ILPA Response to the Independent Chief Inspector of Borders of Immigration for the Inspection of Country Information

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and nongovernmental organisations. ILPA provides this written information further to an oral briefing for the inspection team. We are happy to provide further information on request.

Methodology, processes and guidance within the Home Office's Country Policy and Information Team: collaboration with external 'stakeholders'

ILPA is represented on the Chief Inspectors Independent Advisory Group on Country Information and this is the way in which ILPA interacts with the team. ILPA was represented on predecessor group, the Advisory Panel on Country Information, the papers from which can be found at: http://discovery.nationalarchives.gov.uk/details/r/C16810. All meetings were public and papers published. We list at **Appendix 1** a selection of Advisory Panel on Country Information material held by ILPA, which we should be happy to make available to the enquiry on request.

In July 2008 the Advisory Panel on Country was disbanded and its functions subsumed under the Office of the Chief Inspector. In March 2009 the then Chief Inspector established the Independent Advisory Group on Country Information to assist him with monitoring the UKBA Country of Origin Information Service (COIS) reports. See the Immigration Advisory Service *The APCI legacy: a critical assessment. Monitoring Home Office country of origin information products* February 2010.[1] The report contains an in-depth critical assessment of the conception, structure, function, review methods and implementation. It found that in all aspects, the Home Office had undue influence on the panel that compromised its independence and the transparency of its work. It describes the relationship of the panel to the designation of 'non-suspensive appeal" countries and the controversy over the Home Office refusal to allow the panel to scrutinise Home Office policy documents called Operational Guidance Notes that contain country information.

[1] The author of the report Sheona York, is now at the University of Kent at Canterbury.

The use of Home Office Country of Origin Information 'Products' in policy guidance and how this is interpreted in operational areas.

Home Office country of origin information reports tend to follow rather than lead in that they concentrate on risk in issue if they start to see a number of people seeking asylum from a country on the basis of that risk. They are reactive, and are not horizon scanning; they do not look at where the next risk is coming from based on political changes etc. until the asylum cases arrive in the UK.

Concerns include:

- Factual errors in guidance
- Out of date guidance
- Selective and misleading use of information. This includes quoting selectively from sources; for example omitting a caveat from a sentence quoted. See e.g. Eritrea below for examples.
- Casting doubt on reputable sources, particularly reputable NGO sources
- Policies inconsistent with the appraisal of the Foreign and Commonwealth Office as to the situation in a particular country.

One member[2] writes

> *Over the past four years, I have only had three cases in which there was a published country guidance case that addressed any of the issues presented in my client's asylum claim. In none of the other cases has there been any relevant country guidance case.*
>
> *With regard to the Home Office's own internal country of origin guidance, the picture is inconsistent. There has been relevant guidance with regard to some risk categories and not others. The fragmentation of the guidance into specific risk categories can also make relevant guidance hard to find, even when it does exist. The risk to Baloch nationalists in Pakistan, for example, has never been the subject of any specialised country guidance, but a considerable amount of material on this subject can be found in the guidance on Background information, including actors of protection, and internal relocation published on 6 October 2014. In a recent refusal decision, the Home Office both referred only to the guidance Security and humanitarian situation from November 2015 instead. This guidance was irrelevant as the claimed risk was of targeted persecution by the State.*

Out of date guidance

Identifying how up to date the guidance published on the Home Office website is requires looking at the contents of the guidance, not simply the date on which it is republished on gov.uk as "updated". How far country guidance is up to date varies widely. Although country guidance may be republished on gov.uk as 'updated', the updating may be one specific change while in the body of the guidance evidence from a number of years before is often reproduced, even in rapidly shifting situations. The parts of the guidance changed are not identified. To give just two examples: the country guidance 'Bangladesh: opposition to the government' was published in February 2015 and is still posted on the Home Office website, while the current published guidance on "Pakistan: Fear of the Taliban and other militant groups" dates from May 2014. This is of particular concern in fast-moving situations. An example of this was in 2000-2001 when the situation in Zimbabwe was changing rapidly. The guidance rapidly became out of date and persons were refused on the basis of out of date guidance.

[2] Several of the specific examples below were provided by the same ILPA member. They are being cited at length here because they are, in ILPA's experience, representative of more widespread Home Office practice.

It is not acceptable for a representative, be they lawyer or Home Office, to go in and argue a case without having regard to precedent: decided cases on the point from higher courts, and drawing attention to decided cases from courts at the same level. That is as true the morning after judgment is given in the case as it is two months later. Lawyers have to stay up all night and rewrite skeleton arguments in the light of judgments given on the eve of their case. The Home Office has an equal duty not to make decisions on the basis of out-of-date evidence simply because it is difficult to keep up with rapid change.

