[t]he model has ... been criticised for being used by decision-makers in a way that normalises and homogenises claimants’ sexuality and identity and how these should be expressed, thus replacing old stereotypes with new (Western) ones about the – assumed to be stable and linear – ways in which individuals realise their sexual orientation and what emotions accompany that process ⁽⁸⁷⁵⁾.

Like any prescriptive model the DSSH can and has been shown to be misused, for example with a ‘tick box’ approach ⁽⁸⁷⁶⁾ which can reinforce stereotypes, particularly in the case of shame ⁽⁸⁷⁷⁾. Every person’s response to their own sexual orientation(s) is individual and intersects with their personal history, culture and socioeconomic status ⁽⁸⁷⁸⁾.

⁽⁸⁷¹⁾ See Hungarian Helsinki Committee, *Credibility Assessment Training Manual, Vol. 2*, op. cit., fn. 36, p. 85.

⁽⁸⁷²⁾ UNHCR, *Beyond Proof*, op. cit., fn. 19, p. 71. Internal references originally in this excerpt originally refer to: This issue has been addressed by a number of US 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. UK 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. 246, para. 60(ii).

⁽⁸⁷³⁾ E.g. Dustin, M. and Ferreira, N., *Improving SOGI asylum adjudication: putting persecution ahead of identity*, *Refugee Survey Quarterly*, 2021, Vol.40, No 3, pp. 315-347, which includes a critical review of current models and approaches; Dawson, J. and Gerber, P., *Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?*, *International Journal of Refugee Law*, 2017, Vol. 29, No 2, pp.292–322; COC Netherlands, *Pride or Shame: Assessing LGBTI Asylum Applications in the Netherlands Following the XYZ and ABC Judgments*, June 2018.

⁽⁸⁷⁴⁾ Dustin and Ferreira, *Improving SOGI asylum adjudication: putting persecution ahead of identity*, op. cit., fn. 873.

⁽⁸⁷⁵⁾ Ibid.

⁽⁸⁷⁶⁾ Dawson, J. and Gerber, P. *Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?*, op. cit., fn. 873.

⁽⁸⁷⁷⁾ E.g. Gomez, E., *The Post-ABC Situation of LGB Refugees in Europe*, *Emory International Law Review*, 2016, Vol. 30, p. 475.

⁽⁸⁷⁸⁾ Hedayat S., Korkman, J., Pirjatanniemi, E. and Antfolk, J. *Asylum claims based on sexual orientation: a review of psycho-legal issues in credibility assessments*, *Psychology, Crime & Law*, 2022.





Alongside respectful lines of enquiry, current proposals in the academic literature ⁽⁸⁷⁹⁾ are for a stronger emphasis on the risk of future persecution, drawing on good quality country of origin information.

6.7. Vulnerability

The legal standards and the need for special procedural guarantees for vulnerable applicants are set out in Section [4.3.1](#).

Refer to the *Judicial Analysis - Vulnerability in the context of applications for international protection* for identification of members of vulnerable groups and subsequent needs, guarantees and considerations in the context of credibility assessment.

Further to the categories of vulnerability, account should be taken of an applicant's general vulnerability, which can arise from their situation in the receiving country where, for example, accommodation or financial resources may be poor so that the applicant is living in poor conditions ⁽⁸⁸⁰⁾.

Poor social integration in asylum-seekers and refugees is associated with poor mental health, but even without a diagnosable disorder, current social problems may further affect their 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 ⁽⁸⁸¹⁾.

⁽⁸⁷⁹⁾ See e.g. Dustin and Ferreira, *Improving SOGI asylum adjudication: putting persecution ahead of identity*, op. cit., fn. 873.

⁽⁸⁸⁰⁾ See ECtHR, *MSS v Belgium and Greece*, op. cit., fn. 84, 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*, No 13178/03, ECLI:CE:ECHR:2006:1012JUD001317803; see also Wicki, B., Spiller, T.R., Schick, M., et al., 'A network analysis of postmigration living difficulties in refugees and asylum seekers', *European Journal of Psychotraumatology*, Vol. 12, No 1, 2021; Schick, M., Zumwald, A., Knöpfli, B., Nickerson, A., Bryant, R.A., Schnyder, U., Müller, J., and Morina, N., 'Challenging future, challenging past: the relationship of social integration and psychological impairment in traumatized refugees', *European Journal of Psychotraumatology*, Vol. 7, No 1, 2016.

