



Refugee  
Law  
Initiative

**Report of Proceedings:**

**Roundtable on Due Process Considerations relating to the  
Use of Country of Origin Information in Refugee Status  
Determination Procedures**

**Convened by the International Association of Refugee Law Judges  
(IARLJ), the United Nations High Commissioner for Refugees  
(UNHCR) and the Refugee Law Initiative (RLI), University of London**

**at**

**Council Chamber, Institute of Advanced Legal Studies, University of  
London, Charles Clore House, 17 Russell Square, London, UK**

**Tuesday 22 May 2012**

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## **Background Paper<sup>1</sup>**

The roundtable was jointly hosted by the International Association of Refugee Law Judges (IARLJ), the United Nations High Commissioner for Refugees (UNHCR) and the Refugee Law Initiative (RLI), School of Advanced Study, University of London. The aim was to explore participants' views on what the important issues are in relation to the procedural aspects of the use and role of COI (Country of Origin Information) in asylum-related cases and to identify international similarities and differences in practice. This exercise was conducted with a view to helping to produce draft best practice guidelines in checklist form for judges around the world.

The roundtable brought together judges involved in two of the IARLJ's Working Parties (Procedures and COI), UNHCR, leading non-governmental organisations (NGOs) and academics concerned with COI, representatives of governments, lawyers and practitioners.

The importance of COI (Country of Origin Information) to refugee decision-makers at all levels, including the judicial level, is now well-established. Equally well-established are the *substantive* criteria that decision-makers, including judges, need to apply when evaluating COI, *inter alia*, that it is relevant, reliable, accurate, up-to date information which has been gathered in a transparent and impartial manner, making use of all relevant sources of information, including information gathered from governmental, non-governmental and international organisations.<sup>2</sup> That we now have much clearer substantive standards is a tribute to a number of major studies and initiatives taken by governments, UNHCR, major NGOs and the IARLJ.<sup>3</sup>

Much less well mapped are the *procedural* standards or norms that should govern the use and role of COI. Any attempt to formulate due process criteria runs up against a number of problems, *inter alia*, that there are many different types of asylum procedures, even within one country and/or region; that there are significant differences between national legal systems for dealing with appeals, for example, differences between common law and civil law traditions; that some systems adopt an inquisitorial, some an adversarial approach and some adopt mixtures of both; and that there are differences in the scope of the judicial consideration - ranging from "full jurisdiction" (where the court itself can decide upon the asylum claim and can

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<sup>1</sup> By Hugo Storey, Bostjan Zalar and Bernard Dawson, IARLJ.

<sup>2</sup> See Article 4(a) of *EU Council Regulation 439/2010* establishing a European Asylum Support Office.

<sup>3</sup> See, for example, Article 4(3) of *EU Council Directive 2004/83* (Qualification Directive); Article 8(2) of *EU Council Directive 2005/85/EC* (Procedures Directive); *Country of Origin Information: Towards Enhanced International Cooperation*, UNHCR, Feb 2004; *Common EU Guidelines for Processing Country of Origin Information (COI)*, European Union, April 2008; *Judicial Criteria for Assessing Country of Origin (COI): A Checklist*, IARLJ, November 2006. The IARLJ Checklist was the product of a similar roundtable process in 2005.

grant protection) and mere “cassation jurisdiction” (where the court can only quash lower-instance decisions and order a new procedure, based mainly or purely on points of law).<sup>4</sup>

Nevertheless the IARLJ believes there is scope to try and distil relevant procedural criteria into a best practice checklist and that to do so would help advance the understanding of the underlying norms and principles that should govern work and decision-making concerned with COI of everyone in the field of refugee law.

Two main ways in which COI-related issues can arise in the procedural context were identified in advance of the discussions: i) Governmental use of COI and ii) Access to COI within judicial proceedings.

### *Governmental use of COI*

There are now well-established criteria designed to help ensure that decision-makers make their asylum decisions by reference to COI that meets certain quality standards as detailed above. It has become increasingly clear, however, that there is a need to ensure that governmental decision-makers also adhere to certain due process standards. Their need can arise in various different contexts.

It may be that in cases where COI evidence relied on by the government is of particular relevance, adequate time and opportunity prior to any hearing or judicial decision is given to the claimant to address its significance.

It may be that in deciding to process a claimant in a special accelerated procedure the government has relied on a “list” of safe countries of origin and there is a challenge based on the government’s failure to show that its inclusion of a particular country in such a list was made by reference to major COI reports.

Among the standards that existing European legislation or case law have enshrined in contexts like those just identified are that:

- COI be transparent, i.e. available to all parties in the decision-making procedure.
- That in the use of COI in proceedings there has to be an equality of arms.
- That in drawing up safe country of origin lists (or formulating policies on unsafe countries), governments have a duty to consult.
- That in safe countries for transfer of responsibility for deciding the asylum claim (for example, within Europe under Dublin II<sup>5</sup>), there is proper

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<sup>4</sup> See European Union, April 2008, n.2 supra at p.12; *Structural Differences and Access to Country Information (COI) at European Courts Dealing with Asylum*, Hungarian Helsinki Committee, July 2011.

opportunity afforded to rebut any presumption as to the safety and efficacy of that other country's asylum procedures (see, for example, *MSS v Belgium*,<sup>6</sup> *NS and others*<sup>7</sup>).

### *Access to COI within judicial proceedings*

Judicial instances vary widely in the ways in which judges have regard to COI in asylum-related cases. Sometimes judges may simply rely on the COI which has been put before them by the government. Sometimes judges may simply rely on what has been put before them by the government and the claimant. Or judges may (inquisitorially) take active steps to obtain COI themselves.<sup>8</sup>

In relation to COI produced by the government, there can be due process issues as to whether this has been (fully) disclosed or made available to the claimant. Suppose, for example, the government relies on COI saying that in X's country of origin there has been no victimisation of oppositionists, but this has not been shown to the claimant who, if it had been, may have been able to adduce countervailing evidence.

In relation to cases in which the judicial instance relies solely on what has been put before it by the government and the claimant, issues may arise when on further challenge it transpires that vital COI was not referred to by either side. The government representative and the claimant may not have been aware of a recent major country report which if the court had known about it may have made a difference to the outcome. On that basis the judicial instance may be asked to re-open the case or a higher judicial instance may be asked to quash the decision of the lower judicial instance.

As regards situations where judges themselves take steps to obtain COI (for example, with the help of their own research assistants), issues may arise as to whether the parties have had a proper opportunity to consider and address the significance of this COI. Even if both parties have had a proper opportunity to address it, it may be that the claimant, through lack of any or competent representation, is unable to understand or analyse its significance (for example, in a case where there are numerous country reports). This might be a particular problem

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<sup>5</sup> See *EU Council Regulation 343/2003*.

<sup>6</sup> [2011] INLR 533, 31 BHRC 313, (2011) 53 EHRR 2, [2011] ECHR 108.

<sup>7</sup> *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, European Union: European Court of Justice, 21 December 2011.

<sup>8</sup> In the European context, see Hungarian Helsinki Committee, July 2011, n. 3 supra p.5: "The judiciary currently employs a wide range of practices to obtain COI, and there is no majority (let alone common) approach towards this issue. Judges in some jurisdictions obtain country information themselves (from the court's own COI service, the administrative asylum authority, an independent state funded COI service, professional nongovernmental COI providers or other sources) while in others they use only the COI provided by the parties."

in “generic” cases in which the decision of the judicial instance will identify risk categories or risk factors in a particular country and so have consequences for similarly situated asylum seekers in (perhaps many) other cases.

There may be issues relating to whether a court or tribunal involved in the judicial review of asylum decisions is able to admit new evidence or, if not, what the legal consequences of that are. There may be issues as to whether a court or tribunal can have regard to the latest COI (*ex nunc*) or only the historical position.

There may be issues concerning the use of anonymous evidence (for example, from a host country’s foreign embassy(ies)) or evidence which, because it potentially affects national security, might be requested to be dealt with in secret.

Within Europe there may soon be an issue of what the judicial reaction should be to common European COI produced by the European Asylum Support Office (EASO) under EC Regulation 439/2010.

## **Report of Proceedings**<sup>1</sup>

While the following report of proceedings is divided into two sections, the first on governmental use of COI and the second on judicial use of COI, it should be noted that many of the issues raised in one section also apply to the other and vice versa. There is occasional duplication of issues, or a split of the discussion of a particular issue between the two sections for this reason. However, the absence of duplication between the two sections on a particular issue should not, in general, be interpreted as an absence of relevance of that issue to both. This report seeks to combine a description of the proceedings with a reflection by the author of the report on the underlying trends that emerged during the day's discussions.

