Background Paper- Fresh Claims to Protection from Refoulement

University of London Pro-Bono Refugee Law Clinic

Eric Fripp (Barrister, 36 Public and Human Rights/ Senior Visiting Fellow, Refugee Law Initiative, School of Advanced Study, University of London)

A. Introduction

1. In this paper I will provide an outline of several important matters touching the role of the University of London Pro-Bono Refugee Law Clinic. I will examine in turn:

(i) the concept of and range of protections from *refoulement* (return to harm);
(ii) the law relating to fresh claims to protection from *refoulement* in the UK;
(iii) the main sources relevant to fresh claim;
(iv) the scope of and practical skills and knowledge needed for fresh claims work.

In general my aim is to provide a reasonable basic account of the applicable concepts for persons involved in work at the Clinic, who are likely to be either qualified lawyers or law students in one of the United Kingdom jurisdictions (England and Wales, Northern Ireland, Scotland), and so have a general knowledge of local legal concepts, but are not specialists in human rights or refugee law.

B. Non-refoulement

2. *Non-refoulement* is a term of wider relevance beyond refugee law, and beyond asylum.[1] It denotes a fundamental principle of public international law (PIL) that forbids a country from returning human person to a place where they would face (a) relevant risk of (b) relevant ill-treatment. It is considered to be a principle of customary international law. It has been argued in the refugee law context that it is

[1] The most important difference between 'refugee law' and 'asylum' is that the former generally means qualification as a refugee under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto (and/or the EU regime under Council Directive 2004/83/EC) of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, following CSR51 ('the Qualification Directive'), and the protections CSR51 provides- primarily protection from return to persecution. 'Asylum' goes further than this, and denotes the right to remain in a country of refuge. The UK generally provides asylum under domestic law, with entitlement to refugee status and risk of *refoulement* as an important part of the qualifying rubric and a five year residence permit granted to those held to qualify- see paras 334 and 339Q of the Immigration Rules, which are not statute, but a '*[statement] of the rules, or of any changes in the* rules' relating to asylum and immigration under the Immigration Act 1971, which the Secretary of State is required by section 3(2) of that Act to publish and place before Parliament). The Qualification Directive essentially covers both refugee protection and asylum, providing that a residence permit must be granted to someone who meets the refugee definition.

an *ius cogens* norm of PIL so international law permits no abridgments for any purpose or under any circumstances.[2]

3. When does the UK bear a *non-refoulement* obligation that can be enforced under its laws by an individual concerned? 6 major (non-exhaustive) examples:

(1) **International refugee law (IRL) is based on the Convention relating to the Status of Refugees 1951 (CSR51) and the 1967 Protocol thereto**. For states which apply both of these, original time and geographical limitations in CSR51 (to events occurring in Europe before 1 January 1951 (deleted below)) are disapplied. For present purposes, the key provisions of CSR51 are the refugee definition at art 1A(2) and the (not unlimited) prohibition of *refoulement* at art 33:

Article 1 - Definition of the Term 'Refugee'

A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

(2) … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

Article 33 - Prohibition of expulsion or return ('refoulement')

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having

[2] For instance see J Allain, 'The jus cogens Nature of non-refoulement', *International Journal of Refugee Law*, Vol. 13, Issue 4, pp. 533-558.

> *been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

This requires consideration both of any country of reference under article 1A(2) and of the place of return under article 33. '*The claimant to refugee status is not immediately threatened with danger arising out of a situation then confronting him. The question is what might happen if he were to return to the country of his nationality. He fears that he might be persecuted there. Whether that might happen can only be determined by examining the actual state of affairs in that country. If that examination shows that persecution might indeed take place, then the fear is well founded. Otherwise it is not.*' (Halsbury's Laws v3 Asylum, Humanitarian Protection etc, §373). An individual may face relevant risk by reason of matters which arose whilst in a reference country, or of subsequent matters, for example because of a change of power in that country or political or religious activities in the UK. A claim based on matters arising whilst the individual has been in the UK will often be referred to as a '*sur place*' claim.