⁽⁸⁸¹⁾ Li, S.S.Y., Liddell, B.J., and Nickerson, A., 'The Relationship Between Post-Migration Stress and Psychological Disorders in Refugees and Asylum Seekers', *Current Psychiatry Reports* Vol. 18 No 82, 2016; see also Liddell, B.J., Cheung, J., Outhred, T., et al., 'Neural Correlates of Posttraumatic Stress Disorder Symptoms, Trauma Exposure, and Postmigration Stress in Response to Fear Faces in Resettled Refugees', *Clinical Psychological Science*, Vol. 7, No 4, 2019, pp. 811-825, reporting effects on neural measures of fear responses related to post-migration stressors, even when excluding the effects of PTSD.





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, they 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

Checklist 1A

Duties of the applicant

Duty	<input checked="" type="checkbox"/>	Explanation	Elements	<input checked="" type="checkbox"/>
<p>If the Member State has made it the duty of the applicant to substantiate the application pursuant to Article 4(1), have all the elements needed to substantiate the application been submitted as soon as possible?</p> <p>(Article 4(1) and (2) QD (recast))</p>	<input type="checkbox"/>	<p>The applicant must provide, as soon as practicably possible, statements and all documentary evidence or other evidence, at the applicant's disposal, i.e. which they may be reasonably expected to obtain, in support of their application, or provide a satisfactory explanation regarding any lack of other relevant elements. The obligation on the applicant is qualified by the requirement to take into account the individual position and circumstances of the applicant.</p> <p><i>(Evidence may include anything that asserts, confirms, supports or bears on relevant facts. This may include, for example: passport, birth certificate, medical records, travel documents, objects, photographs, audio recordings, digital data, or physical elements including bodily scarring).</i></p>	<ul style="list-style-type: none"> • Age <input type="checkbox"/> • Background <input type="checkbox"/> • Relevant relatives <input type="checkbox"/> • Identity <input type="checkbox"/> • Nationality(ies) <input type="checkbox"/> • Country(ies) & place(s) of previous residence <input type="checkbox"/> • Previous asylum applications <input type="checkbox"/> • Travel routes <input type="checkbox"/> • Travel documents <input type="checkbox"/> • Reasons for applying for international protection <input type="checkbox"/> 	



Duty	<input checked="" type="checkbox"/> Explanation	Elements	<input checked="" type="checkbox"/>
Pursuant to Article 13(1) APD (recast), has the applicant complied with 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)?	<input type="checkbox"/> The applicant must cooperate with efforts to establish their identity and other elements referred to in Article 4(2) QD (recast).		
If a Member State has imposed additional duties on an applicant pursuant to Article 13(1) APD (recast), such as those reflected in Article 13(2)(a) and (b), has the applicant complied with those duties?	<input type="checkbox"/> In addition to the binding obligation in Article 13(1) APD (recast), Member States may impose additional obligations on applicants, as described in Article 13(2)(a) – (f) APD (recast). The obligations become binding by virtue of the relevant national legislation. An obligation imposed under Article 13(2) (a) requires an applicant to report to the competent authorities or to appear before them in person, either without delay or at a specified time. An obligation imposed under Article 13(2)(b) requires an applicant to hand over documents in their possession relevant to the examination of their application, such as their passport.		



Duty	☑	Explanation	Elements	☑
<p>If the Member State has made it the duty of the applicant to substantiate the application 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 (a) – (e) are met:</p> <p>Has the applicant made a genuine effort to substantiate their application (Article 4(5) (a) QD (recast))?</p>	☐	<p>The applicant must demonstrate that they have made bona fide attempts to substantiate the facts of their application.</p>		
<p>Has the applicant submitted all relevant elements at their disposal and provided a satisfactory explanation regarding any lack of other relevant elements?</p> <p>(Article 4(5)(b) QD (recast))</p>	☐	<p>The applicant must have provided all relevant evidence at their disposal or else provide satisfactory explanations as to why they could not provide such evidence.</p>		
<p>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?</p> <p>(Article 4(5)(c) QD (recast))</p>	☐	<p>The applicant's statements must have the qualities of coherence and plausibility. Their statements should not fly in the face of other available information, whether of a specific nature (for example a private document relating only to the applicant) or a general nature (for example COI).</p>		





Duty	<input checked="" type="checkbox"/>	Explanation	Elements	<input checked="" type="checkbox"/>
Did the applicant apply for international protection at the earliest possible time, or have they demonstrated good reason for not having done so? (Article 4(5)(d) QD (recast))	<input type="checkbox"/>	The applicant is expected to show that they applied for protection at the earliest possible time or else show good reason for why they did not do so.		
Has the general credibility of the applicant been established? (Article 4(5)(e) QD (recast))	<input type="checkbox"/>	There is no guidance to date in CJEU jurisprudence 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.		