**Morning Session:** chaired by Mark Ockelton, Vice President of Upper Tribunal (Immigration and Asylum Chamber), UK

### **Governmental use of COI**

The discussions were opened with the statement that it is more desirable all round, in those countries in which asylum applications are examined in the first instance by the government, for that decision to be correct. In some countries there may be no higher instance to which the claimant can appeal, and even if there is, to have to do so unnecessarily is a waste of time and money and can have various detrimental effects on the claimant. Also, there is no country in which there is the possibility to appeal against a positive decision.

### ***Surveying the landscape of COI procedures***

The recently established European Asylum Support Office (EASO) has a dual role with regards to COI. First, it is tasked with building the general capacity of the asylum determination systems in European Union (EU) member states by, for example, supporting strategy workshops or providing IT support. Second, it will produce some COI reports, although this function will be less of a focus than the first. The first such report, on Afghanistan, produced in association with the UK Borders Agency (UKBA) is forthcoming and will be publicly available in five European languages including English. This and future reports will be prepared according to a methodology which aims to produce documents which are not purely factual in nature, but which also include analysis of the facts such that they make indications of recommended policy regarding assessments of nationals of the country in question across all EU member states. The preparation notes for all reports will also be publicly available.

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<sup>1</sup> By Simon Bennett, RLI.



The asylum determination systems of several states were then discussed starting with the Australian system.<sup>2</sup> There are two kinds of COI therein. The first kind consists of general information about the country in question, for example, it will outline the security situation in country X, or the rights of lesbian, gay, bisexual and trans (LGBT) people in country Y. This is produced from publicly available sources such as NGO or governmental reports (including those of other governments). Since 2008, all of this kind of information that is available to decision makers is available online following complaints about transparency. The second kind of COI is in a database available to decision makers but not available to the general public. This information is specific in nature, such as the answers to questions about the situation of a particular claimant. It is produced by searching the generally available information, but also by, for example, sending a request to the Australian diplomatic mission in the claimant's country to attempt to gather the necessary information. If any of the second kind of information is likely to have a negative effect on the claimant's asylum decision then it must be made available to them. The government cites issues of cost for not making the second kind of information publically available. In a recent pertinent development, a large number of Australian Refugee Status Determinations (RSD) that had been conducted 'offshore' were recently set aside. In around two thirds of those cases, the reasons for doing so related to inadequate disclosure of the COI used in coming to the negative decision. In future all RSDs must be conducted 'onshore' and it is required that the applicant understands at least those important points in the COI which are being brought to bear in their particular case.

In the UK, the approach and structure of UKBA's approach to researching COI has not changed much over recent years. Open source information is used as are some subscription sites, along with data from other countries' fact-finding missions and general country reports. UKBA's own capacity for fact-finding missions is very limited due to a lack of financial resources. There is limited direct engagement with the COI units of other countries, but there is an initiative to engage strongly with the EASO. UKBA COI staff will identify and fill gaps in COI based on feedback from Case Owners (the initial decision makers in the UK's asylum system). Once a draft COI report for a given country is ready, it will be circulated amongst various NGOs and academics, and reviewed by the Independent Advisory Group on Country Information (IAGCI).<sup>3</sup> All of the resulting final reports are available on the UKBA intranet for Case Owners and on the external part of the UKBA website. Sometimes questions from Case Owners on particular COI and the answers thereto are also published internally. The UK also provides a good example of the 'sharp edge' of

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<sup>2</sup> See Appendix 2, Paper 1 for further details.

<sup>3</sup> For further information on the IAGCI see: <http://icinspector.independent.gov.uk/country-information-reviews/>

debates around disclosure because of procedures used at the Special Immigration Appeals Commission whereby evidence used to support a negative decision need not be disclosed to the claimant if doing so is deemed to have the potential to compromise national security.

There are challenges facing the institutions responsible for delivering the European Commission's initiative of a common COI 'portal'. Despite having common standards on paper, in reality the RSD landscape in Europe is highly fragmented. Fifteen EU states have specialised governmental agencies handling COI work with dedicated resources and clear standards for producing and using COI. The remaining states have little or nothing in terms of dedicated resources so decision makers must conduct their own research. In some cases their ability to do so may be limited by the fact that a large proportion of the pertinent information is not available in a language which they can understand. Action plans will focus on building the COI-related capacity of decision makers in the latter groups of states, beginning with the dissemination of standards for COI (substantive and procedural) and of COI reports as they begin to be produced by EASO. Building COI-related capacity is seen as a first step towards building the capacity of those states' systems more generally. One participant suggested that EASO might usefully produce statistics on which EU members states are admitting claimants from which countries of origin, with a view to identifying systemic protection gaps where large discrepancies have arisen.

One speaker invited participants to remain mindful of the status of asylum and RSDs in the global South. For example, in Colombia, there is not access to a judicial instance – governmental decision making is final, though it is often augmented by UNHCR resources. Bearing in mind UNHCR's similar role in many countries, do the above discussions on governmental use of COI extend to UNHCR as well?

### ***The role of UNHCR***

UNHCR is a provider of COI in two ways. First, via the *Refworld* website, selected information from external sources is republished. Second, UNHCR also produces its own COI, which is not limited to factual information but also includes eligibility guidelines. The COI team itself is quite small, so it relies to a considerable extent on information from UNHCR field officers. It is therefore the case that the quality and volume of information varies depending on the type and size of the mission in the country of interest (for example, are programmes in place for the monitoring of returnees and internally displaced persons?). If the mission in a given country is small, then a greater proportion of publically available information will be used to augment UNHCR's own data.

UNHCR advocates for all countries conducting RSDs to fully disclose all COI and the methods and sources used to produce it. This might go some way to mitigating the serious issue of equality of arms that comes about from differences between the information gathering resources of governments' lawyers and of claimants' lawyers, which becomes particularly acute with very case-specific information. For example, the government of country X garners COI in country Y, which is specific to the case of a national of Y claiming asylum in X, by having its diplomatic mission in Y pay a local agent. In the overwhelming majority of cases, the claimant will not have the resources to conduct a similar information gathering exercise with a view to presenting countervailing evidence that engages directly with any evidence which the government of X has acquired that would impact negatively on Y's claim.

In many countries, the claimant's counsel would not have the opportunity to examine and challenge the credibility of the information or its source. Furthermore, even if the information is shared with the claimant's counsel in the particular case, if it is not subsequently released into the public domain, then the government of X builds up over time a 'database' of case-specific COI which it can redeploy in similar cases in future. Claimant's counsel to each new case involving a national of Y will have, at best, access to a tiny fraction of this information if, for example, law firms retain and index the information on cases they have been instructed upon.

UNHCR's 2010 report on improving asylum procedures found that while some states did consistently provide "detailed references" and "pertinent analyses" of COI used, many states systematically failed to refer to any COI whatsoever or failed to elaborate on its use in RSDs other than by citing or applying it in the most general terms.<sup>4</sup> Since publication, some positive changes have been observed mostly in those states that already have well developed RSD institutions, but beyond those states, little improvement has taken place.

### *Disclosure of COI*

The issue of disclosure is of particular importance in cases of denial of international protection for an asylum claimant. Should the same guarantees be applied to immigration cases and information that is disadvantageous to the claimant as are applied to cases in criminal law with regards to disclosure of evidence unfavourable to the defendant?

One opinion offered was that it is necessary to separate out the COI itself from the sources thereof when commenting on disclosure. Consensus on there being justification for withholding the latter in some cases is more likely to be forthcoming.

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<sup>4</sup> *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, UNHCR, 2010, p.15.

A second opinion questioned the broad application of the principle raised in the first opinion with reference to the example of COI gathered in relation to a claimant with diabetes who was fighting return to Eritrea. It was said by this contributor that the UK government claimed to have information that supplies of insulin in Eritrea and access thereto were adequate and moved to reject the claim on account of that purported fact. It transpired that the source of this information was an email from a single member of diplomatic staff in the country, with no supporting information. This raised the question of how much weight the case-specific COI here could reasonably be given. If the source was a survey of relevant staff at several hospitals then considerable weight could be afforded, but if it was simply the opinion of one undisclosed official then little or no weight could be reasonably afforded. A third speaker pointed out that there would certainly be cases where sources of COI would need to be protected, for example local NGO staff. It was suggested that good practice might consist of always providing specific information on how the source was contacted (for example by email, or in a personal meeting) and specific but anonymous information on the nature and quality of the source. A discussion also ensued about the potential for the disclosure of COI in some instances to compromise assessments of claimants' credibility. If the information on which a particular question to the claimant is based is made publically available, and that question is intended to test the credibility of the claimant, then could any well-informed claimant not answer correctly by having done thorough research in advance of their interview or hearing?