The applicable standard of proof, set under domestic law (CSR51 does not dictate burden/standard of proof) is '*reasonable likelihood*' denoting something below the civil standard: *R (otao Sivakumaran) v SSHD* [1987] UKHL 1; [1988] AC 958 and *Kaja* [1995] Imm AR 1;

Central to IRL is the idea of '*surrogate protection*' (see *Horvath v SSHD* [2000] UKHL 37; 1 AC 489). Though this has been gradually but dramatically altered in recent years, classical international law regarded as a matter of exclusive competence the treatment by a State of its own nationals on its territory. This has now been changed by the growth of international human rights law. However legal theory in many countries has posited the existence of some form of protection owed to nationals on its territory. Weis distinguishes diplomatic protection from 'the *internal, legal* protection which every national may claim from his State of nationality under its municipal law i.e, the right of the individual to receive protection of his person, rights and interests from the State' (original emphasis), citing as an example the concept of *Rechtsschutz* (legal protection) by which protection of nationals internally is the subject of State duty.[3]

In 1939, even before the coming into being of a cohesive IRL regime,[4] the eminent British international lawyer R Yewdall Jennings identified the absence

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[3] P Weis, *Nationality and Statelessness in International Law* (Stevens & Sons, 1st edn, 1956) 32-33 citing Jellinek, *System Der Subjectiven Öffentlichen Rechte* (1892, Freiburg, Mohr), 349-51.

[4] The idea of asylum as discretionary protection of a foreigner has a very long history across different civilisations. The development of IRL does not. It has virtually no precedent before WW1. In the inter-war years the League of Nations established early refugee regimes aimed narrowly at particular problems- for example large scale denationalisations of

of protection as the common link in identification of the refugee. His description is remarkably prescient as to the form of PIL relating to refugees as this developed after WWII through the establishment of CSR51 as the basis for an expanded IRL:

> *If a legal regime is to be established governing the status of refugees, the first step must be a definition of the term "refugee". The normal individual is a national of some state enjoying the protection of the government of that state. There are also some stateless persons who are not legally entitled to claim the protection of any state. A refugee may, or may not, be a stateless person. Quite often he remains a national of the state from which he has had to flee. The peculiarity of the refugee is that he does not in fact enjoy the protection of his state of origin, whether he is legally entitled to such protection or not. He is the victim of a pathological state of society in which the government which would normally form the link between and international law not only fails to perform that function, but goes out of its way to embarrass him, so that he is actually in need of protection against it. It is this lack of protection, in fact, which is the test of a refugee adopted in all the arrangements and conventions…*[5]

(2) **The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (commonly known as the United Nations Convention against Torture (UNCAT)). Presently relevant key provisions are the definition of torture at 1.1 and the *refoulement* prohibition at art 3:

> *Art 1.1*
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> *For the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.*

Russian/Soviet emigres after 1918, expulsion of Armenians by Turkey, and Nazi and Fascist measures in the 1930s.

5 R Yewdall Jennings, 'Some International Law Aspects of the Refugee Question', British Yearbook of International Law 1939 (OUP, 1939) 98-114, 99.

Article 3 of UNCAT prohibits parties from returning, extraditing, or *refouling* any person to a state '*where there are substantial grounds for believing that he would be in danger of being subjected to torture*'. The UNCAT protection mechanism can be compared to that under CSR51. CSR51 as part of the rubric for status requires identification of the reference country or countries on the basis of the individual's nationality or (if stateless) former habitual residence. Under UNCAT the sole question is the potential consequence of return to a particular state to which return/sending is proposed.

(3) The **European Convention on Human Rights and Fundamental Freedoms 1950**:

> *Art 2 Right to life*
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> *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law…*
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> *Art 3 Prohibition of torture*
>
> *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

In *Soering v UK* no 14038/88, [1989] ECHR 14, [1989] 11 EHRR 439, the ECtHR found an implied prohibition of *refoulement* in Article 3 ECHR by reference to the '*death row phenomenon*', involving prolonged detention prior to execution. It was held that there was an absolute prohibition against removing the applicant given the prospect of a breach of Article 3 ECHR. Since *Soering*, the Strasbourg Court has found that Article 3 ECHR may be engaged by expulsion, including deportation on national security grounds: *Cruz Varas and others v Sweden* no 15576/89 [1991] ECHR 26, (1991) 14 EHRR 1; *Vilvarajah v UK* no 13163/87; 13164/87; 13165/87 [1991] ECHR 47, (1991) 14 EHRR 248; *Chahal v UK* no 22414/93 [1996] ECHR 54, (1996) 23 EHRR 413; *Hilal v UK* no 45276/99 [2001] ECHR 214, (2001) 33 EHRR 2. Personal conduct or national security risk does not justify breach of article 3: see *Chahal* above.

