doi:10.1093/ijrl/een034, Advance Access Published on October 31, 2008

Articles

Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom

ROBERT THOMAS*

Abstract

National refugee and asylum determination procedures are often criticised for producing inconsistent decisions. This article examines the establishment and operation of a new and innovative technique that has been developed in the United Kingdom (UK) by the Asylum and Immigration Tribunal (AIT) to promote consistency in asylum decision making: the country guidance (CG) concept. Since 2004, the Tribunal has regularly produced 'country guidance determinations' that seek to provide authoritative guidance on recurring 'country issues' commonly encountered in individual asylum claims and that need to be taken into account by asylum decision makers. In order to examine the country guidance system, this article considers its following aspects: the function of country guidance in the context of the asylum decision task; the management and oversight of the country guidance system by the Tribunal; the range of country information upon which the Tribunal relies; the techniques utilised by the Tribunal to issue country guidance; the legal status of such decisions; and the expertise in country conditions that the task of issuing country guidance presupposes. Finally, the article offers an assessment of the strengths and weaknesses of the country guidance system. It will be shown that country guidance both occupies a distinctive place in the UK's asylum determination process and performs an important role in ensuring consistency; at the same time, care is required to ensure that the guidance provided is authoritative and that it is applied appropriately.

1. Introduction

National refugee and asylum status determination procedures have often been criticised for producing inconsistent decisions; it has become almost customary for the phrases 'asylum lottery' or 'refugee roulette' to be employed by those who perceive that the outcomes of decisions on asylum claims differ widely irrespective of their essential similarity.[1] Such

* Senior Lecturer in administrative law, School of Law, University of Manchester. I would like to thank Rodney Brazier, Anthony Good, Philip Schrag, the participants at a conference, 'Best Practices for Refugee Status Determination', held at the Monash University Prato Centre, Italy, in May 2008, and the journal's anonymous referees for their comments. This paper draws upon my empirical research into the asylum appeal process in the United Kingdom funded by the Nuffield Foundation (AJU/00124/G). I would also like to thank the British Academy for an overseas conference grant. The views expressed herein are mine alone. This article is dated Sept. 2008.

[1] See, R. Prasad, 'The Asylum Lottery', *The Guardian*, 25 Jan. 2002. For a detailed empirical study of inconsistent decision making within the US asylum process, see, J. Ramji-Nogales, A.I. Schoenholtz and P.G. Schrag, 'Refugee Roulette: Disparities in Asylum Adjudication' (2007) 60 *Stanford Law Review* 295-411.

inconsistency may itself be bad enough because it undermines an inherent aspect of our sense of justice – that like cases be treated alike. It can also generate further concerns: if a decision making process produces disparate outcomes, then surely some of its decisions must also be substantively incorrect – either because genuine claims have been rejected and/or non-genuine claims accepted. There may be various reasons why such inconsistency arises: the inherent difficulties of the asylum decision problem; the number of decision makers required; the different amounts and quality of evidence relied upon; and the scope for differential assessments as to whether or not such evidential material establishes risk on return. Given the potential scope for inconsistency in asylum adjudication, debate has tended to focus on what, if anything, can be done to reduce, or at least, ameliorate the risk of it.[2]

The purpose of this article is to examine a comparatively new technique of this specialised area of administrative law adjudication – the country guidance concept – that has been developed in the UK by the AIT, the tribunal which determines appeals by individuals initially refused asylum by the responsible government agency, the Home Office. The country guidance system came into being in response to concerns over the inconsistency of appeal outcomes arising from differential assessments by tribunal members of the conditions in countries producing asylum applicants. To reduce the possibility for such dissimilitude, the Tribunal now produces country guidance decisions through which it issues advice on how asylum appeals from a particular country are to be approached by decision makers. This guidance normally concerns the general circumstances, or the circumstances for a certain group or category of person, in the country concerned and the risks, if any, they may face on return to that country.

This article will examine the nature of the country guidance system, how and why it has developed, and its operation in practice. In particular, attention will focus upon some of the key issues of debate concerning the country guidance system: the range of country information upon which the Tribunal relies when producing such guidance; the contestable nature of country expertise; and the degree to which country guidance decisions are binding or authoritative in subsequent appeals. It will be seen that while the country guidance concept is a relatively recent development, it now performs a significant role in the UK's asylum adjudication process. To appreciate the nature of the country guidance concept, and the debates surrounding it, it is necessary to situate it within the broader issue of how the asylum decision process ought to be organised and also to consider the advantages of producing such guidance by way of judicial adjudication.

[2] Ibid., at 378-89; S.H. Legomsky, 'Learning to Live with Unequal Justice: Asylum and the Limits to Consistency' (2007) 60 *Stanford Law Review* 413-74; M.H. Taylor, 'Refugee Roulette in an Administrative Law Context: The Déjà vu of Decisional Disparities in Agency Adjudication' (2007) 60 *Stanford Law Review* 475-501.

2. The asylum decision problem

Before examining the country guidance concept, it is appropriate first to consider the nature of the asylum decision problem itself. Asylum decision making is notoriously problematic.[3] This is partly because of the particular nature of the decision task. Asylum adjudication, as Sedley LJ once explained, does not involve a conventional lawyer's exercise of applying a litmus test to ascertained facts but 'a global appraisal of an individual's past and prospective situation in a particular cultural, social, political and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose'.[4] The task of prognosticating the risk of persecution or ill-treatment must usually be undertaken on the basis of incomplete, uncertain and limited evidence. Also, underlying the decision exercise are unusually high error costs which arise from the acute and pervasive tension between maintaining immigration control and protecting individual rights: asylum adjudication raises the constant problem of either refusing protection to the genuine claimant or affording protection to the non-genuine claimant.

The asylum decision task is, of course, conditioned by the legal tests contained in the Refugee Convention and, in the UK and other EU member states, the European Convention on Human Rights and the EC Qualification Directive. Much attention has been devoted to the rules and principles of asylum and human rights law, and their elucidation by the higher courts. However, the vast majority of decision making occurs within the administrative agency responsible for the initial consideration of claims and at the first-tier of the judicial apparatus in which 'Immigration Judges' determine fact-based merits appeals by holding hearings in which appellants give evidence and are cross-examined. The legal tests provide a broad framework in which decisions are to be taken but there are many other influences on decision making, such as policy and organizational factors, resource considerations, and time pressures. Furthermore, there often remains a considerable role for the decision maker's own personal judgment in assessing whether or not an individual has established, to a reasonable degree of likelihood, that he will be at risk of persecution or ill-treatment on return.

Deciding whether or not an individual qualifies for asylum is therefore an overwhelmingly fact-based form of decision making. It is also an unusual type of decision making, which is often complex and difficult to manage. This is because it involves an assessment of both the *particular*

[3] *Saad, Diriye and Osorio v. Secretary of State for the Home Department* [2002] Imm. AR 471 at 479 (CA); National Audit Office, *Improving the Speed and Quality of Asylum Decisions* (2003-04 HC 535), 37; *HK v. Secretary of State for the Home Department* [2006] EWCA Civ 1037 at para. 27 (Neuberger LJ) (CA).

[4] *R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah* [1997] Imm. AR 145 at 153 (HC).

circumstances of the individual's case and the *general* social and political situation in the country from which refuge is being sought. The dual nature of the decision task is normally divided into its two distinct, though related, components: is the story of the particular applicant credible? If so, then are the conditions in the country concerned such that he would be at risk on return? To adopt the analysis proffered by Zahle, the evidentiary aspects of asylum decision making commonly involve two types of risk assessment questions.[5] The first question concerns the existence of a group of people who will be at risk of persecution or ill-treatment ('risk-group existence'). For instance, are members of Somali minority clans or Jamaican homosexuals generally at risk on return? The second question requires an assessment of the position of a particular asylum applicant: can it be concluded from the facts of an individual asylum case that the particular asylum applicant belongs to this risk group ('risk-group affiliation')? For instance, is the particular individual applicant a member of a Somali minority clan or a homosexual from Jamaica?

Seeking answers to these deceptively simple questions involves the difficult tasks of eliciting the necessary evidence and weighing it up for what it is worth and occupies the bulk of decision makers' time. Determining who is in need of international protection requires an essentially evaluative or interpretive appraisal of evidential material of many kinds and qualities against the eligibility criteria for asylum.[6] As it is impossible to know whether or not fact-based decisions are correct in any objective sense, attempts to assess the quality and legitimacy of the decision process cannot be made by reference to the substantive decisions produced. Instead, such attempts must consider the inputs into the decision process – the training and qualifications of the decision personnel; the procedures for collecting facts; the nature of the relevant evidential materials; the standard of proof; reason-giving requirements; onward rights of challenge – and now country guidance decisions also.[7]

3. The country guidance concept

The focus of the Tribunal's country guidance system, adopted formally in 2004, is solely on 'risk-group existence' – the assessment of whether evidence concerning country conditions shows a risk on return for a particular category of person. Country guidance determinations, the Tribunal has observed, 'give no guidance on individual personal facts: the guidance

[5] H. Zahle, 'Competing Patterns for Evidentiary Assessments' in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden/Boston: Martinus Nijhoff, 2005), 13-26 at 21.

[6] See especially, *Karanakaran v. Secretary of State for the Home Department* [2000] 3 All ER 449 at 477-80 (Sedley LJ) (CA).

[7] See generally, R. Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25 *Legal Studies* 462-98.

is limited to the general circumstances, or the circumstances for a group of people with a particular characteristic, in the country in question'.[8] The requirement to assess the social and political conditions in a particular country would appear to be unique to asylum adjudication.[9] Each asylum case is highly fact-specific in terms of assessing whether or not the particular applicant qualifies for protection. At the same time, each case is also concerned, at least in part, with the situation prevailing in the country from which protection is being sought.[10] What is apparent is that in high volume asylum decision making systems many cases raise similar and recurring issues concerning country conditions. The essential purpose of the country guidance system is to provide decision makers with generic guidance as to whether or not country conditions are such that they will generate a risk on return for broad categories of applicant.

By way of illustration, consider the following country issues. Do Eritrean draft evaders comprise a distinct risk category? Are Sri Lankan Tamils, as a category of person, at risk of serious harm on return from the Sri Lankan authorities? If not, then are there any factors that can be identified that might increase the risk in a particular case? Which particular clans and sub-clans will be at risk on return to Somalia? Are Sikhs and Hindus generally at risk in Afghanistan? These questions could be multiplied several times over as they illustrate the types of country issues that frequently arise in asylum and human rights appeals. They are also topics on which the Tribunal has issued country guidance by, for instance, identifying distinct and generic groups of persons as 'risk categories' or identifying certain factors as indicative of risk. In the assessment of risk in any individual appeal, such guidance, where available, needs to be taken into account.

[8] *AS and AA v. Secretary of State for the Home Department (Effect of previous linked determination) Somalia* [2006] UKAIT00052 at para. 63 (AIT) (note: 'UKAIT' is the neutral citation reference for determinations of the United Kingdom Asylum and Immigration Tribunal).

[9] The novelty of this task initially prompted the English courts (before the establishment of a general right of appeal in asylum cases in 1993) to abstain from subjecting initial decisions refusing asylum to judicial scrutiny as they considered themselves 'ill-equipped' to assess conditions in other countries. See, *R. v. Secretary of State for the Home Department, ex parte Bugdaycay, Santis, and Norman* [1986] Imm. AR 8 at 16 (Neill LJ) (CA). However, this approach was subsequently overturned by the House of Lords: as asylum decisions involve the most fundamental of all human rights, the right to life, the courts should subject them to 'the most anxious scrutiny'. See, *Bugdaycay v. Secretary of State for the Home Department and related appeals* [1987] 1 All ER 940 at 951 (Lord Bridge) (HL).

[10] As the Office of the United Nations High Commissioner for Refugees (UNHCR), *Handbook on Determining Refugee Status* (1992), para. 42 explains: 'The applicant's statements cannot … be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin – while not a primary objective – is an important element in assessing the applicant's credibility'. Under the EC Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304/12 of 30 Sept. 2004 (the 'Qualification' Directive), art.4(3)(a) the assessment of an application for international protection must take into account 'all relevant facts as they relate to the country of origin at the time of taking a decision on the application'.

Broadly speaking, the Tribunal's country guidance system operates as follows. The Tribunal will receive a number of asylum appeals that raise a particular country issue, which will be determined individually by Immigration Judges. The Tribunal's senior judiciary may then decide that it would be appropriate to convene a country guidance hearing to issue specific guidance on the issue in order to promote consistency of approach between different judges. Preparations will then be made for the hearing: a particular appeal will be selected; similar cases might be grouped together; and the parties will be notified that the appeal(s) are to be treated as potential country guidance.[11] At the appeal hearing, the Tribunal will be presented with a range of country information – usually much more than that presented at an ordinary appeal – and country experts, commissioned by the appellant, may be called to give evidence and be cross-examined. After the country guidance has been reported, it will fall to Immigration Judges in subsequent appeals to apply such guidance, which is to be treated as authoritative insofar as such appeals relate to the country guidance in question and depend upon the same or similar evidence. In this way, country guidance becomes an important part of the law governing eligibility for asylum.

The country guidance system attempts to promote two important adjudicatory values: consistency and efficiency. As the Tribunal has explained, the fundamental purpose of its country guidance system is 'to ensure that like cases are treated alike and that generally recurring factors relating to country conditions are the subject of careful and authoritative assessment periodically'.[12] There is always a risk that decision makers reach disparate views as to the credibility of asylum applicants. However, it would be unjust for there to be any inconsistency of approach between decision makers as regards the degree of risk on return which result not from the differentials between individual cases but from different readings of the situation appertaining in the relevant country. A subsidiary purpose is that of promoting efficiency in the adjudication process itself. By producing authoritative assessments of country conditions, the Tribunal seeks 'to avoid the necessity for fresh decisions on the same material in situations of common application in a particular country' and their associated resource (both time and cost) implications.[13]

The system came into being, in large part, through the encouragement of the higher courts, in particular the Court of Appeal, which previously expressed concern as to the inconsistency of outcomes in some appeals with different tribunal panels arriving at different assessments of background

[11] Appeals listed as potential country guidance tend to have a longer 'lead in' time than ordinary asylum appeals with the tribunal panel holding a 'For Mention Only' hearing prior to the substantive hearing in order to clarify the issues and evidence to be relied upon. Some substantive hearings are concluded in a day while others have been conducted over several days.