### *Selective use of COI*

Several comments were made on the apparently selective use by governments of COI – the prevailing opinion was that it is mostly used to support negative RSD outcomes. For example, in Israel, COI and case-law was said by one participant to be used very selectively, to the extent of “shopping around” in the district courts, which are responsible for RSDs. This is in a context where very few lawyers are specialists in refugee law and the details of the provisions of the 1951 Convention Relating to the Status of Refugees<sup>5</sup> (The 1951 Convention) are not widely known by lawyers.

In the UK, UKBA Case Owners frequently deploy COI in the formulation of detailed and complicated status denials. It was said by one participant that academic research has shown that UKBA's Operational Guidance Notes (OGNs)<sup>6</sup> often appear to be highly selective in their use of COI, which is not surprising bearing in mind their

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<sup>5</sup> *Convention Relating to the Status of Refugees*, United Nations General Assembly, July 1951.

<sup>6</sup> UKBA OGNs draw on COI to provide Case owners with general advice on vulnerable groups in the country in question and guidance on eligibility for international protection:  
<http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/>

status as operational documents in an adversarial system. With such analytical reports, there is a necessity for high-quality filtering of the information that goes in to them. In the UK, particularly since cuts to the budget of the Legal Services Commission, the practice of citing information from cheaper sources (for example, from a PhD student working on the country in question, rather than a professor). It is left to the individual decision maker's discretion as to how to treat such information.

Several examples were given of occasions when COI appears to have been edited following its use in an RSD, which appears to undermine any claim that its function is purely investigative. For example in the UK, six words disappeared from the OGN on one country following their being quoted in a positive decision.

### *The collection and use of COI - investigative or adversarial?*

Is the government role in collecting and using COI an investigative or an adversarial one, and should it be? The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status<sup>7</sup> (The UNHCR Handbook) says that there is a shared duty between the examiner of the claim and the claimant to “[...] ascertain and evaluate all the relevant facts [...]”, to the extent that the examiner should, if appropriate, produce evidence in support of the claimant's application. This is ‘soft law’ however and does not appear on the statute books of many of the states parties to the 1951 Convention. The requirement in the UNHCR Handbook is nonetheless of the utmost importance for three reasons: i) there are obligation on states parties to the 1951 Convention to act with the highest levels of concern and scrutiny when conducting RSDs, ii) the UNHCR Handbook is a guide to the practical implementation of international legal obligations and should therefore be taken very seriously, and iii) following such guidelines goes some way to redressing the imbalance of power that is present between the claimant and the state to which they have made an asylum claim.

It seems that even in states where there is a statutory duty to investigate, in practice this does not always happen. For example, interviews with claimants often are, or become, adversarial in nature. Where does this leave questions of duty and good practice with regards to asking questions to which decision makers already know the answer, in order to determine credibility? A possible response is that the duty is to make the highest quality of decision possible, so any reasonable method may be used including asking such a question. It is not the case that such an approach would always be to undermine a claim anyway – it may be used to buttress a claim instead so it is important not to exclude such methodologies out of hand.

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<sup>7</sup> *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UNHCR, 1979 (re-edited 1992), paragraph 196.

In Canada, Judges have criticised the RSB for doing microscopic analyses on all of the details of a claim to establish credibility. It should be the credibility of the substantive and critical issues in the case which are examined, not minutiae such as which day event X happened on, if such information does not apply per se to the RSD.

Issues emanating from the machinations of domestic politics and international relations can also filter down and affect the nature of RSDs - a phenomenon which is compounded by the questionable independence of governmental decision makers in some systems. In the European context, the fair trial protections which normally apply to states parties to the European Convention on Human Rights, under Article 6, do not apply to RSDs.<sup>8</sup> Some participants expressed the view that all RSD procedures should be investigative in principle and in practice, however barriers to realising this paradigm exist, for example, in the UK, whenever an independent body has been mooted, the resulting loss of ministerial oversight has been given as a reason not to proceed with that change.

### *The role and competence of COI researchers*

It is important to distinguish in these discussions the difference between the role of governmental COI research units (in countries where such agencies exist) and the decision makers who utilise their outputs. COI reports can be used in an adversarial manner regardless of the values and procedures governing their production. There is also an issue of the accuracy of such reports as time passes. UKBA, for example, aims to refresh the reports on the top twenty countries of origin every six months. While there is a more general issue about standards and standardisation of such systems, any such approach must be sensitive to the fact that a changing situation in a given country can mean that a refreshing frequency of six months is not adequate even if this had been the case very recently. Possibly even more important than the need to update the available information as often as required is the need for vigilance in removing information that has become inaccurate from the public domain, and from access by governmental and judicial RSD decision makers.

In instances where decision makers can instruct the COI researchers, how might this compromise independence? How about if they work for the same agency? In Poland, COI researchers are not permitted to see the case file that has generated the request for information. In New Zealand, an independent COI research unit was set up in the mid-1990s for use by the governmental Refugee Status Branch (RSB) and by the judiciary. While both the RSB and the Refugee and Immigration Risk Research unit (RIRR) both sit within the government, the lines of responsibility only converge at

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<sup>8</sup> *Asylum and the European Convention on Human Rights* (3<sup>rd</sup> edition), Nuala Mole, 2003, Strasbourg: Council of Europe Publishing.

the level of the Secretary of the Department of Labour. Consequently there is a general consensus amongst legal professionals and also judges that the RIRR is genuinely independent. The names of claimants are withheld from all requests for information. If a judicial request arrives at the RIRR which appears to closely resemble a request which was received from the RSB within a few months of the latter, then it will not be assigned to the same researcher. As a result of these safeguards against bias towards the government, very few of the claims that are referred to judicial review (JR) are done so on grounds relating to COI issues. When the JR is initiated on grounds relating to the COI used, it is generally not because of an issue of the quality, but a dispute about the omission of some obscure piece of crucial information. All decisions are listed on a database with a sophisticated search engine which is available to the general public. The COI used to arrive at the decisions is not directly available to the public, so there is a practice amongst judges of fastidiously citing all COI used such that it is effectively indirectly available most of the time.

An issue closely related to that of COI researchers is that of the potential for arguments about diplomatic relations to compromise the independence of the RSD procedure, and particularly the use of COI. Such arguments sometimes have some value, but on the other hand they are sometimes used inaccurately. Two examples from the UK were mentioned by one participant to illustrate the latter situation. First, when many ex-members of the army's Gurkha unit wished to settle in the UK, initial denial of this right was justified on the grounds of damage to diplomatic relation with Nepal. It eventually transpired that the Nepalese government had no problem with the arrangement at all. Second, former British nationals from Hong Kong who wished to settle in the UK were told that it would be a diplomatic disaster to even ask the Chinese authorities about making arrangements for them to do so. Again, once the question was asked following intense lobbying of the UK government, the Chinese government was said to have expressed no negative sentiments whatsoever.

### *Use of standard or general information in multiple RSDs*

When governmental decision makers utilise COI, especially if they are including a 'standard paragraph' that is regularly used in RSDs of nationals of a given country, then such information must be taken in context and the supporting information must have been considered. One possible way of improving practice in this area is to reduce the time pressure on decision makers that exists in many of the high volume asylum systems. In Canada only 1% of first tier tribunal decisions are overturned. In many of these cases the decision is reversed because of the inappropriate use of a 'standard paragraph', for example by failing to refer to the particulars of the case. An example was given by one participant of a case they had seen wherein a standard

paragraph on spousal abuse in the claimant's country of origin had been instrumental in denying protection to them, but a crucial detail of the particular case – that the abuser was a police officer – had not been taken into account. Decision makers must also be careful in making use of COI from other jurisdictions which may have different standards or approaches to its use. A final universal issue with regards to careful use of COI is the need for decision makers to be trained on the issue of private sphere persecution in some countries. This can lead to the 'invisibility' of, for example, details of the abuse of women in the COI for many countries. It was the opinion of the speaker that this issue is particularly acute with regards to denials on the grounds of the existence of an internal flight alternative in cases of female or LGBT claimants.

This raises the question of who should assess the 'template' or 'standard paragraph' when the range of cases supposedly covered by them could be so wide? For example, the failure of a given claimant to answer a series of factual questions about their purported religion, membership of which is the basis of their claim, does not equate automatically to proof of that claimant's non-membership. A useful example is that of the Alawite sect of Islam – only a core group of elders are familiar with the seminal texts. The same applies to affiliation with a political party – someone may be a member or an ardent supporter without being able to list information on the senior figures in the party, or on its internal structures. Someone may be a recent convert to a religion or political ideology, and even if they are a long-standing affiliate, an absence of factual knowledge may not undermine their claim of conviction, which is an internal state. More importantly when it comes to persecution, an absence of factual knowledge may make no difference to perceptions of the claimant held by the persecuting agents, whether they are governmental officials or non-state actors.