Latterly see review in *J.K. and Others v Sweden* 59166/12 (Grand Chamber) [2016] ECHR 704; 64 EHRR 15, §§79 onwards:

> 79, citing *F.G. v Sweden* §112 '*The assessment of whether there are substantial grounds for believing that the applicant faces such a real risk inevitably requires the Court to examine the conditions in the*

> *destination country in the light of the standards of Article 3 of the Convention…'*
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> 80 *Owing to the absolute character of the right guaranteed, Article 3 of the Convention applies not only to the danger emanating from State authorities but also where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection…*
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> *81. In this context, the possibility of protection or relocation of the applicant in the State of origin is also of relevance. The Court reiterates that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his country of origin would expose him to a real risk of being subjected to treatment proscribed by that provision…*
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> *82. However, the Court has held that reliance on an internal flight alternative does not affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention…*
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> *85 [citing* Saadi v. Italy*] – '… for a planned forcible expulsion to be in breach of the Convention it is necessary - and sufficient - for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3*'
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> 116. *It is for the Court to consider in an expulsion case whether, in all the circumstances of the case before it, substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3 of the Convention. If the existence of such a risk is established, the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two.*

In *R otao Hari Dhima v IAT* [2002] EWHC Admin 80; [2002] INLR 243 a Divisional Court (Auld LJ and Ouseley J) endorsed earlier decisions of tribunals that the definition of 'persecution' under IRL is in general equivalent to inhuman or degrading treatment under article 3 ECHR.

(4) The **1989 Convention on the Rights of the Child** (applied domestically within immigration and asylum by section 55 Borders Citizenship and Immigration Act 2009):

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

(5) The **Charter of Fundamental Rights of the European Union** provides kindred rights and protections under EU law;

(6) Again under EU law, but presently incorporated effectively into UK domestic law, the **Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ('the Qualification Directive')**. The United Kingdom is not a party to the later 'recast' of the Qualification Directive, Council Directive 2011/95/EU. The Qualification Directive provides *inter alia* interpretive standards regarding the CSR51 refugee definition (whilst accepting CSR51 as '*the cornerstone of the international legal regime for the protection of refugees*'. It also provides for '*subsidiary protection*' where relevant risk arises of '*serious harm*' as defined at art 15[6]:

[6] Art 2(e) defines '*person entitled to subsidiary protection*' as '*a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face*

Article 15- Serious harm

Serious harm consists of:

(a) Death penalty or execution
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Articles 15(a) and (b) are largely congruent with protections under articles 2 and 3 ECHR (see above). Article 15(c) has importance as a primary source of protection which stands alone, rather than closely mirroring other protections. Amongst the cases in which it has been considered is *QD (Iran) v SSHD* [2009] ECAD Civ 620; [2011] WLR 689 in which it was held that (i) '*risk*' in article 2(e) of Council Directive 2004/83/EC overlaps the term '*threat*' in article 15(c) so that the latter reiterates but does not qualify the former; (ii) that the word '*serious*' in article 15(c) qualifies the word '*threat*', so that article 15(c) is concerned with serious threats of real harm; (iii) that the phrase '*situations of international or internal armed conflict*' in article 15(c) had an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reached such a high level that substantial grounds were shown for believing that a genuine non-combatant, returned to the relevant country or region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to a serious and individual threat to his life or person, and there was no requirement that the armed conflict itself be exceptional. The *QD* decision does not address something which may be important in some other decisions, namely the geographical and time parameters for the existence of an '*armed conflict*'. This is a term of art in international humanitarian law, or the law of war. The International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, in *Prosecutor v Dusko Tadic*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, addressed relevant questions, and whilst the Court of Appeal has cautioned against overreliance on international humanitarian law to interpret article 15(c), the use of identical terms has some weight in the absence of an apparent distinct meaning. In *Tadic* the Chamber held that:

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a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country'.