If some information is not put out centrally then the only possible approach is anarchic with no common foundation for the submissions of Presenting Officers.

Selective and misleading use of information

The selection of information in the Country Policy and Information notes tends to reflect Home Office policy rather than a neutral best understanding of whether or not persons are at risk. These reports are shorter than their predecessor and tend to refer to fewer sources. Judges and tribunal judges often assume that they are reliable. Where persons are unrepresented, the guidance may be the only country information before the Tribunal. Guidance may minimise the risks to certain groups. See under ***LGBT claims*** below.

At one point, historically, Country Information sat in the research and statistics section of the Home Office, outside the predecessor to UK Visas and Immigration. It was, while there, more independent.[3]

In response to a request from the inspectorate we have also gathered some information on how Home Office country of origin information is used in other countries. See comments at **Appendix 3.**

The use of Home Office Country of Origin Information Products in operational areas

Asylum interviews

A member whose firm does not have a legal aid contract and therefore acts in asylum cases *pro bono publico* or privately is freed up by not having to negotiate with the legal aid agency to collect and submit bundles of country evidence and detailed representations prior to the initial decision being made on an asylum claim, and to attend clients' substantive asylum interviews. The member writes

> *We invest a good deal of time in trying to make any country evidence we submit in support of an asylum claim is relevant, accessible and user-friendly, as well as submitted in good time. Unfortunately, Home Office interviewers often fail to read any of the evidence prior to the interview.*
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> *Prior to the asylum interview, we normally submit a bundle of country evidence including both the Home Office's own guidance (where relevant and up to date) and reports from a range of reputable independent sources, such as Human Rights Watch, the US Department of State, Amnesty International, or relevant regional rights organisations. In many cases the country evidence is in indexed and paginated bundles with a separate table of key passages at the end. In many cases our representations quote at length from the country evidence we are submitting, or give specific citations to page numbers in the bundle.*

[3] Professor Heaven Crawley of Coventry University, who has done considerable research on the Home Office, was a member of the Research and Statistics section at the time. Home Office country of origin.

> *In the past, our practice was to aim to submit the evidence at least a week before the interview. Now that claimants are only given one week's notice of the interview date, this is no longer possible, but we always aim to submit the evidence so as to arrive at least the day before the interview.*
>
> *When I attend the interview, it is my practice always to confirm that the country evidence has been received and to ask the interviewer whether they have read it. My experience has been that there is no predictable pattern with regard to type of claim or the location of the interview as to whether the country guidance has been read and considered prior to the interview. Some interviewers confirm that they have read the evidence and specifically thank us for it. Others state that they have not read the evidence and will not read it either before or during the interview.*

Reasons given for not having read the evidence include "We cannot read it"; it is a point of principle not to allow the interview to be affected by any evidence or submissions that have been made; and that the evidence, although received in the office several days before, was not forwarded to the interviewer in time for the interview.

Interviews that proceed without the interviewer having read country evidence are interviews in which time is spent on irrelevant issues. An applicant may be asked repeatedly whether there was arrest warrant issued or there are charges pending against them, when the country guidance makes clear that the campaign of persecution in the country of origin is extrajudicial, or they may be asked a long series of questions about experiences of persecution ten to fifteen years in the past, when the country evidence makes it clear that there have been several relevant changes in government in the meantime. Interviewers may misunderstand or, in the worst case, cut off an applicant's account of events that are directly relevant to their risk profile, because the interviewer is unaware of the relevance. This would be of particular concern in cases of unrepresented applicants, or others who may not have submitted a written statement prior to the interview. If clients are interrupted and told to move on to a different subject while trying to set out relevant aspects of their account, they may not have any opportunity to set those out prior to an appeal and a witness statement prepared for that appeal. They will then leave themselves open to accusations of having embellished their account at a late stage. A representative writes

> *In one recent experience at Lunar House… my client was repeatedly interrupted and told to move on to discuss the details of the specific acts of persecution that had precipitated his flight from his country of origin, and not allowed to describe the history of his political activities and political associations that made those threats plausible and serious. He was then refused on the grounds that his fear of persecution was entirely "subjective".*

This lack of engagement with the country context can undermine any confidence in what is said about levels of risk in the eventual decision. The experience of being questioned, sometimes for hours, by a representative of the Home Office who displays a complete lack of knowledge and understanding of the basis of the applicant's fear of persecution can be humiliating and distressing.