Has the applicant fulfilled their duty to substantiate? (Article 4(1) QD (recast))





Checklist 2A

Duties of the determining authority

Duty	<input checked="" type="checkbox"/> Explanation
<p>Did the determining authority assess the relevant elements of the application in cooperation with the applicant?</p> <p>(Article 4(1) QD (recast))</p>	<p><input type="checkbox"/> This requirement that the Member State cooperate with the applicant 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. A Member State may also be better placed than an applicant to gain access to certain types of documents.</p> <p>This requirement reflects an 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.</p> <p>The determining authority must inform the applicant in a language they understand, or are reasonably supposed to understand, of their duty to substantiate the application.</p> <p>The relevant elements are:</p> <ul style="list-style-type: none"> • The report or transcript and/or audio or audiovisual recording of the personal interview. • Any expert evidence on particular issues such as medical, cultural, religious, child-related or gender issues. • Country of origin information. • Information on country(ies) of transit and travel route. • Any documents which the determining authority is better placed to gain. <p><i>(A Member State may be better placed to gain access to certain types of documents; a Member State must 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; 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).</i></p>



Duty	<input checked="" type="checkbox"/> Explanation
<p>Pursuant to Article 10(3)(b) APD (recast), has the Member State ensured that precise and up-to-date information is obtained from various sources, such as EUAA 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 decision?</p>	<p><input type="checkbox"/> Such information must be made available to the personnel responsible for examining applications and taking decisions. This includes, but is not limited to, 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’. 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.</p>
<p>Did the determining authority inform the applicant about their duties with regards to substantiation?</p> <p>(Article 12(1)(a) APD (recast))</p>	<p><input type="checkbox"/> Where the Member State imposes a duty on the applicant to submit as soon as possible all the elements needed to substantiate the application, the applicant must be informed of that obligation in a language which they understand or are reasonably supposed to understand in accordance with Article 12(1)(a) APD (recast). They must also be informed of 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.</p> <p>Also, 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.</p>

Duty	<input checked="" type="checkbox"/> Explanation
<p>Did the determining authority give the applicant the opportunity of a personal interview?</p> <p>(Articles 14-17 APD (recast))</p>	<p><input type="checkbox"/> 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 their 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, even though Article 47 EU Charter guarantees effective judicial protection, secondary EU law does not explicitly guarantee the applicant a right to an oral hearing before a judicial body.</p> <p>It should be noted that Article 14(2) APD (recast) sets out optional exceptions to the mandatory personal interview where:</p> <p><i>(a) the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available; or</i></p> <p><i>(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.</i></p>

Duty	<input checked="" type="checkbox"/> Explanation
<p>Did the determining authority comply with the obligation to provide an interpreter for the personal interview?</p> <p>(Article 12(1)(b) APD (recast) and Article 15(3)(c) APD (recast))</p>	<p><input type="checkbox"/> Article 12(1)(b) APD (recast) provides that applicants ‘shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary’. Article 15(3) 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 for their applications in a comprehensive manner’. It is therefore mandatory to ‘select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview’ (Article 15(3)(c) APD (recast)). The interview must also ‘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)). Wherever possible, Member States must ‘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’ (Article 15(3)(c) APD (recast)).</p>
<p>Did the determining authority meet other requirements for a personal interview regarding: presence of family members; conditions of confidentiality; child-appropriate interviews?</p> <p>(Article 15 (APD) (recast))</p>	<p><input type="checkbox"/> The determining authority must ensure that the procedural guarantees set out in Article 15 APD (recast) are fulfilled. These include minimum requirements regarding presence of family members; conditions of confidentiality; and child-appropriate interviews.</p>
<p>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?</p> <p>(Article 16 APD (recast) and EU law principle of the right of defence, including the right to be heard)</p>	<p><input type="checkbox"/> The determining authority must 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.</p>