> *67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting…*
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> *70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.*

C. The law relating to fresh claims

4. People whose claims are rejected may well not be removed from the UK, and may assert that a good claim to protection from refoulement arises, notwithstanding whatever has been held earlier.

5. Persons raising a refugee or human rights claim in the UK, and not transferable to another EU state under 'first safe country' type arrangements[7], are generally entitled to appeal refusal whilst remaining in the UK for the duration of that appeal, unless the refusal is certified as clearly unfounded (Part 5 Nationality Immigration and Asylum Act 2002 (NIAA 2002)). If certified, the means of seeking judicial remedy is judicial review. Judicial review will also be the necessary avenue of recourse if no appeal right arises. So for example the multiple proceedings in *R (Begum) v SIAC; R (Begum) v SSHD; Begum v SSHD* [2021] UKSC 7; [2021] 2 WLR 556 show how a single decision of the Secretary of State for the Home Department (to refuse to grant leave to enter outside the Immigration Rules in order to participate in an appeal against deprivation

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7 Also referred to as '*Dublin Convention*' or '*Dublin Regulation*' cases, referring to EU instruments providing generally that one particular country, often but not always one through which the individual entered the EU, retains responsibility for an individual's claim to asylum/refugee status.

of nationality which could not otherwise be fair) was challenged by appeal so far as it concerned ECHR, and judicial review so far as common law matters.

6. What happens when an individual in the UK asserts that, notwithstanding unsuccessful previous claim, he or she has a relevant case that expulsion/return would be *refoulement*? In *R v SSHD ex p Onibiyo* [1996] EWCA Civ 1338; [1996] QB 768 the Court of Appeal addressed the question. At that time there was no provision for the situation in the Immigration Rules HC 395, published by the SSHD as required under section 3(2) Immigration Act 1971. Per Bingham MR at 783G-784A

> *There is danger in any form of words, which can too easily be regarded as a binding formula. In the* Manvinder Singh *case [1996] Imm AR 41 Carnwath J. held that a change in the character of the application was required. I am content with that statement, provided it is not taken to mean that there must necessarily be a change in the nature of the persecution said to be feared. The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim.*

7. Express provision for consideration of representations seeking acknowledgement of a fresh claim to protection (extended beyond Refugee Convention issues to claims based upon ECHR) was introduced into the Immigration Rules HC 395 in the wake of the *Onibiyo* decision. Initially at para 346 HC 395, this has been established at para 353 HC 395 from 18 October 2004 by a Statement of Changes to the Immigration Rules HC 1112. In its current form para 353 provides as follows:

> *353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:*
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> *(i) had not already been considered; and*
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> *(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.*
>
> *This paragraph does not apply to claims made overseas.*
>
> *353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall*

not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.

8. In context it is clear that significant difference must be shown from '*the material which has previously been considered*' and that that category includes all material raised in support of the '*human rights or asylum claim [which] has been refused or withdrawn or treated as withdrawn.*' It is important that para 343 identifies substantive claims as setting the starting point. It is clear that the refusal to acknowledge a fresh claim under para 353 does not itself alter the starting point. The Court of Appeal has held that the requirement that the new claim be '*sufficiently different*' does not require a change in the factual basis of the claim; convincing fresh evidence of the same persecution previously alleged may give rise to a fresh claim: *R otao Senkoy v SSHD* [2001] EWCA Civ 328; [2001] INLR 555, [2001] Imm AR 399.

9. As to the nature of the test applied by the Secretary of State where para 353 requires administrative consideration, in *WM (DRC) v SSHD; SSHD v AR (Afghanistan)* [2006] EWCA Civ 1495, the Court of Appeal recorded, per Buxton LJ, that:

The task of the Secretary of State

6. There was broad agreement as to the Secretary of State's task under rule 353. He has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i) according to whether the content of the material has already been considered. If the material is not "significantly different" the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.

7. The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and

importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in Bugdaycay v SSHD [1987] AC 514 at p 531F.