[12] *KA v. Secretary of State for the Home Department (draft-related risk categories updated) Eritrea CG* [2005] UKAIT00165 at para. 10 (AIT).

[13] *SL and others v. Secretary of State for the Home Department (Returning Sikhs and Hindus) Afghanistan CG* [2005] UKIAT00137 at para. 26 (AIT).

materials.[14] For instance, in 1997, the Court of Appeal stated that it would be beneficial to the general administration of the asylum appeals system if Immigration Judges had the assistance of the views of the senior tribunal judiciary concerning the general situation in a particular country, provided that the situation had not changed in the meantime; 'consistency in the treatment of asylum seekers is important in so far as objective considerations, not directly affected by the circumstances of the individual asylum seeker, are involved'.[15] Subsequently, Laws LJ noted that there was no public interest in multiple examinations of the political background in a particular country; such revisits give rise to the risk of not only inconsistent results but also of the wasted expenditure of judicial and financial resources upon the same issues and the same evidence. As Laws LJ commented, while the notion of a 'factual precedent' – the phrase is itself disavowed by the Tribunal – is, in general, 'exotic', because it, to some extent, sacrifices the consideration of the individual circumstances of a case to the public interest in securing finality in decision making, in the asylum context it is both 'benign and practical'.[16]

However, despite such encouragement from the courts for the Tribunal to issue country guidance, it was apparent that different tribunal panels were continuing to reach disparate conclusions as to the risks facing appellants in essentially similar situations. To illustrate both this trend and the development of the country guidance system, consider the issue of religious apostasy in Iran. While religious minorities are given constitutional protection in Iran, Sharia law prescribes the death penalty for a Muslim man who becomes an apostate by conversion; there is though little evidence as to the frequency with which the penalty is either imposed in practice or carried out; will an Iranian asylum applicant who has converted to Christianity be at risk on return? In one appeal a tribunal panel had decided that a Christian convert would not be at risk whereas in another appeal a different panel accepted that converts actively involved in church life might be at risk of persecution.[17] Presented with such disparate decisions, the Court of Appeal expressed 'concern that the same political and legal situation, attested by much the same in-country data from case to case, is being evaluated differently by different tribunals.'[18] While

[14] In England and Wales, the Court of Appeal determines appeals from 'reconsidered' AIT decisions (those appeals that having been determined initially are found to contain an error of law and are then 'reconsidered' by the Tribunal in order to correct that error of law) and determinations produced by a tribunal panel of three legally qualified members. In Scotland, such appeals lie to the Court of Session and in Northern Ireland to the Court of Appeal in Northern Ireland. See, Nationality, Immigration and Asylum Act 2002, ss 103B and 103E.

[15] *Manzeke v. Secretary of State for the Home Department* [1997] Imm. AR 524 at 529 (Lord Woolf MR) (CA).

[16] *S and Others v. Secretary of State for the Home Department* [2002] INLR 416 at 435 (Laws LJ) (CA).

[17] *Dorodian v. Secretary of State for the Home Department* (01TH01537), date notified 23 Aug. 2001 (IAT); *Ahmadi v. Secretary of State for the Home Department* [2002] UKIAT05079 (IAT).

[18] *Shirazi v. Secretary of State for the Home Department* [2004] 2 All ER 602 at 611 (Sedley LJ) (CA).

understandable, such inconsistency arising from differential readings of the same country information by different tribunal panels was not satisfactory, the court noted, because it undermined legal certainty. In order to remedy the situation, it was necessary that the Tribunal adopt 'in any one period a judicial policy (with the flexibility that the word implies) … on the effect of the in-country data in recurrent classes of case'.[19] This the Tribunal subsequently did when it issued country guidance to the effect that an ordinary Christian convert would not be at risk of persecution or ill-treatment. However, the more active convert, Pastor, church leader, proselytiser or evangelist could be regarded as being at a real risk; their higher profile and role would be more likely to attract the malevolence of the licensed zealot and the serious adverse attention of the Iranian theocratic state when it sought, as it would on occasion do, to repress conversions from Islam which it sees as a menace and an affront to the state and God. Furthermore, where an ordinary individual convert has additional risk factors, he too could be at risk.[20] Inconsistency and uncertainty was then replaced by authoritative country guidance.

To understand the operation of the country guidance system, it is necessary to appreciate the broader organizational context in which the Tribunal operates. The first organizational feature concerns the differential levels of the personnel within the judicial hierarchy of the 'single-tier' AIT and their geographical dispersal. The Tribunal currently comprises 707 members. Some 600 Immigration Judges (the majority of which work part-time) are located in fifteen hearing centres throughout the UK and determine merits appeals lodged by asylum appellants from a wide range of countries.[21] The twenty-five Senior Immigration Judges, located centrally in London, do the country guidance work, amongst other types of

[19] Ibid. For an emphatic endorsement of the country guidance system, see, *R. (Iran) v. Secretary of State for the Home Department* [2005] INLR 633 at 661-2 (Brooke LJ) (CA) (highlighting the Tribunal's 'beneficent and valuable role in giving CG decisions' and their 'very great importance … in achieving consistency in decision-making'). See also, *Januzi v. Secretary of State for the Home Department* [2006] UKHL 5 at para. 50 (Lord Hope) (HL) (noting that it is desirable for Immigration Judges to follow country guidance cases 'in the interests of fairness and consistency. But in the end of the day each case, whether or not such guidance is available, must depend on an objective and fair assessment of its own facts').

[20] *FS and others v. Secretary of State for the Home Department (Iran – Christian Converts) Iran CG* [2004] UKIAT 00303.

[21] To illustrate the scale of the jurisdiction, the Tribunal's hearing centre in Hatton Cross (near London's Heathrow airport) – reputedly, one of Europe's largest tribunal centres – has 26 hearing rooms in addition to two of its own 'satellite' hearing centres (one of which is the Harmondsworth 'detained fast-track' appeal centre); some 120 Immigration Judges are linked to this hearing centre. As its name suggests, the Asylum and *Immigration* Tribunal also handles various types of non-asylum appeals. As regards caseload, in 2006/07 (2007/08 figures in brackets), the Tribunal determined a total number (both immigration and asylum) of 166,899 (161,517) appeals of which 14,735 (13,700) were asylum appeals; it also determined 7,284 (7,691) review applications in asylum cases and 'reconsidered' some 3,935 (3,573) asylum appeals (source: Asylum and Immigration Tribunal website, *Provisional Statistics for 2006-07 and 2007-08*). Of the total number of Immigration Judges, 121 are salaried (full-time) and 470 are fee-paid (sit on a part-time basis); the Tribunal also has some 52 non-legal members. The Tribunal's President is a High Court judge.

appeal casework, in addition to travelling to the hearing centres to support Immigration Judges in their work and to have direct contact with the issues arising in initial appeals. By producing country guidance – there are currently some 276 decisions covering some fifty-eight countries generating asylum applicants – the Tribunal's senior judiciary seeks to give a lead to its Immigration Judges.[22]

A second organizational factor concerns the short timescales of ordinary asylum appeals. The Tribunal aims to complete 'target' asylum appeals within six weeks; judges are under pressure not to adjourn hearings and to produce their determinations ten days after appeal hearings.[23] Given the administrative and time pressures on Immigration Judges, it may not be realistic to expect them to consider and analyse copious amounts of country information in individual appeals. A third organizational factor concerns the role and variable quality of representation in the appeals process. There are long-standing concerns over the quality of some immigration representatives, who may not be sufficiently competent to assist the Tribunal by preparing adequate country information. More recently, in light of restrictions to publicly funded legal aid provision, an increasing number of appellants are not represented at all.[24] By contrast, the Home Office's contribution tends to be limited to the presentation of its country report.[25] Though less of a problem than was previously the case, the absence of a Home Office representative at appeal hearings to defend the initial refusal decision will mean that the Tribunal may not be

[22] The Tribunal maintains a list of country guidance determinations on its website <http://www.ait.gov.uk/> from where they can be accessed; because of their length, country guidance determinations are not normally published in the specialist law reports such as the Immigration Appeal Reports and the Immigration and Nationality Law Reports.

[23] Under the Asylum and Immigration Tribunal (Procedure) Rules SI 2005/230, r 21(2) an Immigration Judge 'must not adjourn a hearing of an appeal on the application of a party, unless satisfied that the appeal cannot otherwise be justly determined'. Under r 23(4), the Tribunal must serve its determination on the Home Office by sending it not later than 10 days after the hearing finishes. The AIT operates under a target to complete 75% of asylum appeals within six weeks commencing from when the Tribunal receives the appeal and finishing when the Tribunal's written determination is promulgated, see, Tribunal Service, *Reforming, Improving and Delivering: Annual Report and Accounts 2007-08* (2007-08 HC 802), 98.

[24] It is not possible to produce statistics in this respect because the Tribunals Service of the Ministry of Justice, which provides administrative support to the AIT, does not collect any. However, it is apparent that the number of unrepresented appeals has increased in recent years. There are particular trends in this jurisdiction concerning the role representation: first, that of discontinuous representation in which an appellant may have successive representatives; and, secondly, the practice of 'dumping' by which some representatives, having acted initially for an appellant, will no longer do so because such work will not be covered by publicly funded legal aid.

[25] In the UK, the first, though very far from sole, source of country information is usually the relevant Home Office Country of Origin Information Service report <http://www.homeoffice.gov.uk/rds/country_reports.html>. Following concerns over the quality, objectivity and accuracy of these reports, the Advisory Panel on Country Information <http://www.apci.org.uk/> was established in 2002 to consider and make recommendations to the Home Secretary concerning their content. The Home Office is entitled to be represented before the Tribunal; usually this role is undertaken by an agency official known as a presenting officer.

presented with a critique of the appellant's country information. In any event, because of the short timescales, representatives on both sides are under pressure to prepare cases quickly and are therefore often unable to undertake detailed research into country information. Given these difficulties, persistent concerns over the quality of the asylum process and the underlying public interest in achieving correct decisions, the country guidance system is designed to assist Immigration Judges by providing a major input into their decision making.[26] For Immigration Judges themselves, country guidance provides some parameters in which they are to perform the difficult task of assessing credibility.

Country guidance is then a distinctive form of tribunal litigation. Most asylum appeals are simply an individual adjudication decision concerning the circumstances of the particular appellant's claim. However, in country guidance cases, the whole purpose is for the Tribunal to go beyond the individual appeal before it, in order to provide generic guidance that will be relevant in similar, future appeals. In other words, other appellants affected by a country guidance decision will not be able to participate in the making of that country guidance. At first sight, this might not appear to be that unusual. After all, the whole idea of precedent is based on the notion that the higher courts settle issues of law that are then binding on lower courts. However, country guidance issues concern issues not of law but fact, which are mutable. The issue of the extent that country guidance should be binding, persuasive or authoritative in subsequent appeals is addressed in more detail below.

A second point is that if ordinary asylum adjudication involves high error costs, then in the country guidance context, the stakes are raised even higher still since the guidance produced may affect many other cases. Put simply, good country guidance will promote consistently good decision making, while poor country guidance will promote consistently poor decision making. At the same time, because assessing the accuracy of asylum decisions is so elusive, it is impossible to know whether or not the country guidance system produces either consistently accurate or consistently inaccurate decisions. In this respect, it is important that the Tribunal receives a range of good quality country information upon which to base its country guidance.

Thirdly, the Tribunal's country guidance system has, within a comparatively short period of time, become a firmly established aspect of the UK's

[26] A number of commentators have expressed concerns about the quality of the UK's asylum process. See, most recently, the Independent Asylum Commission, *Fit for Purpose Yet? The Independent Asylum Commission's Interim Findings* (London: Independent Asylum Commission, 2008). For specific concerns over the quality of initial Home Office decisions, see, House of Commons Home Affairs Committee, *Asylum Applications* (2003-04 HC 218); Amnesty International, *Get It Right: How Home Office Decision Making Fails Refugees* (London: Amnesty International, 2004).

asylum process. The importance attributed to the system can be seen reflected in calls from both Parliamentary and judicial quarters for the Home Office to halt removals to a particular country pending the production of authoritative country guidance. For instance, in 2007 some Members of Parliament called for a temporary suspension of, and then the High Court issued an injunction against, the removal of failed asylum seekers to the Democratic Republic of Congo until the Tribunal had issued country guidance on whether or not this category of person would be at risk on return.[27] Meanwhile, the Home Office refers to country guidance determinations in its 'Operational Guidance Notes', which instruct case-workers assessing initial claims on the main types of claim that are likely to justify the grant of asylum. A theme well-recognized in the administrative law literature is that if the external forms of legal accountability provided by courts and tribunals are to exert influence upon the operation of large bureaucratic organizations, such as the Home Office, then the messages they contain often need to be incorporated within the internal forms of administrative organization, through soft-law and internal guidance, which are normally the most powerful means of directing the work of subordinate officials.[28] In this way, country guidance tends to filter down into initial Home Office decision making. Furthermore, since 2005, the country guidance system has been underpinned by a statutory basis.[29] From an international survey of asylum determination systems, the AIT stands out as being amongst those that possess the more developed and formalized country guidance systems.[30] Of course, some asylum decision making systems, such as the Canadian Immigration and Refugee Board, may, unlike the AIT, have their own country of origin information units

[27] See, House of Commons Early Day Motion 1729, 'Country Guidance Tribunal on the Democratic Republic of Congo', 19 June 2007; *R. (Lutete and Others) v. Secretary of State for the Home Department* [2007] EWHC Admin 2331 (HC); 'Judge halts Democratic Republic of Congo deportations', *BBC News website*, 23 Aug. 2007. The Tribunal's subsequent country guidance was provided in *BK v. Secretary of State for the Home Department (Failed asylum seekers) DRC CG* [2007] UKAIT00098 (AIT). In July 2008, the Home Office announced that it would defer enforcing the return of non-Arab Darfuri asylum seekers to Sudan until the Tribunal had issued country guidance on the safety of return to Khartoum (Hansard HL Deb., vol.703 col.WA263, July 22, 2008).