### *Improving the sustainability of first instance decision making*

A consensus appeared to emerge around the table that the provision of competent legal representation for all claimants from the beginning of the asylum process is one possible solution to the issue of the large numbers of first instance denials of status that are overturned on appeal in many jurisdictions. UKBA's Early Legal Advice Project and its precursor, the Solihull Project, showed overwhelmingly that providing proper legal representation two weeks in advance of the first instance decision leads to higher quality, sustainable decisions. While this kind of 'front-loading' of high quality decision making can look expensive on a *prima facie* assessment, it will often be the case that money is saved in the long term by adopting such an approach.

The UK Home Office has cited as an additional problem the fact that most first instance decision makers are young graduates and staff turnover is high. It was only



in 2007 that the recruitment prerequisite of a university degree was introduced, along with the requisite increase in salaries. One participant said that recent moves to roll back this requirement by citing the strength of the systems within which the decisions are made are worrying. More pay is not a panacea however, as there is also a phenomenon within UKBA of high quality recruits moving on to other positions within the agency or outside of it shortly after being taken on as Case Owners.

Afternoon session co-chaired by Jacek Chlebny, Rapporteur, IARLJ Working Party on Procedures and Hugo Storey, Rapporteur, IARLJ Working Party on COI

## Judicial use of COI

### *Disclosure of COI*

The discussion on use of COI during judicial RSD procedures was opened by examining the meaning of *effective* disclosure in reference to COI that is produced by the government. For the disclosure of COI pertinent to a given claimant's case to be meaningful to the claimant's counsel, the information must be made available in good time for them to be able to effectively engage with it. Problems with an absence of effective disclosure can be created or exacerbated if the claimant is subject to an accelerated RSD procedure, or if they are being detained (for example, the claimant cannot easily access members of their community to help them to translate COI materials). It was said by one participant that when adjournments are requested in such cases, they are frequently denied on the grounds that the COI in question is available in the public domain. However, particularly with refugee lawyers often working on multiple cases, such accelerated procedures do not afford adequate time to engage meaningfully with either the substance of the COI or any problems with its quality or sourcing. Claimants subjected to such procedures often end up submitting fresh claims for asylum within a couple of weeks of exhausting their appeal rights as information that was requested arrives on their counsel's desk. This is a very poor use of resources all round. Also, refugee law cases are meant to be about whether or not an individual needs protection so COI disclosure must be practical, not just nominal.

In New Zealand, the file on a claimant's case is given to the judge that will rule on their appeal several weeks or more in advance of the hearing so that the judge can carry out any necessary preparatory investigations. Any information which they unearth and which they feel is potentially prejudicial to the case must be disclosed in full to the claimant in adequate time for their counsel to formulate a response. The existence of such norms and laws in New Zealand means that any kind of accelerated RSD procedure would never be introduced – to do so would be seen as being, in practice, the same as failing to disclose potentially prejudicial COI altogether. It is of course noteworthy that the volume of cases passing through the New Zealand system is much lower than that passing through some of the other highly developed systems. One contributor questioned how the New Zealand process can mean that the claimant has knowledge of the full range of COI consulted by the judge and whether that is properly transparent.

Turning to the Netherlands, COI of a general nature is routinely collected by staff of the Foreign Affairs Ministry and published online. Judges will additionally try to gather information particular to an individual case as it progresses. They may look online, or send requests to the Foreign Affairs Ministry staff for information which is proving harder to obtain. This information is not made available to the general public but is made available to the claimant at the same time as it is made available to the judge. The methods of gathering the information, including sources, are not made available to the claimant.

In Canada, which does not have a governmental decision making instance, fully indexed versions for all National Documentation Packages (NDPs) are publically available on the Immigration and Refugee Board of Canada website. These consist of documents containing general information on the country in question, for example on the rights of LGBT people, or on the availability or otherwise of internal flight alternatives for members of certain persecuted groups. Case-specific information requests may also be made by judges to fill in any gaps and this information is not made publically available. A third kind of information is that which is general rather than case-specific, but which is missing from the NDP and only comes to light during case-specific enquiries. This information will be added to the NDP so that it is generally available in the future. In the written grounds for Canadian decisions, reasons for denying (or awarding) protection must be given as must a discussion of the adequacy thereof. There is however in practice considerable inconsistency as to how and how much of this information is disclosed.

### *The role and competence of COI researchers*

Several participants noted that apparently undue deference is given to certain kinds of COI by decision makers. This phenomenon is common with regards to COI produced by governments and there also seems to be a preferential status that is attributed to information that has been formally published. Who can legitimately be called a country expert? EU guidelines state that a COI researcher is not classifiable as a country expert – their role is secondary desk-based research and they will be required to do research on many different countries in the course of their career. Some long-standing COI researchers who have spent many years working on one or more countries consistently may attain the status of being an expert on country X, or region Y, but this is not a given and decision makers must recognise this distinction and afford appropriate weight to the associated information. At least in the more developed asylum systems, improvements in the norms for the need for authoritative COI have improved – COI used to just come from governments' foreign ministries whereas now dedicated staff work on it who are certainly experts in their field, but their field is country research in general, not one particular country

or region. An additional consideration is whether or not professional research ethics standards should be applied to all COI gathering practices.

This theme of the competence of the person(s) conducting the research takes an interesting turn in jurisdictions where judges are given investigative powers. They can or must then take steps to fill in gaps in the COI with their own research, but is this practice dangerous bearing in mind that research is not their *forte*?

Some countries send missions to acquire or develop their COI. Canada has sent two missions in recent years following complaints from decision makers that they were consistently receiving conflicting and outdated COI on Mexico and Czech Republic. The notes from these missions were, on the advice of a coalition board of stakeholders, made public, both for reasons of utility and to assuage critics who had said that the government uses COI reports primarily for denials. In the Canadian case, missions were selected as they seemed to be the best solution to the problems with the COI raised by decision makers. More general considerations with missions include their composition, terms of reference (ideally they should they be drawn up following consultation with decision makers, civil society representatives and other stakeholders) and access issues – a governmental delegation is unlikely to be able to gain the kind of access to vulnerable groups that an independent expert conducting a less ‘visible’ visit might be able to arrange through their established network of governmental and non-governmental contacts in the country in question.

When a decision maker, claimant’s counsel or any other actor questions the competence of a COI fact-finding mission, this should not be seen as being necessarily indicative of distrust – it is a reasonable step to establish what training the delegates have with a view to understanding what kind of weight should be given to the information they gather and the context in which it should be considered. The same applies to the staff of diplomatic missions, whose knowledge of the countries in which they are present can vary dramatically both within and between missions. There are no established standards for the quality of such fact-finding missions, or for investigations carried out by diplomatic staff, yet too much weight is often afforded to the information produced because of a preferential assessment of the quality of the source which is not necessarily justified. One speaker pointed out that it will very often be the case that if an unfamiliar person(s) enters a village and asks a lot of questions about a person or event, information will often not be forthcoming, or the existence of the person or the occurrence of the event may be automatically denied. This may be a more acute issue if a governmental representative or mission from a foreign country is doing the asking. Decision makers must be mindful of such limitations to the ability of governmental research units or missions to reliably acquire adequate information.

## *Outdated COI*

The issue of outdated COI was revisited, beginning with an illustrative example. UNHCR has recently been developing and promoting internationally a new policy on Rwanda which advocates for the revocation of refugee status for some Rwandan nationals. After international pressure, the policy was changed to only refer to people awarded protection status between 1956 and 1998 – anyone who fled since 1998 should not have their status revoked according to UNHCR. This illustrates an issue with updating out of date COI. However, as there is a fear that many decision makers will read the headline of the policy but will not read the large stack of accompanying documents on exemptions, with the consequence that their general disposition towards Rwandan claimants will shift away from awarding protection status to new claims.

Also noteworthy is the distinction between UNHCR protection positions (statements on who should or should not receive protection) and the underlying COI. For example, in the Afghanistan eligibility guidelines, many of the groups highlighted are still considered to be at risk (i.e. the protection position with regards to them remains unchanged), but the examples underlying the protection position as found in the footnotes are outdated. In theory decision makers can find their own examples to bolster the protection position through their own research, but practicalities may make this difficult. This can be particularly difficult in situations of generalised violence and complementary protection. UNHCR is able to publish between four and six sets of eligibility guidelines per year. In prioritising these, considerations include the needs of UNHCR decision makers, the absolute numbers of claimants coming from each country of origin, and the emergence of divergent trends between different states in terms of the outcomes of RSDs of claimants from the same country of origin.