The Home Office 'pilots' of the Personal Information Form in Scotland and in the North East, purport to provide an opportunity for persons seeking asylum to set out their case in writing prior to interview. "Pilots" because there does not appear to have been any end to and evaluation of the 'pilot' in Scotland before treating it as business as usual. "Purport to" because while in Scotland legal aid is available for this work, this is not the case in England and Wales where a fixed fee is payable for work at the initial stage of a claim for asylum, subject to an escape clause that if the work done represents three times that nominally represented by the fixed fee, then an hourly rate is payable. The Home Office has also issued the forms to unrepresented applicants, enjoining them to submit the forms in English and to ensure that any documents submitted are translated.

Oral reports back from the pilots have been made at meetings with ILPA members in Leeds and Glasgow, and at the National Asylum Stakeholder Forum decision-making sub-group suggest that the response from Home Office staff to having more information before the interview has been

favourable. The submission of written evidence in advance appears to have cut interview times, although not by very much and perhaps not by as much as was expected. Representatives, with the caveats that if this approach is to work it must be properly funded and that it is in no way suitable for those who are not represented, are enthusiastic about the approach in principle. In practice, however, they emphasise that if the interviewer proceeds to use the written evidence to attempt to trap the client into inconsistencies then this will lead representatives to decide to put in a less, rather than a more detailed statement at the outset. The way in which Home Office interviewers are perceived to be approaching their task approach to their task will be determinative of the way in which the representative engages with the form.

Country of origin information experts have also, on occasion, attended the National Asylum Stakeholder Forum Equality sub-group, on which ILPA is represented, to discuss specific matters, for example information on claims based on sexual identity.

The Home Office should be able to provide the Inspectorate with minutes of the meetings of these subgroups.

Decisions

In a number of cases the client is recognised as a refugee or granted humanitarian protection following an interview in which the interviewer did not seem to have read country evidence submitted prior to interview. File notes may reveal whether country evidence was read after the interview and the decision made in the light of it.

We have experience of refusal decisions made without any reference whatsoever to country evidence. A member writes

> *…a student activist from an opposition party in Bangladesh was refused asylum on the grounds that it was "implausible" that he would have been arrested in January 2017 for having attended an opposition political party demonstration. The country evidence showed that… thousands of members and supporters of his political party had been arrested exactly at the time that he stated that he had also been arrested. The decision to refuse him was made in November 2015, at a time when there had been published Home Office guidance for six months addressing the risk to opponents of the government in Bangladesh, including a series of mass arrests in the week he claimed to have been arrested. There was no reference …to that guidance. The refusal was overturned on appeal.*

It is not uncommon for the Home Office to recognise that a considerable amount of country evidence has been submitted, but to regard it as irrelevant on the grounds that it does not specifically name the applicant or their family etc. The following sentences are in widespread use:

> *"You have submitted numerous internet articles. However, as these articles do not relate to you specifically, they do not add any weight to your asylum claim."*
>
> *"You have produced numerous documents in support of your claim. These are listed and considered below. … Numerous articles and reports about events in [country of origin] – none name you nor your family. They are reports that are widely available. They do not demonstrate that you are at risk but refer to general events that have occurred."*

They have been used in cases where numerous internet articles included not only the Home Office's own country guidance on the country of origin, but reports of the US Department of State, Human Rights Watch and Amnesty International.

In one case, a member made a specific complaint to the case owner and to their manager, relying on Paragraphs 339J and 339JA of the Immigration Rules which require the Home Office to consider country evidence before making their decision. They received the following response:

> [w]*hilst background information and general country evidence is assessed when making a decision on an asylum claim, if it does not mention specifically mention [sic] an individual claimant, than I am satisfied their claim may be lawfully assessed.*

The refusal was overturned on appeal.

Case workers may undertake research off their own bat in circumstances where there does not appear to be any quality control of the methodology used and the means by which the reliability of the source has been identified. Snippets of information seemingly selected at random may be prepared to independent reports from reputable experts. A member writes:

> *The worst example of the citation of inappropriate sources in my experience was a decision that found that there would be orphanages available to care for an unaccompanied asylum seeking child on return to Nigeria. Three web citations were given for the blanket assertion that there was orphanage care available. Upon going to those sites, I found that they consisted of the following:*
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> 1. *The website of Lufthansa Airlines, stating that one of the recipients of the spare coins donated by passengers on flights was an orphanage in Nigeria.*
> 2. *The Facebook page of a British-based salsa club, stating that one of their members had recently travelled to Nigeria and would like to collect donations to support orphanages there.*
> 3. *The web page of a dried noodle company, based in Nigeria, stating that they had made a charitable donation of dried noodles to orphanages in Lagos.*

In other decisions, the case worker relies on isolated pieces of unrepresentative evidence but does not consider the broader context. For example, in a recent decision, the decision maker cited a google search that verified that the applicant's was of the ethnicity claimed, but did no further research to assess the relevance of his ethnicity to the risk of persecution in the country of origin, something on which a considerable amount of country evidence had already been submitted, and indeed is available in the public domain.