[28] See generally, S. Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart, 2003).

[29] This is because, under the Nationality, Immigration and Asylum Act 2002 Act, s 107(3) (as inserted by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, schedule 2, para. 22(1)(c)), the Tribunal's practice directions 'may, in particular, require the Tribunal to treat a specified decision of the Tribunal as authoritative in respect of a particular matter'. The *Practice Directions* (2007), para. 18.2 state that a reported Tribunal decision 'bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal' that determined the appeal. See also, *HGMO v. Secretary of State for the Home Department (Relocation to Khartoum) Sudan CG* [2006] UKAIT00062 at paras. 141-2 (AIT).

[30] B. Zalar, 'Results of a Survey of Country Guidance Models' (a paper presented at the 7th Biennial IARLJ World Conference, Nov. 2006).

that respond to focused queries or requests for information from decision makers.[31] Alternatively, other systems may have a more informal way of agreeing on those generic categories of asylum claimants that may or may not be at risk. Perhaps the most notable feature of the development of the AIT's country guidance system is that it has evolved through a debate between the higher courts and the Tribunal, with little, if any, input from either the Government or Parliament: it simply seems to have been assumed that this was a function that the Tribunal was best placed to undertake.

A final point concerns the developing role of the Tribunal as an actor in the asylum process. By providing authoritative assessments of country of origin information, the Tribunal has moved a considerable way from its former position of merely performing individualized asylum adjudication. Given its importance, country guidance sometimes illustrates the continuing political and legal controversy attached to assessing risk on return. It is perhaps no coincidence that some of the occasions when the Tribunal has been placed directly in the political and media spotlight have arisen as a result of country guidance decisions. For instance, the most high profile and protracted country guidance litigation to date has concerned the return of failed asylum seekers to Zimbabwe, during the course of which the Tribunal was successively criticised and applauded by Home Office Ministers for its country guidance.[32] Other country guidance issues, such as whether failed Congolese asylum seekers are at risk on return, have also become a focus of political campaigning and have attracted publicity both in the UK and in the relevant country generating asylum applications, prompting the Tribunal in that case to explain that its decision was not concerned with sending any kind of political message to the Congolese

[31] See, Canadian Immigration and Refugee Board (IRB), <http://www.irb-cisr.gc.ca/en/research/origin_e.htm>. The IRB has experimented with a technique analogous to the AIT's country guidance system, known as 'lead cases', in order to promote consistent, informed, efficient, and expeditious decision making. However, after a 'lead case' on the position of Hungarian Roma was overturned by the Federal Court of Appeal on the ground of bias, the IRB seems not to have pursued the initiative. See, *Geza v Minister for Citizenship and Immigration* [2006] FCA 124 (Canadian Federal Court of Appeal). In their study of the IRB, F. Crépeau and D. Nakache, 'Critical Spaces in the Canadian Refugee Determination System: 1989-2002' 20 *IJRL* 50-122 (2008) at 115-16 note that, in order to strengthen the quality of its decisions, the Board had also established 'country discussion groups' which allowed members to discuss a country situation; this helped members to refine their judgment on complex factual situations.

[32] During this complex litigation (2005-8), the Tribunal issued three country guidance determinations on Zimbabwe after the Court of Appeal twice remitted the case back to the Tribunal. See, *AA (No.1) v Secretary of State for the Home Department (Involuntary returns to Zimbabwe) Zimbabwe CG* [2005] UKAIT00144 (AIT); *AA and LK v Secretary of State for the Home Department* [2007] 2 All ER 160 (CA); *AA (No.2) v Secretary of State for the Home Department (Risk for involuntary returnees) Zimbabwe CG* [2006] UKAIT00061 (AIT); *AA (Zimbabwe) v Secretary of State for the Home Department* [2007] EWCA Civ 149 (CA); *HS v Secretary of State for the Home Department (returning asylum seekers) Zimbabwe CG* [2007] UKAIT00094 (AIT); *HS (Zimbabwe) v Secretary of State for the Home Department* [2008] EWCA Civ 915 (CA).

authorities as to how it should treat its citizens.[33] In light of this political context, it is important to consider the advantages offered by issuing country guidance through adjudication.

But first: how does the country guidance system operate in practice? What range of country information does the Tribunal draw upon when seeking to establish such wide-ranging guidance? And what particular techniques has the Tribunal utilised in order to provide country guidance?

4. Managing country guidance

The task of managing the country guidance system is principally one for the Tribunal itself. In terms of selecting particular appeals as appropriate 'vehicles' for country guidance purposes, the Tribunal has indicated that it is a matter for its own decision, and not for the parties concerned, whether a particular appeal is to be selected for country guidance purposes. The fact that conditions in a particular country are unstable or fluid does not necessarily preclude the Tribunal producing country guidance decisions relating to risk categories in that country.[34] While unusually unstable or fluid country conditions might sometimes justify the Tribunal not proceeding with giving guidance in relation to claims made by asylum seekers from that country, much depends on the particular context and the extent to which it is possible, notwithstanding such fluidity, to draw conclusions about risk categories. After all, many asylum seekers tend to come from countries in which conditions are unstable and fluid.

In terms of tribunal composition, a country guidance panel will normally comprise either three Senior Immigration Judges or two and a non-legal member. The advantage of this is that more senior and experienced judges can specialize in country guidance, thereby building up their experience, while Immigration Judges focus on determining individual appeals and applying the guidance provided.[35] Both parties to ordinary appeals concerning a particular country, the Home Office and the asylum appellant, are expected to be conversant with relevant country guidance decisions.[36]

[33] *BK*, above n. 27. This country guidance case proceeded in the context of a political campaign involving a series of public meetings organized by the Congo Support Project (speakers at which had included witnesses who subsequently gave evidence before the Tribunal). The appeal hearing was conducted with demonstrations outside the Tribunal building and the litigation also attracted some attention within the Democratic Republic of Congo itself.

[34] *KG v. Secretary of State for the Home Department (Review of current situation) Nepal CG* [2006] UKAIT 00076 at para. 43 (AIT).

[35] For country guidance purposes, the Tribunal's Senior Immigration Judges are organized into three 'country groups' which oversee different asylum producing countries. Overall responsibility for country guidance resides with the country guidance co-ordinator who is a Senior Immigration Judge.

[36] Asylum and Immigration Tribunal, *Practice Directions* (2007), para. 18.3.

Part of the challenge for the Tribunal is that of detecting which particular 'live' country issues would benefit from authoritative guidance. Managing the system therefore requires close communication between the two levels of the appeal system – the Immigration Judges situated in the hearing centres and the senior judges located centrally. Under the previous two-tier appellate structure, which existed until 2005, it could take up to a year before the senior judges in the Immigration Appeal Tribunal (IAT) could become aware of particular country issues commonly being raised before Adjudicators (now Immigration Judges).[37] However, a distinctive feature of the single tier AIT is the practice by which senior judges go out 'on circuit' to the hearing centres. This peripatetic working practice serves the dual function of enabling the Immigration Judges at the hearing centres to benefit from the assistance of the senior judges, while at the same time ensuring that senior judges have closer contact with the types of cases coming through the appeal system with a view to identifying those issues that would benefit from country guidance. Furthermore, in the hearing centres, twenty-five Designated Immigration Judges, who oversee and manage small teams of Immigration Judges, are expected to notify senior judges of potential country issues arising in appeals. The management of the country guidance is assisted by this two-way, mutually beneficial exchange.

At the same time, there are some practical difficulties for the Tribunal in its management of the system. Cases must be selected that are appropriate to the task of issuing country guidance.[38] The Tribunal's practice is only to select appeals for country guidance purposes if the appellant is in receipt of publicly funded representation. While the Home Office is often

[37] The old two-tier appeal system, which comprised the Immigration Appellate Authority (IAA) and the Immigration Appeal Tribunal (IAT), was replaced with the 'single tier' AIT in 2005 because of the Government's desire to speed up the appeals process. The resulting structure was in large part a political compromise because of opposition to the Government's controversial and ultimately aborted proposal to oust judicial review of tribunal decisions. See further, R. Rawlings, 'Review, Revenge and Retreat' (2005) 68 *Modern Law Review* 378-410; R. Thomas, 'After the Ouster: Review and Reconsideration in a Single Tier Tribunal' [2006] *Public Law* 674-86. Before its abolition, the IAT had developed an embryonic country guidance system under which decisions which were to be regarded as definitive unless there was a material change in country conditions. See, for instance, *Secretary of State for the Home Department v. S* (01TH00632), date notified 1 May 2001 (IAT), which concerned Croatian ethnic Serbs. In Aug. 2008, the Home Office consulted on a further set of reforms to the structure of the appeals process, see, Home Office, *Consultation: Immigration Appeals – Fair Decisions; Faster Justice* (London: Home Office, 2008). These proposals would bring the AIT within the rationalization of the broader tribunal appeal system under the Tribunals, Courts and Enforcement Act 2007. A two-tier appellate structure would be re-instated for immigration and asylum appeals: initial asylum appeals would be heard by the First-tier Tribunal; the losing party could challenge an adverse decision before a separately constituted asylum and immigration appeals chamber of the Upper Tribunal, in which the Senior Immigration Judges would be located and country guidance cases heard.

[38] Individual appeals selected for country guidance purposes are almost always cases that have already been within the appeal system for a period of time, that is an Immigration Judge has dismissed the appeal and reconsideration has been ordered, rather than being cases that in which there has been no previous judicial decision by the Tribunal.

represented in country guidance cases by experienced government lawyers, concerns have been raised that this may militate against an equality of arms if appellants are represented by less competent representatives; some representatives may simply not be up to the task and so the Tribunal must exercise some care when selecting an appropriate appeal. Moreover, representatives themselves may be undecided as to whether or not they should assist the Tribunal when it is seeking to establish wide-ranging country guidance and where their duties lie (to their individual client or to a wider class of asylum applicant?). Some representatives may grasp the opportunity to present country information to assist the Tribunal in producing country guidance; others may think that it is not beneficial for the Tribunal to consider their client's appeal as potential country guidance and may therefore not compile country information beyond that relevant to their particular client.

There may be difficulties on the other side also. As the agency responsible for maintaining immigration control, the Home Office has an obvious interest in the outcome of country guidance cases. Indeed, from the Home Office's perspective, the country guidance enterprise may on occasion appear to be somewhat high-risk if there is the potential that the Tribunal will lay down wide-ranging country guidance favourable to a large number of asylum applicants. A recurrent problem for the Tribunal in managing the system has then been the last-minute concession or reconsideration by the Home Office of individual appeals selected for country guidance purposes, perhaps motivated by concerns that the Tribunal might issue guidance favourable to particular categories of asylum applicant and therefore possibly result in the grant of status to such people. In this respect, the Tribunal's position is that while it is always open to the Home Office to withdraw an initial refusal decision and to grant status to an individual appellant, for it to do so in the knowledge that that individual's appeal has been listed as potential country guidance risks both undermining the system and generating the perception that the Home Office is seeking to evade a judicial decision on an important country issue.[39] From one perspective, this is all part of the cynical 'game' that is the asylum process but from another the practice is deeply troubling on both constitutional and efficiency grounds. Constitutionally, it is anomalous as it enables the executive to undermine the ability of the senior level of the asylum judiciary to issue guidance to its lower level; in practical terms, it is wasteful of judicial time and resources.

In arranging potential country guidance, it might be necessary for the Tribunal to link some appeals together so that they may be heard together for country guidance purposes; this obviously requires effective

[39] *MA v. Secretary of State for the Home Department (Operational Guidance, prison conditions, significance) Sudan* [2005] UKAIT00149 at paras. 27-8 (AIT).

case-management within the Tribunal. The appeal must be then heard and determined. Here other difficulties can arise. At the appeal hearing it may turn out that a particular appeal is not, despite early indications, suited to the task of issuing broader country guidance. For instance, if an appeal, which has been listed as potential country guidance, can be determined without too much examination of the broader country issue, then it will not be reported as such. In determining appeals, the Tribunal's primary focus is on the resolution of the individual case; broader country guidance is viewed by the Tribunal as an extra, value-added component. As a senior judge has explained, country guidance is a feature not of individual cases but of written Tribunal determinations.[40]

Once a determination has been produced, it will then be for the Tribunal's reporting committee to decide whether or not it should receive the special cachet of the 'CG' designation. The practice of the reporting committee is that a case will not be reported as country guidance if, although the case deals with a fair amount of country information, it does not seem to have considered all the country material that it could have. The (albeit, and inevitably, imprecise) criteria for being designated as country guidance is therefore not solely that a case adequately determines the particular appeal but that it is also provides a balanced, impartial and authoritative assessment of available country information drawing out guidance which can be usefully applied in subsequent appeals.