On the other hand, the protection needs of a given group can change very quickly. UNHCR's official position is that protection positions stand until they are updated. This is subject to criticism as UNHCR's responsiveness may not always match changes on the ground with the requisite speed. Old COI should not always be considered to be outdated COI. However, assessment of a claim will often require reference to information about the situation in the claimant's county of origin several years prior to the assessment – the claimant may have spent a long time travelling to their country of asylum seeking, or they may have been present in the country for many years prior to seeking asylum. Such considerations have given rise to a discussion within UNHCR around how better to communicate with their own decision makers and those of member states as to which parts of COI should be considered as standing unless retracted or updated, and which should not. Similarly,

how do decision makers in countries which rely on COI produced by other government know when it has become outdated?

Regardless of improvements in standards with regards to the classification of COI as up to date, or out of date but still relevant to some RSDs, in any asylum system which is nominally or practically adversarial, both sides in a given case may present arguments concerning the admissibility or inadmissibility of a given piece of COI on the basis of its being outdated. Each side would be selective about which pieces of COI it would like to be considered and which it would like to be disregarded, and then formulate arguments for their respective validity or otherwise accordingly.

### *Avoiding conflict with international judicial bodies*

The day's discussion sessions closed with considerations of how the checklist on COI procedures, which is the desired outcome of the process of which this roundtable is the first stage, might interact with judgements handed down by international judicial bodies. The example used was the Court of Justice of the European Union. It is desirable that such a checklist acts to complement, rather than clash with, the judgements of that court. The former is perfectly possible as the relevant treaties contain 'more favourable' clauses which highlight the fact that member states are at liberty to introduce higher standards of procedures than the minima outlined in the treaties. The court has tended to eschew extensive references to Article 47 (Right to an Effective Remedy and to a Fair Trial) of the EU Charter of Fundamental Rights<sup>9</sup> in considerations of due process and COI, choosing instead to draw on Article 39 (Right to an Effective Remedy) of the Procedures Directive instead. It is hoped that the court will develop case law which elaborates on how the standards in the treaties apply to, for example, the use of secret evidence in immigration hearings which are subject to member states' domestic law on national security and secret evidence.

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<sup>9</sup> *Charter of Fundamental Rights of the European Union*, European Union, 7 December 2000, 2000/C 364/01.

## **Round-up of the day's progress**

Refugee law is very different to many other branches of law for at least three reasons: i) one party is an individual claimant while the other party is a state, ii) the substance of the claim makes extensive reference to the state of affairs in other states, and iii) the focus is on the future instead of the past. This presents decision makers with a different task to that which must be conducted in other branches of law which sometimes pit two experts representing two parties against one another. For most legal decision makers the task of examining a case where there is a dispute about facts with supporting evidence presented by both sides is what is normally required, but for decision makers in refugee law, the setup is generally not so simple.

The overarching emerging theme was that following high quality procedures with regards to the collection and use of COI from the very first stages of the RSD process is desirable for all concerned. There are three types of outcomes to cases which most clearly illustrate the importance of the theme of the day's discussions: i) the claim is not looked at again because the outcome was positive, ii) a negative outcome is deemed as final because, for example, the claim has been determined through an accelerated procedure, and iii) the claim is decided primarily on the basis of COI, for example, in the case of an unaccompanied minor. The fact that in some jurisdictions there is a trend towards claimants being unrepresented at first instance means that to have COI is a lot better than having nothing in terms of accurate RSDs. This arrangement is problematic however, as it means that any issue with the COI may only come up during engagement with the first judicial instance, at which point it may be too late for the claimant's counsel to engage with it meaningfully. Furthermore, the fact that COI, and judgements based thereon, may be relied upon in other jurisdictions makes the importance of fastidiousness even greater.

### ***Basic standards for the collection of COI***

On the collection of COI, ensuring the independence of the gathering authority and the often related issue of the completeness of the information are paramount. Decision makers must also be mindful when turning to COI of what it is reasonable to be able to obtain information about – an absence of information on a subject is often not simply indicative of an absence of risk. Expectations of what information may or may not realistically be garnered from a given source will vary with the source and decision makers should give more or less weight to such information as appropriate.

While it is of course of great importance to obtain the real facts and to take all reasonable steps to do so, the exercises conducted to do so must be conducted in a manner which does not endanger the sources of the information, the claimant

(should they be returned to their country of origin), any relatives or associates of the claimant, and any future similar claimants.

The failure to update COI with a frequency that adequately matches the rate of change of the situation in the country in question can be one of the most damaging shortcomings of COI production agencies. When, for whatever practical reason, presenting the most up to date COI to the decision maker in every single RSD is not possible, this must be very clearly indicated to them.

### *Basic standards for general use of COI*

On basic standards for general use of COI, the most salient themes of the discussions were those of disclosure and transparency, and what these really mean. Notwithstanding the need to maintain the confidentiality of individual sources of information in some cases, there must be an opportunity for new information that is brought to bear in a given case to be dealt with by the claimant. For this provision to be meaningful, is it simply a matter of showing the information to an unsuccessful claimant at the time of determining their claim, or is it necessary to provide them with that information well in advance? With regards to disclosing the source itself, such that it can be criticised by the claimant if they wish, in some cases this will be unproblematic, in some cases the source may only be safely indicated in general terms and in some cases it may be necessary for them to remain undisclosed altogether.

When COI is used in an RSD, it must not be used out of context. For example, quotations must not be taken at face value and 'standard paragraphs' or similar must be considered in light of the background information pertaining to the case. Similarly, the word of 'experts' must be afforded a weight which is appropriate to that individual's expertise. Another view expressed was that a broad approach to the meaning of "expert" ensures that relevant evidence is received and taken into account.

In implementing these basic standards, international NGOs such as the IARLJ should perhaps not shy away from promoting systems that are expensive. This is not only in the interests of justice, but in the long-term, for example in reducing occurrences of recourse to appeal proceedings, savings may in fact be made.

At all levels, it is useful for decision makers to remain mindful of the fact that the process of assembling COI is just that, and not the preparation of a case against the claimant. By approaching COI use in a non-adversarial manner, perhaps some of the recurring problems highlighted above might occur less frequently. Likewise it is useful for decision making processes at this level to afford claimants adequate time to marshal information themselves.



### *Producing guidelines on procedural aspects of the use of COI*

Looking forward, everyone agrees having COI is a good thing but as soon as the specifics of due process guidelines are discussed, the situation is less clear. The day's discussions highlighted a need for, and a willingness to work towards, improvements in procedures relating to the gathering and use of COI from all parties present. To what extent should the guidelines constitute mere minima and to what extent should they encourage the best standards of practice? The IARLJ will now work towards the production of guidelines for governmental and judicial decision makers on this topic, which should be read in conjunction with the 2006 guidelines on assessing the substantive content of COI. The format will most likely be similar to the 2006 guidelines - there will be a checklist comprising a single side of A4 paper and a then a longer explanatory document which accompanies it.

It is desirable that the guidelines are congruous with the situations in which they will be read (for example, with previous and forthcoming judgements of the Luxembourg court in Europe as mentioned above). It is neither acceptable practice nor a constructive approach to try to anticipate and prescribe forthcoming judgements in other countries, so the formulation of the guidelines must be sensitive to this.

Participants were encouraged to continue to make contributions to the process of producing the guidelines and to encourage their colleagues and associates to do the same. Written submissions will also continue to be accepted until the end of June 2012. In particular, the IARLJ would be keen to receive information if anyone feels that a particular proposed provision will not work somewhere in the world.