10. As to the role of the Court reviewing a decision by the Secretary of State declining to acknowledge a fresh claim, the judgment in *WM (DRC)* indicates as follows:

The task of the court

10. *…Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.*

11. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §7 above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative, it will have to grant an application for review of the Secretary of State's decision.

12. That is the approach that we must apply to both of these appeals. However, before going on to that stage of the case I must address an argument raised by Mr Nicol, not so much in contradiction of the general approach set out above but rather as providing a shorter and, as he would think, more reliable path to what might often be the same outcome.

11. For a recent reflection/application see for example *SS v SSHD* [2019] EWHC 1402 (Admin); [2019] All ER (D) 32 (Jul) per Judge Coe QC (sitting as a Judge of the High Court)

20. Both parties rely on the decision of R (WM (DRC)) v *SSHD [2006] EWCA Civ 1495. The key points as I find are: from paragraph 9 "the determination of the Secretary of State is only capable of being impugned on* Wednesbury *grounds"; and from paragraph 11 that "the question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed", but whether there is a realistic prospect of success on an application before an immigration judge and; in answering that question, the defendant must be informed by "anxious scrutiny" of the material.*

> *21. This is repeated in* AK (Afghanistan) *v* SSHD *[2007] EWCA Civ 535 at paragraph 23 where Toulson LJ said that the question which the defendant must ask himself is "whether an independent tribunal might realistically come down in favour of the applicant's asylum or human rights claim on considering the new material together with the material previously considered".*

12. In *BA (Nigeria) v SSHD* [2009] UKSC 7; [2010] 1 AC 444 Lord Hope, with whom Lords Brown, Scott, and Rodger concurred, emphasised the importance of the ability to seek the establishment of a fresh claim:

> *The ability of asylum seekers who make unsuccessful claims to be allowed to remain to discover further reasons why they should not be removed from the country where they seek refuge is an inescapable feature of any system that is put in place to meet a State's obligations under the Geneva Convention on the Status of Refugees and article 3 of the European Convention on Human Rights. The opportunity for further reasons to be put forward is enhanced by the fact that a series of decisions may need to be taken before a person's immigration status is resolved. Various measures have been put in place by the United Kingdom to deal with this phenomenon. Some of these measures are to be found in the Immigration Rules, and on occasion the meaning that is to be given to them is the subject of controversy: see* ZT (Kosovo) v Secretary of State for the Home Department *[2009] UKHL 6, [2009] 1 WLR 348.*

13. In *ZA (Nigeria) & Anor, R (otao) v SSHD* [2010] EWCA Civ 926; [2011] 1 QB 722, the Master of the Rolls' Court held that para 353 HC 395 existed to prevent further submissions, which purported to be a renewed claim but merely repeated an earlier claim which had already been refused, having to be considered on its merits and refused, and so a decision under the rule to reject further submissions was a decision, not that the relief which they sought should be refused, but that they did not constitute a claim at all; that, therefore, if the Secretary of State made an appealable immigration decision, even on a hopeless claim, the legislative scheme provided for in Part 5 NIAA 2002 would apply and para 353 would have no part to play.

14. In practice, fresh claim to protection under para 353 generally represents the primary means for a challenge to possible *refoulement* under the law in UK jurisdictions. Statutory appeal on the merits before a specialist independent tribunal provides a remedy superior in significant respects to judicial review challenge against a refusal of representations not referring to protection as a refugee or under ECHR. Fresh claim has gradually obscured some other remedies, which may still be relevant in appropriate circumstances, such as reliance on the Secretary of State to issue a fresh notice of refusal enabling appeal where there has been a miscarriage of justice: *R v SSHD ex p. Syed Mohammed Kazmi* [1995] Imm AR 73.

D. Fresh claims and para 353 Immigration Rules- Summary

15. From the above it follows that:

(i) para 353 HC 305 is important as setting out the legal test in the SSHD's own Immigration Rules for acceptance of entitlement to a fresh appeal. But, critically, para 353 is not exhaustive of the scope for successful claim to protection from *refoulement*. Like the appeals provisions at Part 5 NIAA 2002 it expressly applies only to refugee/asylum, ECHR, and Qualification Directive claims;

(ii) As it stands, para 353 as understood in present authority probably takes in the large majority of *non-refoulement* claims where there has been an earlier failed or discontinued claim. In principle there can be other good *non-refoulement* claims. However in general applicants are better within para 353 rather than outside it, because even where the Secretary of State acknowledges a fresh claim but refuses it, this will generally provide a route to appeal under Part 5 NIAA 2002. By contrast a decision outside para 353 and not attracting any appeal right can be challenged only by judicial review.