One of the real practical difficulties for the Tribunal concerns its ability to identify appropriate cases coming up on sufficiently regular intervals as potential vehicles by which country guidance can be issued. To illustrate the point, consider the issue of Bidoon asylum applicants seeking protection from persecution in Kuwait. In 2004, the Tribunal issued country guidance to the effect that, because of the widespread and systematic nature of the discriminatory measures they experience, the majority of, though not all, Bidoon in Kuwait will face a real risk of persecution in Kuwait.[41] In 2006, subsequent country guidance found that there had been no material change.[42] However, following these cases, the Tribunal has simply not been presented with the opportunity to issue subsequent guidance taking into account any change in country conditions. This was because of a reduction in the number of such asylum applicants; furthermore, as the country guidance was favourable to applicants, there were few onward challenges against adverse determinations by Immigration Judges. It might be that the situation for Bidoon and their treatment has since

[40] Interview with a Senior Immigration Judge.

[41] *BA and Others v Secretary of State for the Home Department (Bedoon – statelessness – risk of persecution) Kuwait CG* [2004] UKIAT00256 (IAT).

[42] *HE v Secretary of State for the Home Department (Bidoon – statelessness – risk of persecution) Kuwait CG* [2006] UKAIT00051 (AIT).

improved – it might not; in any event, the Tribunal has been unable to revisit the issue.[43] The consequence of this is that country guidance is always at the risk of becoming – or appearing to become – out of date.

Country guidance determinations can be challenged in one of two ways. First, the losing party can challenge that guidance issued before the higher courts on the basis that the Tribunal's assessment contained an error of law. Secondly, any party in a subsequent appeal to which the country guidance applies can challenge that guidance on the basis that it has been superseded by a change in country conditions or that new evidence has come to light. Oversight by the higher courts can perform an important function in assessing whether or not the Tribunal made any error of law in its guidance. Unsurprisingly, given the nature of the country issues – is it unduly harsh to expect non-Arab Sudanese nationals at risk in Darfur to relocate internally to Khartoum? will failed Zimbabwean asylum applicants be at risk on return? – a number of country guidance cases have prompted onward challenges to the higher courts, which then either endorse the decision or remit it to the Tribunal for reconsideration. This, of course, raises concerns about the finality of the country guidance process.

Conscious of the ever-present risk of multiple appeals further prolonging the decision making process, the higher courts have been keen to legitimize the country guidance system, while at the same time laying down certain safeguards as to its exercise.[44] When issuing country guidance, the Tribunal needs to set out its reasons with particular rigour. It should also take special care to ensure that its decision is effectively comprehensive by considering all the relevant country information, if necessary by adopting a more inquisitorial approach than would normally be the case, and by explaining what it makes of such information. Furthermore, the Tribunal will usually need to consider evidence presented by 'country experts', those individuals, often academic anthropologists, journalists, independent researchers and the like, who (claim to) possess an objective, expert knowledge of the country concerned.

5. Country information

Good country guidance presupposes good country information. The broader issue of country information has, over recent years, become an area of increasing attention. One particular task has been to identify criteria against which the validity of such information may be assessed.[45]

[43] Interview with a Senior Immigration Judge.

[44] *S & Others*, above n. 16 at 436 (Laws LJ).

[45] See, UNHCR, *Country of Origin Information: Towards Enhanced Cooperation* (Geneva: UNHCR, 2004); International Association of Refugee Law Judges (IARLJ): Country of Origin Information-Country Guidance Working Party, *Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist* (a paper presented at the 7th Biennial IARLJ World Conference, Nov. 2006); G. Gyulai, *Country Information in Asylum Procedures: Quality as a Legal Requirement in the EU* (Budapest: Hungarian Helsinki

The two most significant criteria to emerge are that country information should be both reliable and up to date.[46]

Clearly, given the prominence attached to country guidance, it is important that the Tribunal is presented with comprehensive and relevant country information. As asylum adjudication is an area of law where the parties have a shared interest in co-operating in order to achieve a correct result, it is in the interest of all parties that country guidance should be made on the basis of the best available country information. In particular, it is important that in country guidance decisions, which may have potentially wide ramifications, the Tribunal has before it all the relevant materials from which to make its assessment of the relevant country issues which is to act as a guide in other appeals. It can only be disadvantageous to all concerned if an ostensibly comprehensive appraisal issued by the Tribunal, upon which Immigration Judges subsequently rely when determining other cases, has been produced in ignorance of relevant country information and therefore has to be undone. There are though inherent problems with what country information is available. Concerns are often raised with regard to how reliable and up to date such information is and whether or not it accurately reflects the reality of conditions on the ground in the relevant country. Furthermore, the Tribunal's handling of country information has itself sometimes been criticised. According to one commentator, the country guidance system exemplifies an endemic problem within the Tribunal: the expectation that some sort of evidence will be forthcoming in order to support an appellant's claim; the implication being that if such evidence is not forthcoming, then it is because it does not exist rather because than such evidence is not available to the particular appellant.[47] At the same time, while the burden of proof is on the appellant, it is set at the lower standard.

Initially, some country guidance decisions were criticised on the basis that the Tribunal's reasoning was too brief, the sources of country information relied upon too limited and that the Tribunal did not always list such information.[48] However, in more recent country guidance cases, the Tribunal has typically relied upon a much wider range of country information, which it lists in an appendix to the determination so that

---

Committee, 2007). On the use of country information within the UK asylum process, see, B. Morgan, V. Gelsthorpe, H. Crawley and G.A. Jones, *Country of Origin Information: A User and Content Evaluation* (London: Home Office Research Study 271, 2003); M.L. Pirouet, 'Materials Used in Making Asylum Decisions in the U.K.' (2003) 93 *African Research & Documentation* 29-38.

[46] EC Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status, 2005/85/EC of 1 Dec. 2005, OJ 13. Dec 2005, L 326/13-34, art 8(2)(b); Statement of Changes to Immigration Rules (HC 82), 19 Nov. 2007, r 339JA.

[47] C. Yeo, 'Country Information, the Courts and Truth' (2005) 11(2) *Immigration Law Digest* 26-8 at 27.

[48] C. Yeo (ed.), *Country Guideline Cases: Benign and Practical?* (London: Immigration Advisory Service, 2005), 3.

representatives can know what was in the Tribunal's factual 'database'. Indeed, some decisions are very lengthy because of the volume of country information considered and the detailed assessment it receives from the Tribunal. For instance, two recent determinations are each some 144 pages long.[49] Some concerns have been raised over the length of some decisions: given the pressures on judges and representatives, who has the time to read them? Furthermore, the longer country guidance determinations are, then the greater is the scope for any onward challenge. However, issuing country guidance imposes special demands on the Tribunal: that the coverage of country information is effectively comprehensive and that the Tribunal give detailed reasons. In order to meet these requirements, the Tribunal will, in its determination, provide both a conspectus and an evaluation of the relevant country information. By so doing, the Tribunal will identify those sources of country information that are accepted and those that are not, thereby enabling the parties in subsequent appeals to know which sources of country information they can rely upon without having to reproduce it on each occasion.

In addition to the usual sources of country information – country reports produced by the Home Office, the US State Department, the UNHCR and non-governmental organizations (NGOs) – the Tribunal will often be presented with expert evidence from one or more country experts who have been commissioned by appellants to submit a report containing their views. However, to summarize the point, the issue of country expert evidence is, on occasion, a contested one.[50] The Tribunal has expressed concern that country expert evidence is sometimes tendentious, that is, the perception is that some country experts have acted more as advocates than as impartial witnesses, that not all individuals who have presented themselves as country experts have possessed sufficient objectivity in their views, and that some experts have made sweeping generalisations as to country conditions in the absence of adequate empirical support.[51] By contrast, country experts have opined that the Tribunal's expectation that it is possible to present wholly objective information concerning country

[49] See, *BK*, above n. 27 and *HH & Others v. Secretary of State for the Home Department (Mogadishu: armed conflict: risk) Somalia CG* [2008] UKAIT00022 (AIT). In *BK*, the appendix listing the background country materials considered by the Tribunal was itself nine pages long. In its country guidance determinations, the Tribunal will regularly provide a head-note summary of its decision.

[50] See, A. Good, '"Undoubtedly an Expert"? Country Experts in the UK Asylum Courts' (2004) 10 *Journal of the Royal Anthropological Institute* 113-33; R. Thomas, 'Expert Evidence in Asylum Appeals' (2007) 13(2) *Immigration Law Digest* 2-6.

[51] See, *Slimani v. Secretary of State for the Home Department (Content of Adjudicator Determination) Algeria* (Starred determination) (01TH00092), date notified 12 Feb. 2001 at para. 17 (IAT); *Secretary of State for the Home Department v. SK (Return – Ethnic Serb) Croatia CG* (Starred determination) [2002] UKIAT05613 at para. 5 (IAT); *GH v. Secretary of State for the Home Department (Former KAZ – Country Conditions – Effect) Iraq CG* [2004] Imm. AR 707 at 726-7 (IAT). The Tribunal's *Practice Directions* (2007), para. 8A.4 state that 'an expert should assist the Tribunal by providing objective, unbiased opinion on matters within his or her expertise, and should not assume the role of an advocate'.

conditions is unrealistic.[52] In other words, there is no such thing as a 'value-free' assessment of country conditions because each assessment is bound to be affected, whether consciously or otherwise, by the particular vantage point of the agency or person that produced it. The higher courts have noted that although the Tribunal is not bound to accept the views of a country expert, it should give adequate reasons for rejecting them.[53] While the Tribunal has subjected country experts to close scrutiny, prompting occasional criticism from the Court of Appeal, it has rejected an attempt by the Home Office to confine the role of country experts to that of solely presenting, but not interpreting, country data.[54]

One problem here arises from the procedure through which the Tribunal is presented with country expert evidence: it is virtually always commissioned by appellants, with the concern that it is unlikely for such reports ever to say anything detrimental to an appellant's case. The Tribunal is itself unable to commission its own expert reports whereas the Home Office has not normally produced its own expert report but preferred instead to focus its case on undermining the appellant's expert evidence (though in a recent country guidance case, the Home Office for the first time produced its own country expert report).[55] As the Court of Appeal has explained, the Home Office's approach is perfectly proper because it is the appellant who bears the burden of proof 'but it does mean that the content of the primary evidence going towards the wider situation in the country in question depends on what experts are known to, and ready to give evidence on behalf of, the applicants'.[56] However, as the court noted, it is the Home Office which is likely to have the most comprehensive knowledge of conditions in foreign countries, not least through diplomatic and consular channels, and if decisions with the enhanced status of country guidance cases are to be made about those countries, then it might be appropriate for the Home Office directly to contribute that knowledge. The general need for cooperation in asylum decision making between applicant and examiner in both ascertaining and evaluating all the relevant

[52] A. Good, 'Expert Evidence in Asylum and Human Rights Appeals: an Expert's View' 16 *IJRL* 358-79 (2004).

[53] See, *K v. Secretary of State for the Home Department* [2006] Imm. AR 161 (CA); *Jasim v. Secretary of State for the Home Department* [2006] EWCA Civ 342 (CA); *FK (Kenya) v. Secretary of State for the Home Department* [2008] EWCA Civ 119 (CA).

[54] *LP v. Secretary of State for the Home Department (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG* [2007] UKAIT00076 at paras. 18-42 (AIT).

[55] *JC v. Secretary of State for the Home Department (double jeopardy: Art 10 CL) China CG* [2008] UKAIT00036 (AIT). In this country guidance decision, the Tribunal considered whether or not the risk of prosecution or re-prosecution of Chinese nationals who have committed offences overseas on their return to China was sufficient to engage international protection under the Refugee Convention, the ECHR or to require humanitarian protection. The Tribunal was presented with a range of country information totalling well over 1,000 pages; it also had the assistance of significant and detailed expert evidence from six country experts one of whom was recognized to be the world's leading authority on Chinese law.

[56] *AH (Sudan), IG (Sudan) and NM (Sudan) v. Secretary of State for the Home Department* [2007] Imm. AR 584 at 601 (Buxton LJ) (CA).

materials is, of course, highlighted by the UNHCR handbook.[57] Given the broader influence of country guidance decisions, the Home Office could do more to contribute to country guidance cases. For this reason, the higher courts have exhorted the Home Office to adopt a more pro-active approach by encouraging it to present information from officials posted at diplomatic and consular posts in the countries concerned. For the Tribunal, such sources of information are to be welcomed as much as country expert reports in furtherance of both producing balanced decisions and obtaining the highest quality of country guidance determinations.[58] As a source of country information, letters from diplomatic and consular posts are not unproblematic: such information emanates from a different branch of the executive; the sources relied upon may not be disclosed; and little is known about the information-gathering process. On the other hand, such information is produced by a diplomatic post with a permanent presence in the country concerned as opposed to the temporary presence of a country expert.

A related issue concerns the mode of tribunal procedure. Traditionally, this has been an adversarial appellate jurisdiction: the appellant bears the burden of proof; it is for the parties to present the evidence that they wish to rely upon; and, to maintain its independence, the Tribunal should refrain from descending into the arena. However, the task of producing authoritative country guidance is of a different nature from that of determining individual asylum appeals. If the Tribunal were strictly confined to the body of evidence presented before it by the parties, even though it was aware that this omitted other potentially material evidence, then this would undermine the whole purpose of producing authoritative guidance. The country guidance exercise can therefore assume 'something of an inquisitorial quality, although the adversarial structure of the appeal procedure of course remains'.[59] In this respect, much may depend upon the awareness of the senior judges of recent country information and the discussion between the parties at pre-hearing reviews concerning the sources of country information to be relied upon. The Tribunal has occasionally explicitly adopted a more inquisitorial approach by using country information not presented by either party.[60] One suggestion is that the Tribunal needs to go further in this respect by developing its own research resources, by establishing a system of independent counsel to research country information and make submissions, or by being able to instruct country experts for itself rather than relying upon those country expert reports submitted by

[57] UNHCR, above n. 10, para. 196.

[58] *AH (Sudan)*, above n. 56 at 601; *LP*, above n. 42 at paras. 45 and 204-5.

[59] *S & Others*, above n. 16 at 431 (Laws LJ).