## **Appendix A - List of Participants**

Sebastiaan de Groot (IARLJ, The Netherlands)

Bostjan Zalar (IARLJ, Slovenia)

Jacek Chlebny (IARLJ, Poland)

Joseph Krulic (IARLJ, France)

Martin Treadwell (IARLJ, New Zealand)

Jolien Schukking (IARLJ, The Netherlands)

Rolf Driver (IARLJ, Australia)

Kyrie James (First-tier Tribunal Judge, UK)

Lorraine Mensah (First-tier Tribunal Judge, UK)

Hugo Storey (IARLJ, UK)

Bernard Dawson (IARLJ, UK)

Judith Gleeson (UTIAC, UK)

Mark Ockelton (IARLJ, UK)

Brian Goodman (Immigration and Refugee Board, Canada)

David James Cantor (Refugee Law Initiative, UK)

Roland Schilling (UNHCR)

Blanche Tax (UNHCR)

Alexandra McDowall (UNHCR)

Nino Hartl (EASO)

Lise Penisson (EASO)

Anita Athi (UKBA, UK)

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Roseanna Atherton (UKBA, UK)

Stephanie Huber (Asylum Research Consultancy, UK)

Elizabeth Williams (Asylum Research Consultancy, UK)

Maurice Wren (Asylum Aid)

Bethany Collier (CORI)

Reinhold Jawhari (ACCORD, Austria)

Alison Harvey (ILPA)

David Chirico (Pump Court, UK)

Mark Symes (Garden Court, UK)

Tori Sicher (Sutovic & Hartigan Solicitors, UK)

Sheona York (Rights of Women, UK)

Barbara Harrell-Bond (Fahamu Refugee Programme)

Mark van Elzaker (Ministry of the Interior and Kingdom Relations, The Netherlands)

Dr. John Campbell (SOAS, UK)

Dr Alan George (University of Oxford, UK)

Robert Thomas (University of Manchester, UK)

Jill Family (Widener University, USA)

Anna Bengtsson (Swedish Migration Court of Stockholm)

Linda Kirk (Refugee Review Tribunal, Australia)

Simon Regis (Treasury Solicitor), UK

## Appendix B - Papers Submitted in Advance of the Roundtable

### Paper 1

#### An Australian Perspective

*Rolf Driver FM, IARLJ, Australia*

At a basic level in Australia there is transparency in the use of country of origin information (COI) by decision makers dealing with claims for protection under the 1951 Refugees Convention and the Australian *Migration Act 1958* ("the Migration Act"). That is because the Australian Department of Immigration publishes on the internet all COI available to decision makers. However, issues have arisen concerning the non disclosure of country information to particular applicants in relation to their claims for protection.

There is no doubt that, under the general law in Australia, procedural fairness may require the disclosure of COI to an asylum seeker: see *Muin v Refugee Review Tribunal*; *Lie v Refugee Review Tribunal*<sup>1</sup>. In order to modify the obligation imposed on decision makers, the Australian Government enacted a code of procedure within the Migration Act binding first instance decision makers and the Refugee Review Tribunal ("the RRT") which reviews their decisions. The code contains the following key provisions:

Section 424A which provides:

- (1) *Subject to subsections (2A) and (3), the Tribunal must:*
  - (a) *give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and*
  - (b) *ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and*
  - (c) *invite the applicant to comment on or respond to it.*
- (2) *The information and invitation must be given to the applicant:*
  - (a) *except where paragraph (b) applies--by one of the methods specified in section 441A; or*

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<sup>1</sup> (2002) 190 ALR 601

- (b) *if the applicant is in immigration detention--by a method prescribed for the purposes of giving documents to such a person.*
- (2A) *The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 424AA.*
- (3) *This section does not apply to information:*
- (a) *that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or*
  - (b) *that the applicant gave for the purpose of the application for review; or*
  - (b-a) *that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or*
  - (c) *that is non-disclosable information.*

Section 422B which provides:

- (1) *This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.*
- (2) *Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.*
- (3) *In applying this Division, the Tribunal must act in a way that is fair and just.*

The Courts in Australia have accepted that the code relieves decision makers of the obligation to disclose COI which is general in nature and does not relate to a particular asylum seeker: see *SAAP v Minister for Immigration*<sup>2</sup> and *SZBYR v Minister for Immigration*<sup>3</sup>.

In recent years, a further complication has arisen in respect of unauthorised maritime arrivals in the Australian offshore territories which are excised from the Australian migration zone. Amendments to the Migration Act in 2001 prevented offshore entry persons from applying for any Australian visa unless the Minister for Immigration, in the exercise of a personal discretion, agrees to lift the bar. Over time, a parallel administrative process developed for the assessment of asylum claims by offshore

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<sup>2</sup> (2005) 228 CLR 294

<sup>3</sup> (2007) 235 ALR 609

entry persons. The Australian High Court in *Plaintiff M61/201E v Commonwealth*<sup>4</sup> held that the common law rules of procedural fairness apply to that process and that the code of procedure in the Migration Act does not. We have been left in the confusing position of having two parallel processing regimes to which different rights and obligations apply.

The Australian government decided that from 24 March 2012 offshore entry persons would be permitted to apply for onshore protection visas under the Migration Act with the result that henceforth the statutory regime under the Migration Act will apply to all claimants.

Notwithstanding the legislature's efforts to oust the general law, there is still work for the general law rules of procedural fairness to do at oral hearings conducted by the RRT. This is because the High Court has held in *SZBEL v Minister for Immigration*<sup>5</sup> that the RRT must ensure that an applicant understands the essential and significant issues upon which a review will turn, at least where these are not already known to an applicant. This may require in particular cases the disclosure of COI.

In any event, the code of procedure binding decision makers in Australia should be seen as establishing minimum standards. Decision makers are free to exceed those standards and it is appropriate for decision makers to be provided with guidance about internationally recognised standards of due process.

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<sup>4</sup> (2010) 85 ALJR 133

<sup>5</sup> (2006) 228 CLR 152

## Paper 2

### The New Zealand Response - The Nature of the Immigration and Protection Tribunal: Inquisitorial, Adversarial or Both?

*Martin Treadwell, Deputy Chair, Immigration and Protection Tribunal and IARLJ, New Zealand*

The (generally) inquisitorial nature of the Tribunal was confirmed by the Supreme Court in *Attorney-General v Tamil X*<sup>1</sup> in regard to its predecessor, the Refugee Status Appeals Authority (“the Authority”). Today, section 218 of the Immigration Act 2009 (“the Act”) allows the Tribunal to carry out its proceedings in either an inquisitorial manner or an adversarial manner, or both. Even so, for the most part its proceedings remain inquisitorial.

At the same time, importantly, the Act makes it plain that it is the responsibility of a claimant to establish his or her claim to refugee status.<sup>2</sup> In addition, it is the claimant who must ensure that all relevant information that he or she wishes to be considered is provided to the Tribunal before the decision is made.<sup>3</sup> The Act also states that the Tribunal is not obliged to seek any information, evidence or submissions, further to those provided by the appellant.<sup>4</sup>

In spite of these sections, the new Act has maintained the basic premise that the Tribunal may seek information from any source.<sup>5</sup> As reinforced in the Tribunal’s Practice Note 2/2012, the Tribunal may receive as evidence any document, information or matter that, in its opinion, may assist it, whether or not it would be admissible in a court of law.<sup>6</sup> The Tribunal may also inspect and examine any papers, documents, records or things; and require any person to produce these for examination.<sup>7</sup>

#### *The establishment of an independent research unit*

The Tribunal obtains its COI materials from the Refugee and Immigration Risk Research unit (the RIRR)<sup>8</sup>. The RIRR is a specialist and independent research body, which is available to the initial administrative decision-makers (the Refugee Status

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<sup>1</sup> [2010] NZSC 107 (SC), paragraph [35]-[37]

<sup>2</sup> Or protected person status, but this paper will refer simply to refugee status, for clarity - section 135(1), Immigration Act 2009

<sup>3</sup> Section 226(1), Immigration Act 2009

<sup>4</sup> Section 228(2), Immigration Act 2009

<sup>5</sup> Section 228(1), Immigration Act 2009 (NZ); Immigration and Protection Tribunal Practice Note 2/2012 (Refugee and Protection) 10 May 2012, paragraph [24.1]

<sup>6</sup> Practice Note 2/2012, paragraph [12.4]; Clause 8(1), Schedule 2, Immigration Act 2009

<sup>7</sup> Clause 10, Schedule 2, Immigration Act 2009

<sup>8</sup> Following restructuring, the former Refugee Research Information Branch is now named Refugee and Immigration Risk Research.

Branch), the appeals body (the Tribunal) and to both claimants and their counsel. This arrangement aims to ensure equal access. New Zealand does not have a formal process which puts in place standards for researching and assessing COI.<sup>9</sup> However, this is not to say that there are no mechanisms in place to ensure that the obtained COI is sufficient and applied in a procedurally fair manner.

To begin with, the RIRR is staffed by experienced researchers with post-graduate qualifications, who adhere to the Library and Information Association of New Zealand *Code of Professional Conduct*.<sup>10</sup> In addition to researching general country information and highly specific topics on request by any party or decision-maker, the researchers at the RIRR are also trained to assess and offer opinion on the credibility of sources. Further, the Tribunal and the RIRR staff engage on regular basis, by way of meetings and workshops that will enable the researchers to obtain the most relevant information to the members' specific requests.