(iii) If para 353 disappeared from the Immigration Rules or the understanding of its scope changed, the Court would have to decide, as in the pre-para 353 *Onibiyo* case, whether a statutory remedy arises, and if not, whether the SSHD has addressed a claim to protection from non-*refoulement* in a legally adequate manner.

E. Content of fresh claims consideration

16. Amongst matters that may be relevant to whether the fresh claims test is satisfied are the following:

i. **Relevant jurisprudence may have changed** – to identify some examples (a) by recognition that arbitrary deprivation of nationality and ensuing expulsion/exclusion, for relevant reason, ground a right to refugee status- *EB (Ethiopia) v SSHD* [2007] EWCA Civ 809; [2009] QB 1, (b) that LGBTI individuals could not be expected to hide their protected identity using '*discretion*' to avert the risk of persecution- *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31; [2011] 1 AC 596, or (c) that members of a targeted religious group are entitled to protection without having to show individually that the attach '*particular importance*' to open expression of their faith- *WA (Pakistan) v SSHD* [2019] EWCA Civ 302;

ii. The **individual's situation may have changed**, for instance the individual may have been active politically or religiously in the UK in a way

creating risk on return, giving rise to a *sur place* claim (see for instance *Danian v SSHD* [1999] EWCA Civ 3000; [1999] INLR 533, on possibly self-serving political demonstrations, or *PS (Christianity - risk) Iran CG* [2020] UKUT 00046 (IAC), on religious conversion);

iii. The **general situation in the country (or countries) of reference may have changed**, for example by the coming to power of new forces said to create risk or the increased focus of those maintaining power on certain forms of dissent or difference;

iv. There may be a **change in information/evidence concerning either the individual's situation or the general country situation** in a relevant country, providing additional support for propositions possibly rejected or not raised earlier- for instance forensic medical evidence concerning the individual, or increased country evidence relevant to the case, published by third party organisations such as Human Rights Watch or Amnesty International, or fresh witness evidence from a relevant country or the UK;

v. There may be a **change in the perception of the situation in a relevant country by a body whose judgments have particular weight** in this context- chiefly:

a. **The Upper Tribunal may have (re)considered relevant 'Country Guidance' (CG) conclusions** expressed in a decision relating to the country in question and varied any previous such decision. CG decisions have a binding quality: in *R (Iran) v SSHD* [2005] EWCA Civ 982; [2005] INLR 633, the Court of Appeal per Brooke LJ at §27, endorsed an earlier observation of Ouseley J given as President of the Asylum and Immigration Tribunal, '*It will have been noticed that Ouseley J [in NM and Others (Lone women – Ashraf) Somalia CG [2005] UKIAT 00076] said that any failure to apply a CG decision unless there was good reason, explicitly stated, for not doing so would constitute an error of law in that a material consideration had been ignored or legally inadequate reasons for the decision had been given*', the Court also endorsed the specific distinction drawn by Ouseley J between CG and decisions binding on points of law:

> *140. These decisions are now denoted as 'CG'. They are not starred decisions. Those latter are decisions which are binding on points of law. The requirement to apply CG cases is rather different: they should be applied except where they do not apply to the particular facts which an Adjudicator or the Tribunal faces and can properly be held inapplicable for legally adequate reasons; there may be evidence that circumstances have changed in a material way which requires a different decision, again on*

the basis that proper reasons for that view are given; there may be significant new evidence which shows that the views originally expressed require consideration for revision or refinement, even without any material change in circumstances. It may be that the passage of time itself or substantial new evidence itself warrants a re-examination of the position, even though the outcome may be unchanged. It is a misunderstanding of their nature, therefore, to see these cases as equivalent to starred cases. The system does not have the rigidity of the legally binding precedent but has instead the flexibility to accommodate individual cases, changes, fresh evidence and the other circumstances which we have set out.