[60] See, *VL v Secretary of State for the Home Department (Risk - Failed Asylum Seekers) Democratic Republic of Congo CG* [2004] UKIAT 00007 (IAT) in which the Tribunal considered a country expert's report of which it was aware but which neither party to the appeal had presented.

the appellant.[61] Furthermore, the Home Office could itself adopt a more collaborative approach in all country guidance cases and co-operate with both the Tribunal and appellants by supplying its own sources of country information (for instance, by presenting information from diplomatic posts in the country concerned and by commissioning its own country expert evidence).

Having assembled the relevant country information, the task is then one of assessing and comparing the information, scrutinizing its relevance and impartiality and the reliability of its sources and methodology. The critical issue for the Tribunal is that of attributing weight to the sources of country information when assessing risk. Every country guidance case therefore has the potential to become an inquiry into the nature of country information and the criteria against which it is to be assessed. The Tribunal must then decide what, if any, guidance it is able to distil from the country information about the existence and degree of risk on return that will be of assistance to Immigration Judges deciding similar, subsequent cases.

6. Country guidance techniques and risk assessment

Risk assessment is at the centre of asylum decision making. How does country guidance contribute toward this task? If we review country guidance decisions, do any distinctive risk assessment techniques emerge? If so, then what advantages and disadvantages do they possess?

Surveying current country guidance determinations, it is apparent that the manner or technique through which guidance is provided is highly dependant on the nature of the particular country issue. Given the rapidity with which the country guidance system has developed and the range of country issues covered, it is not surprising that the Tribunal has utilised a number of different country guidance techniques. At the same time, some distinctive methods have emerged. In an attempt to identify some general trends, the following, non-exhaustive taxonomy is proposed. First, there are cases in which the Tribunal's country guidance is closely linked to the application of a particular concept of refugee, asylum or human rights law. Secondly, there are country guidance cases in which the Tribunal assesses whether or not the circumstances in the relevant country mean that a particular category of asylum claimant will be at risk on return and therefore comprise a 'risk category'. Thirdly, there are those country guidance cases in which the Tribunal enumerates criteria, or 'risk factors', which are likely to be considered relevant when determining the degree of risk on return in any individual case.

[61] Curiously, the UNHCR has not to date participated in country guidance hearings even though it may, under the Asylum and Immigration Tribunal (Procedure) Rules SI 2005/230, r 49, intervene in any appeal before the AIT and has also acted as an intervener before the House of Lords in cases raising general points of asylum law.

6.1 Country guidance and concepts of asylum law

As the adjudication of asylum appeals involves the application of the legal concepts of asylum, refugee and human rights law to the circumstances of individual cases, a clear means of issuing guidance has been for the Tribunal to issue country guidance concerning the application of those legal tests in relation to particular country issues. The specific nature of the country guidance will then depend largely on the particular nature of the country issue and the relevant legal rule.

By way of illustration, consider country guidance concerning internal relocation for Pakistani Ahmadis. For some years, Pakistan Ahmadis have sought asylum in the UK on the basis that they will be at risk of persecution because of their religion, Ahamdis being subject to various restrictions on the public practice of their faith. In previous country guidance, the Tribunal had accepted that such individuals could, if found to be at risk on return, internally relocate to Rabwah. However, in 2007 a challenge was mounted against this guidance; a special report had been prepared on behalf of the Parliamentary Human Rights Group as to whether such internal relocation would be reasonable. In its subsequent country guidance determination, the Tribunal, examining the report, concluded that Rabwah no longer constituted a place of safety and was not generally to be treated as an appropriate place of internal relocation.[62] Country guidance can, then, go in the general favour of appellants but it can go against them as well. So, in a controversial decision, the Tribunal held that it would not, except in discernible cases, be unduly harsh to expect non-Arab Sudanese nationals at risk of persecution or ill-treatment in Darfur to relocate from there to internally displaced persons' camps around Khartoum, despite the deplorable conditions of those camps.[63]

In other cases, country guidance has been linked to other concepts of asylum law, such as the membership of a particular social group. For instance, the Tribunal has issued guidance that a Moldovan woman, who has been trafficked for the purposes of sexual exploitation, is a member of a particular social group, the particular social group in question being 'former victims of trafficking for sexual exploitation'. Whether a particular individual is at risk of persecution because of their membership of that group is a question that needs to be decided on the facts of the particular case.[64]

Elsewhere, certain rules of asylum law may be particularly suited for country guidance purposes. Under article 15(c) of the EC Qualification

[62] *IA and Others v Secretary of State for the Home Department (Ahmadis: Rabwah) Pakistan CG* [2007] UKAIT00088 (AIT). See also, *MJ and ZM v Secretary of State for the Home Department (Ahmadis – risk) Pakistan CG* [2008] UKAIT00033 (AIT).

[63] *HGMO*, above n. 29.

[64] *SB v Secretary of State for the Home Department (PSG – Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT00002 (AIT).

Directive, a person who does not qualify for refugee status may nevertheless be eligible for subsidiary protection on the basis that he is at risk of serious harm consisting of a serious and individual threat by reason of indiscriminate violence in situations of international or internal armed conflict. The assessment of whether or not a particular country – Iraq, for instance – or region/city – Mogadishu, for example – is in a situation of internal armed conflict, almost presupposes a country guidance system by which such assessments are to be made.[65]

6.2 Risk categories

A second method is for the Tribunal to identify distinct risk categories, membership of which will mean that an individual appellant will be at real risk on return. A risk category might be defined as a class of person who, because they share particular characteristics, will be at risk. The Tribunal tends to recognize a risk category when the evidence enables such categories to be identified with confidence.

To provide some examples, the Tribunal has recognized the following risk categories: nationals from the Democratic Republic of Congo who possess an ethnic, political or military profile in opposition to the Congolese government; Eritrean nationals who have left that country illegally and are of draft age; ethnic Palestinians in Iraq; and in relation to Zimbabwean nationals, the Tribunal has identified a number of risk categories including those individuals who are, or are perceived to be, politically active in opposition to, and for this reason of serious adverse interest to, the Mugabe/Zanu PF regime.[66]

Such risk categories will heavily condition the focus of subsequent appeals. For instance, if country guidance states that those Congolese nationals who either are or are believed to be of Tutsi ethnicity will be at risk on return to the Democratic Republic of Congo, then individual appeals will focus on whether the particular appellant is, or could be perceived to be, of Tutsi ethnicity. The same applies in relation to Somali minority clans. The identification of risk categories through country guidance does not therefore determine the outcome of individual appeals; the assessment of appeals against the risk categories laid down in country guidance always requires the assessment of the particular circumstances of each case to determine whether or not the appellant does indeed fall within the claimed risk category.[67] However, risk categories provide a clear guide

[65] See, *HH & Others*, above n. 49; *KH v Secretary of State for the Home Department (Article 15 (c) Qualification Directive) Iraq CG* [2008] UKAIT00023 (AIT).

[66] *AB and DM v Secretary of State for the Home Department (Risk categories reviewed – Tutsis added) DRC CG* [2005] UKIAT00118 (IAT); *MA v Secretary of State for the Home Department (Draft evaders – illegal departures – risk) Eritrea CG* [2007] UKAIT00059 (AIT); *NA v Secretary of State for the Home Department (Palestinians - risk) Iraq CG* [2008] UKAIT 00046 (AIT); *HS*, above n. 32.

[67] *KA*, above n. 12 at para. 74.

and focus for Immigration Judges determining subsequent appeals and thereby promote a consistent approach toward 'risk-group existence'.

The advantage of this technique is its flexibility. Risk categories may be drawn by the Tribunal more or less widely dependant on the degree to which available country information enables the Tribunal to make relevant conclusions; the breadth of risk categories can therefore vary. The widest possible risk category is that of failed asylum seekers, that is, the mere fact of having sought asylum, irrespective of the merits of such claims, places the nationals of a particular country at real risk on return. Alternatively, the width of risk categories may be more circumscribed through the identification of a narrow group of people who will be at risk on return. Furthermore, risk categories can be reaffirmed, refined, supplemented or amended as new country information emerges. In this way, the country guidance process allows the Tribunal to revisit particular risk categories in subsequent cases. Furthermore, this country guidance technique can be used in conjunction with the first technique already identified. So, for instance, while the Tribunal held that it would not be unduly harsh to expect someone to relocate internally from Darfur to Khartoum, it did at the same time identify limited risk categories of Darfuri returnees who would be at risk in Khartoum. These limited risk categories included *inter alia* persons from Darfuri 'hotspots' or 'rebel strongholds' from which rebel leaders are known to originate, and female returnees if they are associated with a man of adverse interest to the authorities or have no alternative but to become the female head of a household in a squatter camp around Khartoum.

At the same time, it could be argued that the identification of risk categories may have its disadvantages. Appellants may seek to fit their case within existing risk categories. Secondly, it has been argued that the use of risk categories creates a risk of Immigration Judges stereotyping appellants and failing to take into account individual circumstances.[68] However, in recognizing risk categories, the Tribunal is issuing guidance that all members of a particular class of person are at risk; membership of that class will entitle an individual to succeed. At the same time, if members of that class are not generally at risk, then a successful individual will need to demonstrate that they possess additional characteristics that place them at risk.

6.3 Risk factors

A third technique is for the Tribunal to identify a list of 'risk factors' arising from its assessment of country information that are to be used by an Immigration Judge when assessing risk in an individual appeal. By

[68] See, *NABD v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1 at para. 27 (McHugh J) (Australian High Court).

itemizing risk factors, the Tribunal is seeking to select those criteria which, on a proper view of the country information, are likely to be regarded as relevant in determining the degree of risk in any particular case. The particular risk factors ascertained will, of course, depend on the Tribunal's assessment of the relevant country information regarding the particular country issue. Furthermore, the risk factors can be modified over time through subsequent country guidance, either as the Tribunal develops it own thinking about a particular country issue or as the higher courts indicate to the Tribunal which risk factors they think that it should consider.[69]

An illustration of the use of risk factors is provided by a country guidance case concerning the risks facing Tamils. Here the Tribunal concluded that Sri Lankan Tamils were not *per se* at risk on return but it did identify twelve risk factors that might increase the risk in a particular case.[70] In its guidance, the Tribunal explained that its assessment of the various risk factors had highlighted the need to determine each case on its own facts. In some individual cases, it might be that the fulfilment of one individual risk factor would be sufficient for an appellant to be at risk. In other cases, appellants with a lower profile would need to have their own specific profiles assessed in their own individual situation and set against the non-exhaustive and non-conclusive set of risk factors and the volatile country situation. Some factors were identified by the Tribunal as indicating a much higher level of propensity to risk than various other factors.[71] Overall, the Tribunal explained that, given the volatile and worsening situation in Sri Lanka, the assessment of risk in any individual case by an Immigration Judge would require serious consideration of all of the risk factors together with a review of up to date country of origin information set against the very carefully assessed profile of the appellant.[72]

The High Court subsequently delineated the twelve risk factors identified by the Tribunal into those 'background factors' which would not in

[69] Some of the impetus to identify risk factors has on occasion emanated from the higher courts; for instance, on the country issue of Albanian blood feuds, see, *Koci v. Secretary of State for the Home Department* [2003] EWCA Civ 1507 (CA); *TB v. Secretary of State for the Home Department (Blood Feuds – Relevant Risk Factors) Albania CG* [2004] UKIAT00158 (IAT).

[70] *LP*, above n. 54 at paras. 207-22. The risk factors were: Tamil ethnicity; a previous record as a suspected or actual member or supporter of the Liberation Tigers of Tamil Eelam (LTTE); a previous criminal record and/or outstanding arrest warrant; bail jumping and/or escaping from custody; having signed a confession or similar document; having been asked by the security forces to become an informer; the presence of scarring; having returned from London or other centre of LTTE activity or fund-raising; illegal departure from Sri Lanka; the lack of ID card or other documentation; having made an asylum claim abroad; and having relatives in the LTTE. In *NA v. United Kingdom* (Application no. 25904/07, 17 July 2008) at para. 129 (ECtHR), the European Court of Human Rights concluded that it was in principle legitimate, when assessing the individual risk to Sri Lankan Tamil returnees, to carry out that assessment on the basis of these 'risk factors'.

[71] For instance, being subject to an outstanding arrest warrant, or being a proven bail jumper from a formal bail hearing.

[72] *LP*, above n. 54 at para. 227.

themselves, either singly or cumulatively, create a real risk on return, though in conjunction with other factors would exacerbate the degree of risk on return, and other risk factors *per se* that were likely to make a person of adverse interest to the Sri Lankan authorities.[73] Therefore, an individual exhibiting any 'background factor' (for instance, being of Tamil ethnicity, having departed illegally from Sri Lanka or having made an asylum claim abroad) would not for that reason alone be reasonably likely to fear ill-treatment. However, if that individual also possessed other risk factors *per se* (for instance, a previous record as a suspected or actual member of the LTTE, a previous criminal record and/or outstanding arrest warrant), then this might signify to the Sri Lankan authorities significant involvement with the LTTE to warrant detention or interrogation sufficient to amount to serious ill-treatment.

The clear intention is that, by identifying risk factors, guidance can be produced to assist in the assessment of risk while at the same time affording sufficient scope for the particular circumstances of individual cases and their assessment by Immigration Judges. Risk factors are not intended to be exhaustive but merely to require the consideration of characteristics that are likely to be relevant in deciding whether an appellant will face a real risk of persecution in the circumstances of his own case. Furthermore, the decision maker should pay due regard to the possibility that a number of individual risk factors may not, when considered separately, result in a real risk but, when taken cumulatively and considered in the context of general country conditions, those factors may give rise to a real risk.