Duty	☑	Explanation
<p>Did the determining authority obtain and take into account relevant country of origin and country information?</p> <p>(Article 4(3)(a) QD (recast), Article 9 EUAA regulation)</p>	☐	<p>The determining authority must take account of 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. This includes taking account of relevant material produced by EUAA.</p>
<p>Did the determining authority seek advice, whenever necessary, from experts on particular issues?</p> <p>(Article 10(3)(d) APD (recast))</p>	☐	<p>Member States shall ensure that the competent authorities may seek expert evidence on various issues including, for example, child-related issues.</p>
<p>Did the determining authority deal properly with any special procedural needs?</p> <p>(Article 24 APD (recast))</p>	☐	<p>Member States must 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’.</p>
<p>Did the determining authority comply with the requirement to put particular guarantees in place for unaccompanied minors?</p> <p>(Article 25 APD (recast))</p>	☐	<p>Member States must comply with the requirement to put particular guarantees in place for unaccompanied minors including in relation to assignment of a representative to assist the minor: special measures for the personal interview; and the provision of legal and procedural information free of charge.</p>





Duty	<input checked="" type="checkbox"/> Explanation
Did the determining authority comply with a finding of a court or tribunal that a particular application was entitled to international protection? (Article 46(3) APD (recast))	<input type="checkbox"/> The CJEU, in <i>Torubarov</i> , ⁽⁸⁸²⁾ held that: <i>Article 46(3) [APD (recast)], read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in circumstances, such as those at issue in the main proceedings, where a first-instance court or tribunal has found – after making a full and ex nunc examination of all the relevant elements of fact and law submitted by an applicant for international protection – that, under the criteria laid down by [QD (recast)], that applicant must be granted such protection on the ground that he or she relied on in support of his or her application, but after which the administrative or quasi-judicial body adopts a contrary decision without establishing that new elements have arisen that justify a new assessment of the international protection needs of the applicant, that court or tribunal must vary that decision which does not comply with its previous judgment and substitute its own decision for it as to the application for international protection, disapplying as necessary the national law that would prohibit it from proceeding in that way.</i>

Has the determining authority's duty of investigation been duly fulfilled?

⁽⁸⁸²⁾ CJEU, judgment of 29 July 2019, *Torubarov*, C-556/17, ECLI:EU:C:2019:626, para. 79.





B. EVIDENCE AND CREDIBILITY ASSESSMENT

Checklist 1B

Steps to be taken when conducting the assessment of evidence and credibility

Steps	<input checked="" type="checkbox"/>	Action	<input checked="" type="checkbox"/>	Principles/standards/factors to be taken into account	<input checked="" type="checkbox"/>
Identify the material facts.	<input type="checkbox"/>	Identify those facts that are linked to one or more of the requirements of the definition of a refugee and a person eligible for subsidiary protection and which are relevant for a determination of international protection.		Has the assessment of the application for international protection been carried out on an individual basis? (Article 4(3) QD (recast)).	<input type="checkbox"/>
Identify the statements, documents and other evidence relating to each material fact.	<input type="checkbox"/>	Identify the evidence from the applicant's statements, documentation and other exhibits which supports, verifies, or refutes 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?	<input type="checkbox"/>
Assess the authenticity/reliability of documentary evidence.	<input type="checkbox"/>	Apply criteria applicable to documentary evidence: <ul style="list-style-type: none"> • Relevance • Existence • Form • Content • Nature • Author 	<input type="checkbox"/>	Did the decision-maker conduct an appropriate examination and ensure that decisions were taken individually, objectively and impartially? (Article 46 APD (recast)).	<input type="checkbox"/>



Steps	☑ Action	☑ Principles/standards/factors to be taken into account	☑
Assess the reliability of expert evidence.	<input type="checkbox"/> Apply criteria applicable to the duties of the expert: <ul style="list-style-type: none"> • Established credentials (including qualifications, education and training, membership of professional bodies and experience) • Independent • Objective • Unbiased • Familiar with breadth of current practice/opinion 	<input type="checkbox"/> Did the decision-maker conduct a rigorous examination of the application for international protection? (Recital 34 APD (recast)).	<input type="checkbox"/>
Assess the reliability of COI evidence.	<input type="checkbox"/> Apply criteria applicable to the duties of the Member State: <ul style="list-style-type: none"> • 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 EUAA 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 	<input type="checkbox"/>	<input type="checkbox"/>