However not all guidance of the UT is equally binding- for instance the Supreme Court found guidance of the UT relating to the use of linguistic analysis to ascertain place of origin unlawful where this asserted '*general applicability*' and the requirement for '*some very good reason*' for a departure: *SSHD v MN and KY* [2014] UKSC 30; [2014] 4 All ER 443, per Lord Carnwath with whom other members of the Court concurred, at §50: '*Again that seems with respect unduly prescriptive on an issue which must depend on the circumstances of each case…*'. The effect of such 'guidance' in the individual case depends upon the particular circumstances in any given case;

b. **The Home Office now publishes, as Country Policy Information Notes, its own regularly updated accounts of country circumstances,** often combined with instructions to case workers and taking into account CG decisions of the UT. These are available online: https://www.gov.uk/government/collections/country-policy-and-information-notes. Logically a decision by the Home Office or a minister at odds with the current CPIN will be precarious unless justified on the facts.

17. Other considerations which require close attention include the following:

vi. Given the gravity of the issues, **the standards applicable to assessment of official decision making are correspondingly heightened**- decisions must receive '*the most anxious scrutiny*', in line with the observations of Lord Bridge of Harwich in *Musisi v SSHD; R v SSHD ex p. Bugdaycay* [1986] UKHL 3; [1987] AC 514, 531 and '*only the highest standards of fairness*' per Bingham LJ, as he then was, in *R v SSHD ex p Thirukumar & ors* [1989] EWCA Civ 12; [1989] Imm AR 402, 414;

vii. Attention has to be given to **past appellate findings**, which bind the Secretary of State, barring reason to the contrary (*SSHD v Danaie* [1997] EWCA

Civ 2704; [1998] Imm AR 84; [1998] INLR 124) and represent 'the starting point' to subsequent adjudication, even though the later adjudication may on evidence reach a different conclusion: *Devaseelan v SSHD* [2002] UKIAT 702; [2003] Imm AR 1 and *Djebbar v SSHD* [2004] EWCA Civ 804; [2004] INLR 466. The Tribunal in *Devaseelan (*§38) warns that

> *The second Adjudicator must, however, be careful to recognise that the issue before him is not the issue that was before the first Adjudicator. In particular, time has passed; and the situation at the time of the second Adjudicator's determination may be shown to be different from that which obtained previously. Appellants may want to ask the second Adjudicator to consider arguments on issues that were not - or could not be - raised before the first Adjudicator; or evidence that was not - or could not have been - presented to the first Adjudicator.*'

The Court of Appeal in *Djebbar [aka LJ (Algeria)] v SSHD* [2004] EWCA Civ 804; [2004] INLR 466, §30, emphasised, per Judge LJ (with whom Tuckey and Kay LJJ concurred) the duty of an adjudicator to decide a second appeal on its merits:

> *Perhaps the most important feature of the guidance is that the fundamental obligation of every special adjudicator independently to decide each new application on its own individual merits was preserved. The guidance was expressly subject to this overriding principle…*

F. Scope of work; skills and knowledge

18. Work on fresh claims to protection from *refoulement* is important. Properly understood, fresh claims to protection from *refoulement* demand a high degree skill and care, encompassing the whole body of knowledge necessary for dealing with protection claims generally- plus an appreciation and ability to use the separate standards applicable to fresh claims *per se*. It obviously requires the development of substantial legal skill and the exercise of professional care. In practice currently cases do not universally benefit from the exercise of adequate care and skill, because of, amongst other reasons, defaults in Home Office decision making and shortcomings in public funding for legal work. A very important aim of the University of London clinical scheme is to enable standards to be assessed and raised in the area, providing a supported environment in which time and assistance can be provided to clients and volunteers and a positive learning experience can be provided for students and lawyers, resulting in good quality work in cases of great importance to individuals and contributing to the protection of humanitarian and legal values in the United Kingdom.

Eric Fripp
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36 Public & Human Rights
4 Field Court
Gray's Inn
London, WC1R 5EF
United Kingdom

and

Refugee Law Initiative
University of London
School of Advanced Study
Senate House
Malet Street
London WC1E 7HU
United Kingdom