As a country guidance technique, the identification of risk factors possesses certain advantages. It might indicate that while the evidence does not enable the Tribunal to identify with certainty a distinct risk category, it is nevertheless able to discern generic criteria indicative of risk on return. The use of risk factors may, then, be most apposite where the Tribunal is not convinced that the country information supports the view that a particular category of person will as a whole be at risk but where there are nevertheless certain factors which are indicative of establishing a real risk on return. The utility of the technique is that it still enables the Tribunal to issue guidance in order to promote consistency in decision making between different judges, while at the same time allowing the assessment of the relevant weight of each risk factor to be undertaken by a judge on the basis of the circumstances of the individual case.

At the same time, the use of risk factors may have some potential drawbacks. Despite guidance from senior judges that a list of risk factors is not considered to be exhaustive and that risk factors should be considered both

[73] *R. (Thangeswarajah) v Secretary of State for the Home Department* [2007] EWHC Admin 3288 at para. 10 (HC); *AN & SS v Secretary of State for the Home Department (Tamils – Colombo – risk?) Sri Lanka CG* [2008] UKAIT00063 at paras. 109-10 (AIT).

individually and cumulatively, there is always the possibility that Immigration Judges may nevertheless approach the assessment of individual appeals by applying the relevant risk factors by rote and not attune them to the particular circumstances of the case. Put simply, a list of risk factors may be treated as a checklist by Immigration Judges rather than as a series of factors to be considered in the round. Furthermore, there is always the risk that appellants might be tempted to tailor their stories to factors regarded as relevant.

7. Country guidance: binding factual precedent or authoritative guidance?

To what extent are country guidance decisions binding on Immigration Judges in determining subsequent appeals? In a sense, this question is central to the efficacious and fair operation of the system. On the one hand, if country guidance decisions are to achieve the goal of promoting consistency in decision making, then they need to possess an element of binding authority. On the other hand, if they have too much binding effect, then this may lead to undue rigidity which undermines precisely the individual consideration of each appeal that is necessary to assess future risk in any particular case. This may be especially the case if there is fresh evidence indicating that country conditions have changed (whether for the better or otherwise) since the country guidance was produced. While inconsistency can be productive of injustice, so can excessive rigidity in the application of previous decisions. To adopt the language of K.C. Davis, the task is 'to locate the optimum degree of binding effect . . . so that the role of precedents … [is] … neither too strong nor too weak'.[74] Here the subtle distinction between authoritative guidance and binding precedent is crucial.

Under the Tribunal's practice directions, unless a country guidance decision has either been expressly superseded or replaced by any later 'CG' determination, or is inconsistent with other authority that is binding on the Tribunal (that is, a decision of the higher courts), it is authoritative in any subsequent appeal, so far as that appeal relates to the country guidance issue in question and depends upon the same or similar evidence.[75] In light of the principle that like cases should be treated in like manner, any failure by an Immigration Judge to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is

[74] K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Urbana and Chicago: University of Illinois Press, 1969), 107. For a general discussion of the developing role of precedent in UK tribunals, see, T. Buck, 'Precedent in Tribunals and the Development of Principles' (2006) 25 *Civil Justice Quarterly* 458-84.

[75] Asylum and Immigration Tribunal, *Practice Directions* (2007), para. 18.2.

likely to be regarded as grounds for review or appeal on a point of law.[76] In other words, an applicable country guidance determination is normally to be treated as authoritative in subsequent appeals unless it is capable of being distinguished because there is fresh evidence that country conditions were not what they were thought to be, or that they have changed or because the country guidance decision itself has been overturned on appeal. As the Court of Appeal has put it, 'no country guidance case is for ever'; such decisions are always open to revision in the light of new facts – new either in the sense of being newly ascertained or in the sense that they have arisen only since the decision was promulgated.[77] Such decisions may provide authoritative country guidance but they can never be regarded as being definitive for all time.

Elaborating upon this, the Tribunal has explained that the requirement on Immigration Judges to apply country guidance determinations is rather different from that of legally binding precedents. Country guidance cases should be applied except where they do not apply to the particular facts raised in a subsequent appeal and they can properly be held inapplicable for legally adequate reasons, such as a change in country conditions. The country guidance system 'does not have the rigidity of legally binding precedent but has instead the flexibility to accommodate individual cases, changes, fresh evidence and … other circumstances'.[78] It is always possible for either of the parties, the appellant or the Home Office, to produce further evidence to show that an original country guidance decision was wrong or to expose other country issues which require authoritative examination.[79]

This does though require that fresh evidence be presented; 'back door' attempts to re-litigate country guidance without such evidence are likely to receive short shrift.[80] More generally, the Tribunal has made the point that '[n]o judicial decision has the power of crystallizing the facts of the real world to an extent where not reality, but what has been said about it is the guide' – country guidance is intended to lay down an approach to a settled factual situation, not to decree that that situation is to be treated as if it were the same for ever.[81] Country guidance decisions are not therefore

[76] Ibid., para. 18.4. Appeals determined by Immigration Judges can only be challenged on the basis that they contain a material error of law. See, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s 26.

[77] *KH (Sudan) v Secretary of State for the Home Department* [2008] EWCA Civ 887 at para. 4 (Sedley LJ) (CA).

[78] *NM v Secretary of State for the Home Department (Lone women – Ashraf) Somalia CG* [2005] UKIAT00076 at para. 140 (IAT).

[79] Ibid. at para. 141. See also, *OM v Secretary of State for the Home Department (AA(1) wrong in law) Zimbabwe CG* [2006] UKAIT00077 (AIT).

[80] *MY v Secretary of State for the Home Department (Country Guidance cases – no fresh evidence) Eritrea* [2005] UKAIT00158 (AIT); *Ariaya v Secretary of State for the Home Department* [2006] Imm. AR 347 at 364 (Richards LJ) (CA).

[81] *LT v Secretary of State for the Home Department (Internal flight – Registration system) Turkey* [2004] UKIAT000175 at para. 3 (IAT).

(*contra* Laws LJ) 'accurately understood or described as "*factual precedents*"'.[82]

While Immigration Judges are not strictly bound by country guidance in all circumstances, the Tribunal has though emphasized the importance of judges supplying adequate reasons to justify departure from such guidance. Consider, for instance, the issue of whether or not Congolese nationals will be at risk on return simply because they are failed asylum seekers. In 2004 and 2005, the Tribunal issued two country guidance determinations to the effect that such individuals were not, as a general category, at risk on return.[83] However, in one appeal an Immigration Judge deviated from this guidance on the basis that a country report had come into existence which supported the claimed practice that the Congolese authorities both detained and ill-treated returnees. This, the Tribunal held, did not amount to adequate justification for not applying the guidance. The previous country guidance decisions had not accepted that untested reports of a small number of cases of asylum seekers said to have been ill-treated on return were sufficient on their own to demonstrate that failed asylum seekers were generally at real risk of ill-treatment, contrary to Article 3 ECHR. The mere existence of a more recent country report to similar effect was not by itself sufficient; what was required was an assessment of why that report should be accepted and of why, if so, it demonstrated a real risk to returnees generally, in the light of the body of background evidence. As the Tribunal explained, '[t]he wider the risk category posited the greater the duty on an Immigration Judge to give careful reasons based on an adequate body of evidence'.[84] In the event, this particular country issue was the subject of a subsequent guidance in which the Tribunal, from an examination of a wide range of country and expert evidence, concluded that failed asylum seekers were not generally at risk on return.[85] While Immigration Judges do not normally need to refer specifically in their written determinations to every piece of country information relied upon in an appeal, they should nevertheless refer to such evidence in sufficient detail so as to justify why relevant country guidance is not being followed.

There are a number of other features that prevent the application of country guidance in subsequent appeals from becoming too rigid and inflexible. First, when producing country guidance the Tribunal often ensures that such guidance itself possesses sufficient built-in flexibility so that its application can take into account the individual basis of asylum claims.[86] Some cases might illustrate the point. When the Tribunal

[82] *NM*, above n. 78 at para. 141.

[83] *VL*, above n. 60; *AB and DM*, above n. 66 at paras. 47-50.

[84] *MK v. Secretary of State for the Home Department (AB and DM confirmed) Democratic Republic of Congo CG* [2006] UKAIT00001 at para. 18 (AIT).

[85] *BK*, above n. 27.

[86] On the use of this general technique in tribunal precedents, see, J.A. Farmer, *Tribunals and Government* (London: Weidenfeld and Nicolson, 1974), 174-5.

enumerates a list of risk factors, it will normally do so subject to the proviso that the list is neither a checklist nor is it intended to be exhaustive. The assessment of a claim should be undertaken in the round taking into account any risk factors identified in country guidance alongside the careful scrutiny and assessment of the evidence in an individual appeal.[87] When giving guidance concerning the existence or otherwise of 'risk categories', the Tribunal will similarly subject this to some qualification to assess the individual case carefully. So, for instance, country guidance states that Sikhs and Hindus are not as a class of person at real risk in Afghanistan despite the societal discrimination they may experience; however, an appellant's status as a Sikh or Hindu is a factor to be taken into account in assessing individual claims on a case by case basis.[88] In relation to the assessment of the risk on return for a member of an opposition political party, a relevant issue will often be an individual's 'profile'. When the Tribunal has issued guidance that mere membership of a political party is unlikely to give rise to a real risk of persecution, it has noted that more prominent or high-ranking political activists may be at risk depending on their particular profile.[89]

A second feature concerns the temporal dimension of country guidance. Strictly speaking, country guidance remains valid until it is replaced by subsequent guidance on the same country issue. At the same time, the temporal validity of a country guidance decision may vary depending on the nature of the country issue dealt with. For instance, country guidance concerning whether or not political oppositionists are at risk in a particular country may be undermined by quick developments in the political regime. When issuing country guidance dealing with particularly volatile country situations, the Tribunal has itself on occasion recognized that the guidance may soon be overtaken by events in the country concerned. As the Tribunal noted in a 2005 country guidance case on Iraq, '[w]e are conscious of the fact that Iraq is a country where change occurs at a faster rate than most other countries of the world. Country Guidance cases on Iraq are unlikely to have a very long shelf life'.[90] By contrast, country guidance concerning deeply rooted moral, social and religious causes of persecution or ill-treatment – for example, female genital mutilation, the treatment of ethnic minorities or religious apostasy – may by its nature possess greater longevity. Immigration Judges applying country guidance are, as one might expect, fully aware that the age of individual country guidance decisions

[87] See, *IA HC KD RO HG v Secretary of State for the Home Department (Risk-Guidelines-Separatist) Turkey CG* [2003] UKIAT 00034 at para. 46 (IAT); *IK v Secretary of State for the Home Department (Returnees – Records – IFA) Turkey CG* [2004] UKIAT00312 at para. 133 (IAT).

[88] *SL*, above n. 13.

[89] See, *GG v Secretary of State for the Home Department (political oppositionists) Ivory Coast CG* [2007] UKAIT00086 (AIT).

[90] *RA v Secretary of State for the Home Department (Christians) Iraq CG* [2005] UKIAT00091 at para. 74.

may mean that they have been overtaken by changes in country conditions and should therefore be treated with a corresponding degree of caution.

In any event, when applying country guidance determinations in a subsequent appeal, Immigration Judges will still need to take into account any subsequent country information to determine whether or not the relevant country guidance is still applicable. It is a fundamental precept of asylum law that the assessment of prospective risk is not to be determined on the basis of historical evidence but on the basis of the facts in existence at the date of the appeal hearing.[91] In this sense, country guidance may provide the parameters for decision making by establishing a benchmark against which subsequent country developments are to be assessed. As one Immigration Judge has explained, when deciding whether or not a country guidance decision remains 'generally applicable, it is not just a question of deciding whether some pieces of the jigsaw have changed. It is almost inevitable that they will have done. The real issue is whether there is fresh evidence to show that the overall picture in the jigsaw has changed'.[92] If there is subsequent evidence from a source or of a nature not dealt with in the country guidance case which affects the degree of risk, then that guidance will not be applicable.

In summary, country guidance determinations are to be considered as possessing something more than merely persuasive force but something less than binding precedent. The most appropriate phrase to articulate this middle ground is perhaps that country guidance is to be treated as authoritative until fresh evidence demonstrates a change in country conditions; authoritative, though flexible, guidance but not binding precedent.

8. Assessing country guidance

So, what then is to be made of the AIT's country guidance system? Is this new technique of value? Has it been successful? Is adjudication suited to the task of issuing country guidance? What of the requisite expertise to produce such guidance?

Let us begin with the benefits, as summarised by the Tribunal itself:

> The system enables the parties and the judiciary to know where to look for what the Tribunal sees as the relevant guidance, the parties to know what they have to deal with, and, if they wish to take issue with it, what it is that has to be the target of their evidence or argument. It enables parties to rely on the material which others have had accepted without reproducing or repeating it every time, or if it has been rejected, to know that there is no point in repeating it. Consistency and the justice which that brings can be provided for, even though differing and

[91] See, *Sandralingham and Ravichandran v. Secretary of State for the Home Department* [1996] Imm. AR 97 at 112-13 (Simon Brown LJ) (CA); Nationality, Immigration and Asylum Act 2002, s 85(4).

[92] Immigration Judge asylum appeal determination (unreported, 2007).

perhaps reasonable views can be taken of a wide variety of material. It also has the advantage of enabling the understanding of country conditions to be refined as successive decisions may lead to the identification of consequential issues to be grappled with which had hitherto been unrecognized … parties can focus their evidence and arguments upon the aspect with which they take issue.[93]

At the same time, the system inevitably suffers from some drawbacks. First, country guidance tends only to be issued after claims raising a particular country issue have been within the appeal process for sometime. This is not necessarily always a problem. Some countries produce continuing flows of applicants. However, in relation to other countries, it may mean that the Tribunal has expended its resources on producing guidance which does not subsequently fall to be widely applied because the stream of potentially affected claims has dried up. This in turn can lead to country guidance decisions that may be of marginal use and increasingly out of date remaining on the Tribunal's website but not being removed because the Tribunal's view is that, as country guidance is a judicial function, such decisions may only be superseded by subsequent country guidance and not otherwise. Of the 276 current decisions, approximately one hundred date from 2002, many of which are out of date and/or do not contain sufficiently detailed consideration of country information when compared with more recent decisions.