Steps	<input checked="" type="checkbox"/>	Action	<input checked="" type="checkbox"/>	Principles/standards/ factors to be taken into account	<input checked="" type="checkbox"/>
Assess the credibility of each material fact applying the credibility indicators.	<input type="checkbox"/>	<ul style="list-style-type: none"> • Internal consistency • External consistency • Sufficiency of detail • Plausibility (See table below for further detail).	<input type="checkbox"/>		
Review the evidence as a whole and assess credibility in the light of all of the evidence.	<input type="checkbox"/>	Take all relevant matters into account to ensure good administration, an effective remedy, and an assessment, which is individual, objective and impartial.	<input type="checkbox"/>		
Accept/reject each material fact.	<input type="checkbox"/>	Assess the applicant's statements, based on facts material to the core of the claim.	<input type="checkbox"/>		



**Checklist 3B****Multidisciplinary approach to the assessment of evidence and credibility**

Standards/factors to be taken into account	<input checked="" type="checkbox"/>	Explanation	Action	<input checked="" type="checkbox"/>
Take into account the limits and variations of human memory.	<input type="checkbox"/>	<p>Expectations are based on assumptions about human memory; however, memory is very personal and varies from one applicant to another.</p> <p>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.</p>	<ul style="list-style-type: none">• Hold a realistic expectation of what an applicant should know and remember.• Consider the effect of any traumatic events.• Consider the impact of, for example, an applicant's gender, age, and vulnerability.	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
Take into account the possible shame, avoidance, dissociation or fear, which may affect the applicant's abilities to disclose their experiences.	<input type="checkbox"/>	<p>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.</p>	<ul style="list-style-type: none">• Be aware of the impact of trauma, shame, avoidance, dissociation and fear on disclosure.	<input type="checkbox"/>





Standards/factors to be taken into account	<input checked="" type="checkbox"/>	Explanation	Action	<input checked="" type="checkbox"/>
<p>Ensure that any stereotypical conception(s) held by decision-makers, have not influenced their evidence and credibility assessment of the application for international protection.</p>	<input type="checkbox"/>	<p>There is a risk that stereotypical conceptions held by the decision-maker as to how an applicant ought to behave may unfairly influence the evidence and credibility assessment carried out by the decision-maker.</p>	<ul style="list-style-type: none"> • Consider the impact of cultural differences. 	<input type="checkbox"/>





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 \(entry into force: 1 December 2009\)\) \(OJ C 326/47, 26.10.2012\).](#)

[Charter of Fundamental Rights of the European Union of 18 December 2000 \(OJ C 326/391, 26.10.2012, \(entry into force: 1 December 2009\).](#)

[Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 2019/C 384 I/01; UK Parliament, European Union \(Withdrawal\) Act 2018; UK Parliament European Union \(Withdrawal Agreement\) Act 2020.](#)

[Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 2019/C 384 I/02.](#)

The [EU \(Withdrawal\) Act 2018](#) ('the 2018 Act') as amended by the [European Union \(Withdrawal Agreement\) Act 2020](#) ('the 2020 Act'), s 6(7), creates a category of 'retained EU law', which includes UK legislation transposing directives as they had effect in domestic law immediately before 'exit day', namely 31 January 2020 (see, [European Union \(Withdrawal\) Act 2018 \(Exit Day\) \(Amendment\) \(No 3\) Regulations 2019](#)).

1.2. EU secondary legislation

1.2.1. Regulations

[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 \(VIS Regulation\) \(OJ L 218, 13.08.2008\).](#)

[Regulation \(EU\) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office \(OJ L 132, 29.05.2010\).](#)

[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 \(OJ L 55, 28.02.2011\).](#)

[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), (OJ L 180, 29.06. 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) (OJ L 180, 29.06.2013).

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, 04.05.2016).

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 (OJ L 39, 08.02.2014).

Immigration, Nationality and Asylum (EU Exit) Regulations 2019, regulations 1-3.

Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum.

1.2.2. Directives

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251, 03.10.2003).

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 (OJ L 304, 30.09.2004).

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326, 13.12.2005).

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) (OJ L 337, 20.12.2011).

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) (OJ L 180, 29.06.2013).





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 (OJ L 180, 29.06.2013).

Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39/40 14.02.1976).

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).