New Zealand does not have a 'country guidance' decisions system per se.<sup>11</sup> In practice, prior to the hearing, members are able to consider the latest decision(s) containing extensive COI on the particular topic, in addition to updated COI materials from the RIRR. It is important to note that the members always obtain updated information as opposed to merely referring to generic information packs or decisions. Even if a decision on similar facts and country was made recently, members still ask for an update since the last decision was determined (even if only to confirm that the situation is the same since it was last considered).

In terms of the work carried out by the RIRR, the majority of requests they receive are highly specific. The unit does maintain a collection of 'country information packs' which are aimed at providing a broad, up-to-date overview of the situation in a particular country. They are no more than a convenient starting point for personal research, however, and the RIRR does not hold them to be finally authoritative on any topic. This is exemplified by the reality that the RIRR's responses are much more question-specific and rarely contain overlapping material with that in the country information packs.

Two further policies help to enhance the objective nature of the RIRR's responses:

- a) the RIRR's responses are compiled without knowledge of the names of the claimant in question; and

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<sup>9</sup> Rodger Haines QC "Country Information and Evidence Assessment in New Zealand" (paper presented to COI in Judicial Practice, Budapest, 13-15 April 2011), paragraph 2

<sup>10</sup> *Ibid*, paragraph 32

<sup>11</sup> *Ibid*, paragraph 46



- b) where a research topic is requested by the Tribunal which it has already dealt with at first instance, the RIRR team tries to ensure that a different researcher takes responsibility of the new request.

### *The Tribunal's own informal policies regarding COI*

In order to contextualise the Tribunal's policies, it is first necessary to explain that its general approach to refugee claims is "to focus primarily on the credibility of the refugee claimant as assessed against publicly accessible information".<sup>12</sup> In practical terms, this means that once the credible parts of the claim have been identified and the claimant's profile and characteristics have been established (we think of this as identifying "the facts, as found"), the Tribunal *then* goes on to place the facts, as found, against the wider context of the country information, by establishing what in fact takes place on the ground and determining whether this means that the person is a refugee.

For an example, in the Tribunal's decision *AD (Egypt)* [2011] NZIPT 800177, the Tribunal considered the appellant's credibility at paragraphs [33]-[41]. It was accepted that the appellant was a citizen of Egypt who was homosexual and was living in a genuine relationship with another man in New Zealand. The Tribunal *then* considered the COI as to the predicament of homosexuals generally in Egypt. This was set out at paragraphs [49]-[58], and was followed by an assessment of potential breaches of the appellant's fundamental human rights, at paragraphs [59]-[65].

COI can, of course, also be relevant to the credibility assessment (the determining of the facts as found), but it risks muddying the waters here and can be ignored for present purposes. Of course, the policies which follow in respect of the use of COI apply to *all* uses of it.

I turn now to the Tribunal's informal policies.

#### *a. Consistent application*

As to the Tribunal's contribution in ensuring that COI is applied reasonably and consistently in its decisions, there are a number of informal practices in place.

From time to time, for example, it holds workshops for the members to discuss and review human rights developments in a particular country of origin in a category of cases that are being determined at the time.

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<sup>12</sup> *Refugee Appeal No 72668/01* [2002] NZAR 649, paragraph [45], (see also Rodger Haines QC "Country Information and Evidence Assessment in New Zealand")

In addition, fortnightly informal meetings are held to encourage discussion of human rights situation in key countries. It is noted, however, that cases are always determined on the basis of the evidence heard and disclosed in the particular case.

Generally, the Tribunal appoints a panel of two or more members to hear an appeal involving a country of origin which has not previously been considered, or where there have been major changes in the human rights situation in that country.<sup>13</sup> This helps to ensure widespread dissemination of the new information and also to ensure that it is not misconstrued and is given appropriate weight.

*b. Obtaining of information from the RIRR*

As to the members' use of COI and its role in the decision-making process, the norm is that before the hearing, the member sends a COI request to the RRIR. The purpose of the request is for the member to familiarise him or herself with the particular human rights, cultural, and/or economic context of the country; and equip he or herself with the ability to ask more specific questions at the hearing. If new issues surface during the hearing, the member may well send a further COI request during, or even following, the hearing. The newly-acquired information is, of course, also sent to counsel for the appellant if it proves relevant and is to be relied upon.

*c. Adequate time and opportunity for the claimant to consider additional COI*

The Tribunal is required by statute to disclose prejudicial information to the appellant and give them an opportunity to rebut or comment on the information.<sup>14</sup> This is subject to section 230(3), however, which states that the Tribunal is not required to disclose any information or material if the disclosure would be likely to endanger the safety of any person, or the information is classified.

In practice, if additional material is handed to counsel or an unrepresented appellant at the hearing, counsel or the appellant is not expected to comment right away. Counsel may comment on additional information in closing submissions at the hearing, or in additional written submissions after the hearing. If, following the hearing, the member obtains additional COI on which they intend to rely, they must send that information to counsel or the appellant, for further comment. On the other hand, if counsel or the appellant wishes to admit new evidence after the hearing, they can do so with the leave of the Tribunal.<sup>15</sup> In practice, such an application would rarely, if ever, be refused.

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<sup>13</sup> Ibid, paragraphs [42]-[45]

<sup>14</sup> Section 230(1) and (2), Immigration Act 2009

<sup>15</sup> Practice Note 2/2012, paragraph [29.1]

When the appellant is unrepresented, members apply increased vigilance in order to ensure that the process is fair and that it enables the appellant to put their best case forward. With this in mind, lack of counsel can cause the member to proactively seek COI research from the RIRR, out of concern that the appellant may lack the resources to do so. The issues that arise out of lack of legal representation form part of a wider problem, of course, which is one of access to justice. The Tribunal endeavours to remain vigilant to such issues and to use its inquisitorial powers to fill those gaps when they are seen.

The emphasis on the currency of information and the enabling of claimants to provide comment reflects the declaratory nature of refugee law determinations. Conditions in the country of origin are commonly in flux and it is therefore necessary for decision-makers to continue to take into account newly-acquired information. The Tribunal's willingness to make further inquiries also aims to ensure that New Zealand's international obligations are met by accepting a level of shared responsibility in the decision-making process, notwithstanding the statutory obligations on the claimant.<sup>16</sup>

#### *Failure by the appellant to submit relevant COI*

The issues in refugee determination are seen in New Zealand as so important that, where injustice would otherwise be done, the Courts have occasionally gone to extreme lengths to ensure that the person's right to a fair assessment is not lost. Below are two examples of the different ways in which the New Zealand Courts have dealt with the issue of counsel's failure to submit vital COI.

In *Isak v Refugee Status Appeals Authority*,<sup>17</sup> the High Court addressed the impact of a document which, through counsel's oversight, had never been brought to the attention of the Authority. At paragraph 37, Asher J noted that the letter in question could "well have affected the outcome of the plaintiff's appeal by corroborating his claim to be a member of the Ogaden clan" and there was "a real possibility that if the Authority had had [the] letter before it and had accepted as a consequence that the appellant was a member of the clan, it would have upheld [the appellant's] refugee status". It was therefore found that there had been a material error (even though the Authority had made no error itself). The dismissal of the plaintiff's appeal before the Authority was accordingly set aside and a rehearing was directed.

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<sup>16</sup> Allan Mackey and Maya Bozovik "Power of the judge vis-à-vis new facts that happened after examination of the claim by the administrative authority" (paper presented to Asylum Procedure Working Party, Bled IARLJ World Conference, 14 July 2011), paragraph 13

<sup>17</sup> [2010] NZAR 535

In the case of a more recent ‘humanitarian appeal’, however, *RT, DT and LT v Immigration and Protection Tribunal*,<sup>18</sup> the appellants sought judicial review of a decision of the Tribunal.<sup>19</sup> One of the issues was that the Tribunal did not expressly consider material specifically relating to the risk of “well-off” Tamils being held for ransom, because sufficient material had not been put before it. The Court, at paragraph [48], noted that it is the responsibility of an appellant to ensure that all information that the appellant wishes to have considered is received by the decision-making body within the 42-day period for bringing the appeal. The Tribunal’s decision could not be impugned for failing to take into account material that was not before it and which it did not have an obligation to seek out for itself. Crucially, as it was found that the information was unlikely to have made a material difference to the outcome, the application for review was declined.

### *Classified information, national security and special advocates*

As a closing comment, it is appropriate to refer briefly to the newly-created concept of ‘classified information’ in New Zealand. There, the traditional rules of disclosure cease to apply.