A second practical difficulty arises from the amount of time it takes to produce country guidance determinations. The word may get around amongst Immigration Judges, representatives and the Home Office at the hearing centres that country guidance on a particular issue is either possibly forthcoming or imminent. However, as we have seen, given the practical difficulties of managing the system, it is not usually certain that an appeal listed as potential country guidance will in fact be reported as such. Then there is the balance to be drawn by the tribunal panel hearing a country guidance case between ensuring that its guidance is effectively comprehensive by taking into account recent country information, which can always be up-dated, while at the same time seeking to achieve finality in decision making.[94] Furthermore, a potential country guidance decision

[93] *NM*, above n. 78 at para. 142. This country guidance decision was the last one produced by the IAT before the introduction of the AIT in 2005. At para. 144, the Tribunal ended its determination by noting that the country guidance system may be refined and improved but that it would remain as 'part of the continuing input into immigration judge decision making … The haphazard ways of old will not return. Those ways were productive of inconsistency, incoherence, injustice and waste'.

[94] For instance, representatives may wish to submit further evidence after the appeal hearing has finished, a course that the Tribunal has indicated will only be allowed in exceptional circumstances. See, *AN & SS*, above n. 73 at para. 95: 'Country guidance cases take long enough as it is to be written and promulgated. The hearing should normally be the cut-off point. If the Tribunal is bombarded with further evidence and arguments after the hearing but before the determination has been written up, it may be an unconscionably long time before the determination is complete.'

will have to proceed through the Tribunal's own quality assurance processes, the internal review of that decision by other senior judges, and its reporting committee will have to decide whether or not the decision should receive the 'CG' designation. In the meantime, other ordinary asylum appeals will still need to be heard and determined. In this respect, the Tribunal's position is that an individual appeal should not be adjourned pending the promulgation of a forthcoming country guidance decision. The administration of justice, one Immigration Judge has noted, 'does not dictate that the Tribunal should routinely adjourn appeals on the off chance that, at some future point, the Tribunal will be in a position to consider an issue in greater detail or on the off chance that the law or views of the Tribunal might change'.[95] It would moreover be illogical to adjourn an appeal to await country guidance without then further adjourning the appeal to await the outcome of any future challenges against that country guidance case to the higher courts. In practice, if this approach were to be adopted, then the Tribunal's work would simply grind to a halt.

A third difficulty is that country guidance decisions are always susceptible to becoming out of date and overtaken by changes in country conditions; there is no necessary reason to suppose that country guidance issued in 2008 will be adequate in relation to appeals that fall to be determined in 2009. As we have already seen, Immigration Judges applying country guidance will need to supplement it with up to date country information. But is this sufficient when country conditions can change rapidly? To provide a contemporary example, the Tribunal produced country guidance on the situation in Zimbabwe in July 2007 on the basis of evidence about conditions in that country largely concerning the previous two years or so before then.[96] Conditions in Zimbabwe subsequently deteriorated swiftly. The consequence is that there may be an air of unreality in handling country guidance dealing with past events when it is apparent that country conditions have changed. A further practical difficulty is that while it is possible for appellants in subsequent appeals to adduce fresh country information, there is no guarantee that they will always be in a position to do – especially if they are unrepresented. One way to remedy this may be for country guidance decisions to be subject to a sunset clause, a technique familiar enough from its deployment in the legislative process, to ensure that a provision or statute will lapse unless specifically renewed.[97] Given the importance of country guidance, it might well be preferable if such cases had a limited lifespan – say one year – after which time they would automatically cease to have an authoritative status, though they could still be drawn upon by Immigration Judges, as supplemented by fresh country

[95] Immigration Judge asylum appeal determination (unreported, 2007).
[96] *HS*, above n. 32.
[97] See, for instance, the Prevention of Terrorism Act 2005, s 13.

information. If so, then this would require the Tribunal to consider, on a regular basis, whether or not fresh country information and changes in country conditions necessitated modification of its guidance.

Two particular concerns with the country guidance system have been raised by representatives.[98] The first is that overall country guidance tends to be negative toward appellants – the perception is that country guidance limits rather than extends the range of people who qualify for international protection. On a factual level, this criticism may be misplaced since a fair amount of country guidance concerning well-known asylum generating countries – the Democratic Republic of Congo, Somalia and Zimbabwe – does identify risk categories to the effect that people who fall within them are entitled to protection. At the same time, an explanatory factor for the perception that country guidance seems negative toward asylum applicants arises from the dynamics of reason-giving and decision-writing itself. The trend within the Tribunal is that detailed reasons are given when dismissing appeals because of the importance of informing an appellant why he has lost; when allowing an appeal, it is not usually necessary for the Tribunal to give such detailed reasons. When on examination at the hearing an individual appellant, whose case has been selected for potential country guidance purposes, succeeds on an issue particular to his own appeal, the resulting determination is unlikely to generate the long discourse that is necessary for effective and comprehensive country guidance.

A second criticism is that the process by which potential country guidance cases are selected seems too opaque and insufficiently transparent; what are the criteria by which the Tribunal decides to select an appeal as suitable country guidance? Representatives have also complained about preparing for a country guidance case only to be informed by the Tribunal at the hearing that the appeal is no longer to be treated as a country guidance 'vehicle'. However, as noted above, the task of managing the system is at times beset with practical difficulties, which preclude the establishment of formal, fixed criteria. The obvious implication is that, as the Tribunal has been developing its country guidance system, it has been cautiously feeling its way as well as undergoing its own learning process: to understand the nature of the endeavour upon which it has embarked.

A further concern with the operation of the system relates to the application of country guidance determinations by Immigration Judges in subsequent appeals. There is always the risk that an Immigration Judge will – by reason of a lack of either proper consideration or sufficient effort and care – apply country guidance but not tailor its application distinctly to the circumstances of the individual case. As a senior judge has explained, the

[98] This section draws upon interviews with representatives and Senior Immigration Judges.

existence of country guidance does not excuse Immigration Judges from undertaking their own reasoning. Immigration Judges should not simply conclude that 'this country guidance case means that this particular appeal is either allowed or dismissed'; they also need to explain and justify the application of that guidance in the context of the particular appeal.[99] The application of country guidance therefore requires particular care and attention when assessing risk in the circumstances of an individual appeal. In this respect, the senior judges who compile country guidance have little control over its application. At the same time, any party who considers that country guidance has been inappropriately applied may challenge that decision on the basis that it contains an error of law.

Practicalities and criticism of individual country guidance decisions aside, there has developed a more fundamental critique of the country guidance system, which proceeds along the following lines.[100] Country guidance prioritizes certainty and consistency over individual justice. In particular, country guideline determinations, it has been argued, seek to impose artificial certainty on what are often uncertain and rapidly changing country situations. Furthermore, the system subverts the fundamental rule that *obiter* comments in a judicial decision are not binding in subsequent cases because, as they were not germane to the determination of the particular case, it is not known whether such issues received full argument and consideration. In short, the concern is that country guidance is too blunt a tool with which to perform a sensitive and complex adjudicative task.

While not framed in such terms, this critique could be said to draw implicitly upon the limits to adjudication posed by 'polycentric' issues, as identified by Fuller.[101] A polycentric decision can be described as one which possesses and exerts an effect beyond the resolution of the particular dispute between the two parties involved; its ramifications will affect others who were not party to the particular dispute. While Fuller did not argue that polycentric issues should be excluded altogether from the domain of adjudication and noted that the matter is often one of degree, he did emphasize that such issues tended to highlight the limits of adjudication. This is because the adjudication of disputes arising from a polycentric situation can affect other individuals, who have not had the opportunity of participating in the process by which they have been produced; for Fuller, the distinguishing characteristic of adjudication was the ability of individuals affected by a decision to participate directly in the process by which

[99] Interview with a Senior Immigration Judge.

[100] See, C. Yeo, 'Certainty, consistency and justice' in Yeo (ed.), above n. 48 at 9-29; J. Ensor, 'Country Guideline Cases: Can they be Challenged?' (2005) 11 *Immigration Law Digest* 19-23; Immigration Law Practitioners' Association, *Country Guidance Cases: ILPA members' concerns* (notes of a meeting with the AIT, Mar. 2006).

[101] L.L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353-409 at 394-404.

that decision is to be made. In relation to country guidance, the concerns may be said to be heightened because the (country) issues involved are factual and evidential, not legal, and prone to frequent change. In summary, the source of apprehension with regard to country guidance is that the case from which such guidance emerges remains one in which there is a dispute between a particular appellant and the Home Office; the determination of a *lis inter partes* may not be the most appropriate means of producing generic country guidance designed to be applied in relation to many other individuals.

There are though a number of responses to be made here. First, the country guidance system necessarily restricts the ability of other potentially affected individuals to become litigants in the country guidance process; were it otherwise, then the process itself would simply be rendered unmanageable. At the same time, the system does not entirely limit the participation of affected individuals who were not party to the country guidance litigation; such individuals can always participate in their own individual appeal in which they can present fresh country information with which to take issue with the relevant country guidance. Secondly, the Tribunal adopts a flexible approach towards the status of country guidance cases; the system has a built-in remedy by which fresh evidence can be presented. Indeed, Fuller's own description of the desirable degree of flexibility of precedent in such situations is an appropriate description of the authoritative status of country guidance cases: '[i]f judicial precedents are liberally interpreted and are subject to reformulation and clarification as problems not originally foreseen arise, the judicial process is enabled to absorb … polycentric elements'.[102] Thirdly, country guidance does not preclude decision makers from assessing risk on the basis of evidence in existence at the date of decision. On the contrary, Immigration Judges will still need to supplement country guidance with more recent country information; failure to do so will be an error of law.[103]

More generally, it has been argued that Fuller's analysis of the limits to adjudication posed by polycentric issues is deficient in that it is predicated upon too strict an adherence to the adversary process and overlooks the expert investigation of the issues by the decision maker.[104] If we conceive of adjudication as a kind of organization by collaborative expert investigation rather than merely as a forum for the participation of affected parties, then the challenges posed by polycentric issues may, to some extent, be overcome. In other words, if the legitimacy of an adjudication process is not solely predicated upon the participation of affected parties but also

[102] Ibid., at 398.

[103] This is supported by appeals determined by Immigration Judges drawn from my empirical research.

[104] J.W.F. Allison, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 *Cambridge Law Journal* 367-83.

upon the expertise of the adjudicator and the adoption of an inquisitorial approach toward investigating the issues, then the concerns prompted by restricted party-participation in the resolution of polycentric issues might be ameliorated. However, this begs the question whether the decision maker is properly entitled to be considered as an expert in the relevant subject-matter.

A related area of debate concerning the country guidance system has focused on precisely this latter issue: do the Tribunal's senior judges themselves possess the necessary expertise with which to assess country conditions and issue wide-ranging country guidance? In undertaking the country guidance function, much will inevitably depend on the Tribunal's own expertise; but what kind of expertise is required and how is it to be attained? As a former Tribunal member has pointed out, there is little or no training for decision makers on either fact-finding in general or, more specifically, on how to evaluate country of origin information.[105] The Tribunal itself has justified its country guidance function by explaining that it 'builds up its own expertise in relation to the limited number of countries from which asylum seekers come'.[106] As another former senior judge has noted, the Tribunal is recognized as possessing its own level of expertise as a specialist tribunal, 'not only in the legal issues for its determination, but also in its knowledge of country situations'.[107] For their part, the higher courts have emphasized that the Tribunal is a specialist, expert body whose members possess 'a background of experience … in assessing evidence about country conditions' that is not available to judges in the higher courts.[108] In practice, this expertise is built up by having a select group of senior judges who undertake the country guidance work.

These views have though not gone unchallenged. Country experts have disputed the Tribunal's claim to possess its own specialist knowledge of country conditions. In particular, Good, a Sri Lankan country expert and academic anthropologist, has argued that Tribunal members are not, irrespective of their claims to the contrary, experts in country conditions.[109] As Good has noted, 'the issue of tribunal expertise arises particularly' in relation to the country guidance system that takes for granted the ability of the asylum judiciary alone to assess for itself country information, however extensive and comprehensive, 'regarding countries for which it lacks

[105] G. Care, 'The Judiciary, the State and the Refugee: the Evolution of Judicial Protection in Asylum – A UK Perspective' (2005) 28 *Fordham International Law Journal* 1421-56 at 1455.

[106] *SK*, above n. 51 at para. 5.

[107] J. Barnes, 'Expert Evidence – The Judicial Perspective in Asylum and Human Rights Appeals' 16 *IJRL* 349-57 at 349 (2004).

[108] *R. (Madan and Kapoor) v. Secretary of State for the Home Department* [2008] 1 All ER 971 at 978 (CA). Higher up the judicial hierarchy, the House of Lords in *AH (Sudan) v. Secretary of State for the Home Department* [2007] UKHL 49 at para. 30 (Baroness Hale) (HL) has described the AIT as 'an expert tribunal charged with administering a complex area of law in challenging circumstances'.

[109] Good, above n. 52 at 359.

first-hand knowledge or experience, and contexts whose cultural nuances call for specialised hermeneutic elucidation'.[110] The basic point is that while senior judges may become thoroughly informed at a factual level as to the political histories of countries producing asylum appellants, they will themselves often lack direct knowledge or experience of the countries concerned, but it is precisely in the assessment and interpretation of the cultural and political significance of such facts that country expertise comes into play. For Good, the central issue is that the interpretation of facts is as important as the knowledge of them; this is why specialist country expertise is essential. A further point is that the range of countries covered by country guidance may preclude effective tribunal expertise in the country issues that arise.