Appendix C. Methodology

The first edition of the *Judicial analysis on Evidence and credibility assessment in the context of the Common European Asylum System* was published in December 2018. In 2021, under a specific contract implementing Framework Contract for Services (FWC) EASO/2017/589, the International Association of Refugee and Migration Judges (IARMJ-Europe) undertook a review of the first edition of the judicial analysis. Based on feedback from users and an analysis of the content of the first edition, as well as taking into account findings regarding key legislative and jurisprudential developments since its publication, IARMJ-Europe produced a review report setting out recommendations to EASO (now EUAA) with regard to the need to update the material. On 3 December 2021, the IARMJ-Europe and EASO (now the EUAA) concluded a specific contract under which IARMJ was to update the judicial analysis.

IARMJ-Europe's editorial team, which comprises exclusively serving and recently retired judges and tribunal members with expertise in asylum law and/or the training of members of courts and tribunals from across the EU+ countries, selected and appointed two researchers to undertake the update. A further expert provided editorial support and didactic content. Their work was undertaken under the supervision and guidance of the editorial team. The editorial team was established in order to ensure the integrity of the principle of judicial independence and to guarantee that judicial training materials for members of courts and tribunals are prepared and delivered under judicial guidance. The editorial team provided guidance on the update of the material and took all decisions pertaining to the structure, format, style, and content.

The role of the commissioned researchers was to undertake research in line with a 'research methodology' provided by the editorial team and to produce an updated new edition of the judicial analysis with appendices in accordance with the instructions set out in terms of reference. Each researcher and expert adhered to a schedule of work and was required to produce drafts to publication standard in line with an EUAA writing guide. They were required to keep in mind at all times that the materials being produced are for use by judges and tribunal members. In particular, they were required to take into account that judicial independence is a cardinal principle in the professional development of judges and tribunal members and that for them there is an abiding concern to interpret the relevant legal provisions in accordance with EU law and to identify trends in jurisprudence.

The editorial team shared the draft materials with a judge and legal secretary of the CJEU and ECtHR in their personal capacity, and with UNHCR. The feedback received was taken into consideration by the editorial team in the finalisation of the materials. The update of the judicial analysis was completed in July 2022.





Appendix D. Case-law

Preface

None.

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

1.1. Structure and scope

None.

1.2. Use of terminology

CJEU, judgment of 25 January 2018, *F.*, C-473/16, ECLI:EU:C:2018:36, paras 71 and 72.

CJEU (GC), judgment of 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, joined cases C-148/13 to C-150/13, ECLI:EU:C:2014:2406, paras 54, 65, 72 and 73.

ECtHR (GC), judgment of 23 August 2016, *JK and Others v Sweden*, No 59166/12, ECLI:CE:ECHR:2016:0823JUD005916612, para. 53.

Part 2. The EU legal framework for evidence assessment

CJEU, judgment of 10 December 2020, *M.S. v Minister for Justice*, C-616/19, ECLI:EU:C:2020:1010.

CJEU, judgment of 25 January 2018, *F.*, C-473/16, ECLI:EU:C:2018:36.

CJEU (GC), judgment of 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, joined cases C-148/13 to C-150/13, ECLI:EU:C:2014:2406.

CJEU, judgment of 22 November 2012, *M.M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, ECLI:EU:C:2012:744.

CJEU (GC), judgment of 5 September 2012, *Bundesrepublik Deutschland v Y and Z*, joined cases C-71/11 and C-99/11, ECLI:EU:C:2012:558.

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

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

CJEU, judgment of 19 March 2020, *P.G.*, C-406/18, ECLI:EU:C:2020:216.

CJEU, judgment of 19 March 2020, *L.H.*, C-564/18, ECLI:EU:C:2020:218.

CJEU, judgment of 9 September 2020, *J.P.*, C-651-19, ECLI:EU:C:2020:681.





CJEU, judgment of 29 July 2019, *Torubarov*, C-556/17, ECLI:EU:C:2019:626, paras 51-54 and 79.

CJEU, judgment of 4 October 2018, *Ahmedbekova*, C-652/16, ECLI:EU:C:2018/801.

CJEU, judgment of 26 September 2018, *X and Y v Staatssecretaris van Veiligheid en Justitie* C-180/17, ECLI:EU:C:2018/775, paras 25-26.

CJEU, judgment of 4 October 2018, *Fathi*, C-56/17, ECLI:EU:C:2018/803.

CJEU (GC), judgment of 25 July 2018, *Alheto*, C-585/16, ECLI:EU:C:2018:584, paras 110, 118, 130 and 149.

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