The High Court in *Santokh Singh v Refugee Status Appeals Authority*<sup>20</sup> held many years ago that the Authority should make determinations based on publicly available information only. The only exception to this rule, today, is in the context of classified information.<sup>21</sup> Under the new Act, before a decision is made relying on classified information, the chief executive of the relevant agency and the Minister, or the refugee and protection officer, must agree a summary of the allegations and forward the summary to the claimant. The claimant may then comment on the summary.<sup>22</sup> In making the final determination, the classified information may be relied on only to the extent that the allegations arising from the information can be summarised without disclosing the classified information.<sup>23</sup> The person who is the subject of the classified information must be told of the fact that the decision is made using the information, the reasons for the decision, their appeal rights and the right to be represented by a special advocate.<sup>24</sup> Lastly, section 40 sets out the circumstances in

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<sup>18</sup> (HC Auckland, CIV-2011-404-1805, 7 March 2012)

<sup>19</sup> These appeals were initially lodged with the Removal Review Authority under the Immigration Act 1987. Pursuant to section 446 of the new Act, they were determined by the Tribunal, but in accordance with the Immigration Act 1987.

<sup>20</sup> [1994] NZAR 193 (as cited in Rodger Haines QC “Country Information and Evidence Assessment in New Zealand”), paragraph 48

<sup>21</sup> See sections 33, 34, 36, 38, 40, Immigration Act 2009

<sup>22</sup> Section 38(2), Immigration Act 2009

<sup>23</sup> Section 38(3), Immigration Act 2009

<sup>24</sup> Section 39(1), Immigration Act 2009. For special advocate provisions, see the sections related to special advocates: ss263 – 271, Immigration Act 2009.

which classified information may be relied on without requirement for a summary or reasons. These provisions have not yet been applied under the 2009 Act.

*Summary of New Zealand's approach to best practice considerations*

1. Independent COI research unit, available on equal terms to decision-maker, counsel and parties.
2. Highly experienced and qualified researchers in the unit.
3. Disclosure of all information to be relied upon to all parties (when and how depending on circumstances).
4. Access by all, on equal terms, to past decisions of the Tribunal, by sophisticated search engine.
5. Adequate time given to parties to comment on potentially prejudicial information.
6. Vigilance in cases where claimant is self-represented (especially so where English is not spoken and much COI may thus be inaccessible to him/her).
7. Reliance on COI in past decisions *only* where current research establishes still relevant and applicable.
8. Consistency of application by decision-makers (regular skills-update workshops on specific COI)
9. Peer review of draft decisions to ensure, *inter alia*, consistency of application of COI.

Comments for the Roundtable on COI and Due Process

*Sheona York, Legal Officer, Rights of Women*

***Government use of COI***

Research has shown,<sup>1</sup> and practitioners are well aware, of the partial and selective use of COI by UKBA decision-makers, for example, by quoting small extracts to support a refusal, while evidence supporting the claimant's case is to be found a few paragraphs later or earlier in the document (or even, in a case of mine, in the very next sentence). It is easy to see the mischief here. However it is difficult to see how there can be equality of arms in the use of COI, especially for an unrepresented applicant or an applicant in a fast track appeal procedure, without making a formal change to the burden of proof, or introducing a requirement similar to that in the criminal courts vis-à-vis that the UKBA would be legally required to cite any evidence supporting the claimant's case.

Equality of arms, and transparency, is difficult to ensure where the UKBA quotes extensively not just from freely available human rights reports, but from reports of thinktanks, etc, which require a subscription. Should we require that if a report is quoted, the whole report and details of the institution providing it be made available to the appellant and to the Tribunal?

***Use of COI in Determinations***

UKBA decision-makers sometimes rely on specific pieces of COI evidence which are not conclusive, or which are based on only one source, which, if ever cited in an appeal and not challenged, effectively become unchallengeable, leading to the refusal and dismissal of large numbers of applicants. My first example is rather old:

"Ethiopia did not deport Jehovah's Witnesses back to Eritrea" was a one-line sentence from one particular US State Department (USSD) report from around 2002. The original source, I think, was reported to be a comment from the Ethiopian Embassy presumably to the US State Department. This statement, which may well have been Ethiopia's stated public position, was challenged in the accounts of scores of Eritrean asylum-seekers, (accounts of imprisonment, deportation etc by the Ethiopian authorities) whose accounts were backed up by research reports and international legal documents attesting to the 60,000 deportations from Ethiopia 'without due process' during the border war. Those mass deportations, with their lack of due process, were fully accepted and cited in USSD and other COI reports. But in no case

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<sup>1</sup> See, for example, *The Refugee Roulette: The Role of Country of Origin Information in Refugee Status Determination*, Natasha Tsangarides, 2010, London: Immigration Advisory Service

did it seem that any immigration judge willing to consider that any particular Eritrean may have been deported back to Eritrea without her religion being checked on before deporting her: and more than one immigration judge criticised the legal representative for even raising 'this settled issue'.

The second has not yet been set in stone:

"Eritrea appears to have stopped persecuting the parents of draft evaders" was quoted in a client's decision letter. The source was a lengthy report not easy to obtain, in which that sentence was part of a larger sentence "...according to one unnamed source...." And nothing in the remainder of the report, of some 30 pages, suggested that this was true.

Similar statements like this, based on single and/or unnamed sources, arise in relation to other countries in particular Somalia (on for example how certain clans always have certain surnames, etc). Without a major change in the burden of proof, or the role of the judiciary, we cannot expect that every asylum appeal will fully consider every such statement. However, what should be considered is that, where a particular appellant does produce cogent evidence challenging one of these 'set in stone' findings, a genuinely fresh approach is made to that finding, in the light of the evidence before that particular immigration judge (I am not here talking about evidence examined thoroughly in a Country Guidance case).

## Paper 4

### Comments for the Roundtable on COI and Due Process

*Reinhold Jawhari, Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), Vienna*

#### **1. Ensuring that all actors involved in the production of COI are aware of quality standards**

Some countries have established the practice of sending queries to institutions in the country of origin (for example, embassies, the International Organization for Migration, etc). It seems that staff working at these institutions is not always aware of quality standards established for the production of COI. Information produced is not always transparent and based on reliable sources, in some cases even the procedural standard of data protection is not adhered to.

Example:

An asylum authority wants to verify the statements made by an applicant about his origin from a certain village. It sends a query to its embassy in the country of origin. The embassy commissions a person to travel to that village in order to question the inhabitants about the applicant. The person commissioned by the embassy is not aware that the applicant or his family could be endangered by the mere fact that he is asking about him/her and does not pay attention to issues concerning reliability of sources (who is telling him what and why?) and transparency ("People in the village told me that..."). The embassy forwards this information to the asylum authority which takes it for granted and uses it as a basis for its decision.

##### *a. Procedural Questions*

Should it be permitted that this kind of information is being used in the procedure? Which safeguards can be established to ensure that all actors in the "production chain" of COI adhere to the relevant quality standards?

#### **2. Clarity of terminology**

It is recommended to define key terms in a glossary, otherwise the problem of using the same term for different meanings or using different terms for the same meaning will be increased.

Example: In the background note sent for the preparation of the round table, the transparency of COI is used as a synonym for the availability of COI to all parties in the decision-making procedure.

In our opinion, three different aspects should be distinguished:



*a. The transparency of information*

Transparency of COI used in asylum procedures means that it must be retrievable for others; therefore it must be properly referenced. This is a substantive quality standard that concerns the presentation of information.

*b. The transparency of a decision*

As stipulated in Article 9 (2) of the EU Procedures Directive, “the reasons in fact and in law” for the rejection of a claim shall be “stated in the decision”. This can be understood as an obligation for the decision-maker to show the connection between his/her decision and country information if relevant to the case.

Although transparency of information may often be an important pre-condition for the transparency of a decision, these two should not be treated as synonyms.

*c. Equality of Arms*

The principle of equality of arms demands that information that forms the basis of a decision should be made available to all actors involved in the procedure. This standard concerns the access to COI, regardless whether the information itself (paragraph I) or the decision based on it (paragraph II) is transparent.

**3. Procedural standards in the ACCORD Training Manual**

The Austrian Red Cross/ ACCORD is in the process of updating its Training Manual “Researching Country of Origin Information” which was published in 2004. We are highly interested in the discussion on procedural standards and hope to be able to integrate results from the roundtable into the updated version of our manual. The current version of the Training Manual names four procedural standards for researching COI: Equality of arms, using and producing public information, impartiality and neutrality of research, data protection.<sup>1</sup>

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<sup>1</sup> Researching Country of Origin Information: A Training Manual, Austrian Red Cross and ACCORD, 2004 (updated 2006), pp. 24-26.