To point out the obvious: the views espoused here depend greatly upon the different presuppositions of those involved. Country experts may take exception to legal decision makers who closely scrutinize their professional judgment; declarations of expertise by the Tribunal in country conditions may be viewed by country experts as unjustifiably self-reinforcing judicial hegemony. By contrast, Tribunal members may be similarly sceptical of self-proclaimed 'experts', some of whom may have their own 'axes to grind' or who would confer upon themselves the sole ability to pronounce on country conditions.

One way to understand, though perhaps not to resolve, this difference of view is to consider the broader issue of the organization of the asylum decision process. In short, the issue of country guidance is inseparable from more general issues concerning the institutional design of the asylum decision making process and the broader topic of administrative justice. The basic normative question – how should the asylum decision process be organized? – usually produces three different answers, or models, each of which possesses its own distinct processes, cultures and legitimizing values.[111] Under the first model, asylum decision making should be organized as an *administrative* process, with the emphasis on implementing the policy goal of maintaining immigration control by administering an efficient and quick decision process with a view to removing unsuccessful applicants. The second model prioritizes the values of *professional judgment* in which experts – medical, psychological and country – give their considered opinions to inform the assessment of risk facing an individual.[112] By contrast, the third

[110] A. Good, *Anthropology and Expertise in the Asylum Courts* (London: Routledge-Cavendish, 2007), 234-5.

[111] On this general approach toward analysing administrative justice, see, J.L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven: Yale University Press, 1983); M. Adler, 'A Socio-legal Approach to Administrative Justice' (2003) 25 *Law & Policy* 323-52.

[112] In the UK, psychiatric and medical experts are often commissioned by asylum appellants to produce expert reports which are then relied upon before the Tribunal in support of the credibility of the appellant's claim to be in need of international protection. There is an ongoing debate concerning what degree of weight can and ought to be attributed to such reports. See, D. Rhys Jones and S. Verity

model conceives of asylum decision making as a *legal* process in which disputes concerning an individual's status and rights are resolved by way of adjudication by an independent judicial decision maker through fair procedures.

While each of these models may be attractive in its own terms, they are highly competitive; most decision making systems involve some sort of messy compromise between them.[113] If we view country experts as reflecting the professional judgment model and the Tribunal as reflecting the legal model, then some difference of view is to be expected because of the different underlying values and presuppositions in play. Equally, in the context of a workable decision process, some sort of compromise or synthesis of approaches is necessary.

In the country guidance context, this synthesis is attained in two ways. First, while country experts are fully entitled to present their own views and readings of country conditions, these will not automatically be accepted by the Tribunal but fall to be evaluated and compared with other sources of country information. While the Tribunal will closely scrutinize country expert evidence, it does take seriously the views of country experts accepted to be knowledgeable in the particular country concerned. Secondly, while the Tribunal will draw upon accepted country information, the task of assessing whether or not country conditions are such that they create a risk on return remains one for legal decision by the Tribunal itself. As has been noted, 'much of the skill of judicial decision makers in dealing with country of origin information consists in correlating what it says about risk and dangers for particular categories with the legal concepts arising under the Refugee Convention and international human rights treaties'.[114] The country guidance task involves not only the assessment of country information data but also the application of the legal concepts of asylum law to determine whether there is a risk on return. As country experts are neither legally qualified nor use the same legal vocabulary as judicial decision makers, their assessment of risk cannot be taken to be determinative of the ultimate question of risk on return.[115]

Smith, 'Medical Evidence in Asylum and Human Rights Appeals' 16 *IJRL* 381-410 (2004); *HE v. Secretary of State for the Home Department (DRC – credibility and psychiatric reports) DRC* [2005] Imm AR 119 (IAT); *RT v. Secretary of State for the Home Department (medical reports – causation of scarring) Sri Lanka* [2008] UKAIT0009 (AIT).

[113] For further development of this analysis in the asylum context, see, R. Thomas, 'Risk, Legitimacy and Asylum Adjudication' (2007) 58 *Northern Ireland Legal Quarterly* 49-77.

[114] IARLJ, above n. 45 at 19.

[115] There are, of course, tensions between the administrative and legal models. From the Home Office's perspective, while country guidance can perform a useful function in securing consistency, it depends on the guidance issued. It is perhaps not too cynical to suggest that the Home Office would prefer country guidance to be consistently negative for appellants. At the same time, for the Home Office, the country guidance system represents a potential loss of control from itself to the Tribunal; hence the Home Office's inclination to concede or reconsider individual appeals listed for country guidance purposes – better to issue status to one appellant than to risk the establishment of guidance that could result in many other appellants receiving status.

What then are the advantages presented by using the technique of adjudication in order to produce country guidance? It might be argued that country guidance has long been provided in the form of country information produced by both national governmental agencies and NGOs. However, the concern with such guidance is that it is likely to be coloured by broader institutional and policy purposes. Governmentally-produced country information has often been criticised for portraying an overly positive picture of country conditions, whereas concerns have been raised that country reports produced by NGOs and country experts tend to paint an unduly negative picture.[116] Likewise, the Tribunal has expressed a degree of caution with regard to country information and positions papers emanating from the UNHCR. While the UNHCR will normally have its own observers in the country concerned, it tends to frame its assessment of risk on return by reference to more general humanitarian assessments of international protection rather than by the criteria contained in the Refugee Convention. In any event, assessments provided by the UNHCR are not framed by reference to the high threshold of Article 3 ECHR as elaborated by both the European Court of Human Rights and the UK courts. Such sources of country information are, then, entitled to respect but may not be decisive in assessing risk on return.[117]

By contrast, country guidance issued by the Tribunal reflects a new development: the production of such guidance by the asylum judiciary. The distinctiveness of the judicial process is that it must use a particular technique – adjudication – in order to issue and apply such guidance. To qualify as such, a decision making process needs to exhibit certain features: the parties to the process must be able to participate in the making of those decisions that affect them; the decision making process must be sufficiently transparent; furthermore, the decision maker must be both independent and impartial and justify its decision by giving adequate

[116] For a critique of Home Office country reports, see, N. Carver (ed.), *Home Office Country Assessments: an Analysis* (London: Immigration Advisory Service, 2003). See also, House of Lords European Union Committee, *Handling EU asylum claims: new approaches examined* (2003-04 HL 74), paras. 104 and 115 (arguing that a high quality asylum decision making system requires 'authoritative and credible country of origin information' but that Home Office country reports were not generally considered to be 'authoritative, credible and free from political or policy bias'). On US State Department reports, see, *Said v. Netherlands* (2006) 43 EHRR 248 at 262 (separate opinion of Judge Loucaides) (ECtHR): 'There is always an element of suspicion that such Reports are influenced by political expediency based on US foreign policy with reference to the situation in the country concerned and that they serve a political agenda.' In the UK, the Court of Appeal has emphasized that country information produced by NGOs, such as Amnesty International, 'a responsible, important and well-informed body', deserves to be taken seriously, see, *R. v. Immigration Appeal Tribunal, ex parte K* [1999] EWCA Civ 2066 (CA); *SA (Syria) and IA (Syria) v. Secretary of State for the Home Department* [2007] EWCA Civ 1390 at para. 22 (Toulson LJ) (CA). By contrast, the Tribunal has, in *LP* above n. 54 at para. 44, noted that material from NGOs 'can be selective … Immigration Judges are aware that much of the background evidence which is adduced before them comes from sources with a special interest or a specific agenda. That must be borne in mind when assessing the weight to be put on any background evidence'.

[117] *NM*, above n. 78 at paras. 108-15.

reasons. Adjudication presupposes decision making through fair procedures and reasoned argument.

Given its highly charged, almost schizophrenic, political context, in which the asylum process is characterised as being tainted by either a 'culture of disbelief' or a 'culture of abuse', the value of independence is a matter of some importance.[118] Allocating a particular decision task to an adjudicative process does not, of course, cause the politically disputed context to disappear. What it does do though is, to a large extent, to insulate the decision making task from those direct political pressures.

At the same time, country guidance also requires a re-appreciation of the concept of adjudication itself. Rather than seeing adjudication merely as a process for resolving individual disputes, it must also be seen as an ongoing, collaborative activity in which the parties concerned seek to cooperate together in the broader interest of ensuring consistency and quality in the asylum process. From this perspective, the adjudication process can accommodate its guidance to the complex aspects of a problem as it reveals itself in successive cases; a particular advantage of adjudication is that it allows for the incremental elaboration of the issues on a case by case basis.[119]

9. Conclusion

As is well-known, the Refugee Convention does not itself prescribe which particular procedures are to be adopted for the determination of refugee status; 'it is therefore left to each Contracting State to establish the procedure that it considers the most appropriate, having particular regard to its particular constitutional and administrative structure'.[120] In devising such procedures, national governments, and more recently the EU, are often under pressure to fulfil a range of different and competing values.[121] The basic task is to structure and organize a decision making process that is able to be produce good quality decisions through fair procedures while at the same time ensuring that the process is sufficiently

[118] For treatments of the asylum debate in the UK, see, N. Steiner, *Arguing About Asylum: The Complexity of Refugee Debates in Europe* (New York: St Martin's Press, 2000), 97-132; L. Schuster, *The Use and Abuse of Political Asylum in Britain and Germany* (London: Frank Cass, 2003), 131-79; M. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004), 107-31.

[119] J. Jowell, 'The Legal Control of Administrative Discretion' [1973] *Public Law* 178-220 at 198.

[120] UNHCR, above n. 10, para. 189.

[121] Interesting questions arise here in terms of the potential for a common country guidance system in the context of the developing Common European Asylum System. A project group of eight EU member states are currently in the process of elaborating Common EU Guidelines for Processing Country of Origin Information. If the EU wishes to develop a common asylum system, then does this not also imply a common country guidance system to produce consistency across the EU? If so, then how might it be organized? Which particular judicial institution might produce such guidance?

quick and efficient so that it is not susceptible to abuse by those who do not qualify for international protection. Decision making procedures, though, are not static but fluid; their design tends to respond to particular concerns relating to their operation (for instance, cases taking too long to conclude, costing too much or procedures not being sufficiently fair) in addition to the domestic political context. In the UK, managing this basic tension between fairness and speed in the asylum process has produced a whole number of difficulties and compromises including a constant emphasis on ensuring that the appeals process operates swiftly, restricted onward rights of challenge against initial tribunal decisions, and constraints on publicly funded representation.

As regards country guidance, it is suggested here that when this system is viewed from the perspective of how to manage and administer a difficult adjudicative process, that its significance and usefulness can be identified. In the UK, criticisms arising from the inconsistency of asylum decisions have prompted the Tribunal to establish and develop its country guidance system which is now an established input into the asylum decision process. In this context, country guidance is a useful and innovative technique in terms of promoting both two important values of any adjudication process: consistency and efficiency.

The realistic future project is not whether country guidance remains a component of the UK's asylum process but how it may be refined and improved. In this regard, it is important that the Tribunal ensures that it receives a wide range of country information and that the procedures adopted promote the collaborative approach between the parties that the country guidance enterprise presupposes. The Home Office has been encouraged to present a wider range of country information from diplomatic sources and country experts but it could clearly do more in this regard. Furthermore, the Tribunal might give further consideration as to whether it should be able to commission country expert evidence for itself. Immigration Judges may need further training on the application of country guidance. Finally, subjecting country guidance to sunset clauses and regular re-visits of country issues may ensure that country guidance remains reasonably up to date and also enhance the depth of the Tribunal's understanding of those issues.

While these suggestions may improve the country guidance process, it is important to recognize that, by itself, country guidance can only do so much to reduce the risk of the 'asylum lottery'. Country guidance provides assistance to decision makers with regard to one aspect of the asylum decision problem, that of 'risk-group existence'; its application is heavily dependant on decision makers' assessments of credibility in order to determine the 'risk-group affiliation' of individual appellants. The vast majority of asylum cases either succeed or fail depending on the decision maker's view of the claimant's credibility to be in need of

protection.[122] For all we know, disparities in asylum adjudication may stem more from differential credibility assessments between different decision makers than from differential evaluations of country information.[123] Country guidance may provide the context in which the assessment of credibility is to be undertaken but it cannot eliminate the scope for inconsistency as regards such assessments. Promoting greater consistency in this respect is likely to be a far more elusive endeavour – one that may not, because of the nature of the task, even be possible. As we have seen, while the notion of treating like cases alike is important, an equally pervasive adage throughout this jurisdiction is that each case must be decided on its own individual facts.

Since the introduction of the country guidance system, the Tribunal has, with support from the higher courts, made substantial efforts to improve the quality of the guidance issued and to broaden the range of country information relied upon. Impressions of the quality of tribunal decisions are, of course, highly subjective. My own view is that the Tribunal's recent country guidance determinations are generally of high quality. Properly performed and applied, this technique can be of assistance to those responsible for deciding asylum claims and an important contribution to the promotion of a quality asylum decision making process.

[122] See generally, Noll (ed.), above n. 5; R. Thomas, 'Assessing the Credibility of Asylum Claims: UK and EU Approaches Examined' (2006) 8 *European Journal of Migration and Law* 79-96; R. Byrne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals' 19 *IJRL* 609-38 (2007).

[123] On disparities in credibility assessments, see, *HF (Algeria) v. Secretary of State for the Home Department* [2007] EWCA Civ 445 at para. 25 (CA) in which Carnwarth LJ commented that judging credibility 'is inevitably a difficult and imperfect exercise. Different tribunals hearing the same witnesses may reach quite different views'. More generally, the AIT has itself candidly noted, in *RU v. Entry Clearance Officer, Lagos (Immigration Judge: treatment of evidence)* [2008] UKAIT00067 at para. 10 (AIT), that 'a diverse judiciary such as that of this Tribunal will be diverse in its attitude and approach as well as in other characteristics'.