In a recent decision refusing to recognise a single, independent businesswomen from Libya, the refusal decision stated, "by way of background it is known that," and then quoted at great length from a single fact sheet from the USAID website and the website of a small US charity that operates in Libya with USAID. There was no further reference to any more general reports concerning the situation of women in Libya whether in country guidance cases then in effect, the Home Office's own guidance on gender-based persecution in Libya or more general human rights reports such as that of the US Department of State, Human Rights Watch, or Amnesty International. All of that evidence was referred to in the following two sentences only:

> *"You have also submitted numerous articles on the current country situation. None of the articles are specifically about you and are generic in nature."*

Reasons for refusal are given, but reasons for recognition as a refugee or a grant of humanitarian protection are not. The inspectorate should examine the notes on file where a grant is made to identify good practice in considering country of origin information at this time.

Appeals

We provided information in our June 2017 submission to the inspectorate for the inspection of asylum casework which is relevant to this matter and we draw upon it here.

Statistics on the increased numbers of Home Office asylum decisions overturned at appeal by the First-tier Tribunal (Immigration and Asylum) Chamber reflect our experience that the quality of Home Office decisions on asylum cases has deteriorated further in recent times.

In 2016, the First-tier Tribunal overturned Home Office decisions on asylum claims in 41% of the 12,304 appeals brought before it by applicants.

Year	Number of appeals determined[4]	% Determined appeals allowed	% Determined appeals withdrawn	% Determined appeals dismissed
2016	12,304	41	5	54
2015	9,224	35	5	60
2014	6,178	28	5	66
2013	8,325	25	7	68
2012	8,285	27	7	66
2011	10,597	26	6	67
2010	14,723	27	4	68
2009	12,813	29	4	67
2008	9,209	23	5	72
2007	12,395	22	5	73

High proportions of Home Office decisions were overturned by the Tribunal: Eritrea (75%) Sudan (58%), Libya (49%), Afghanistan (49%), Sri Lanka (47%), Iran (44%), Ethiopia (44%) and Uganda (44%).

The statistics available on the proportion of Home Office decisions overturned by the Tribunal at appeal over the last ten years demonstrate a deterioration. The proportion of asylum appeals allowed has almost doubled in ten years, from 22% in 2007 to 41% in 2016.

Whilst the proportion of Home Office decisions overturned at appeal during the first quarter of 2017 appears to have decreased (35% of the 5205 appeals determined), this could be explained by the high proportion of Eritrean appeals that were withdrawn (51%) rather than determined and allowed by the Tribunal (33%).[5] There were high rates of success at appeal for asylum applicants from Libya (63%), Somalia (56%), Afghanistan (52%), Sri Lanka (47%), Syria (46%), Sudan (45%), Iran (43%) and the Democratic Republic of Congo (40%).

The proportion of Home Office decisions overturned during the first quarter of 2017 is higher than the 30% of decisions identified by the Home Affairs Committee as *'an unacceptable rate of error on the part of the Home Office.'* Eritrean cases were highlighted at that time:

> *In addition to increasing its capacity to process applications for asylum, the Government should do more to ensure that its initial decisions are correct. Around 30% of decisions to refuse asylum are overturned in the courts, and this figure is much higher for certain nationalities such as Eritreans and Iranians. This is an unacceptable rate of error on the part of the Home Office. Incorrect decisions, if appealed, mean that those affected will require asylum accommodation for longer, adding further pressure to an already stretched system. The Government needs to improve its decision-making and commit to regular reviews of its approach to those nationalities which the courts are consistently identifying as receiving incorrect decisions. We have highlighted specific*

[4] Source: UK Visas and Immigration, *Immigration Statistics, October to December 2016*, Asylum Data Tables Volume 4, Table as_14: Asylum appeal applications and determinations, by country of nationality and sex, at: https://www.gov.uk/government/statistics/immigration-statistics-october-to-december-2016 (percentages calculated)

[5] UK Visas and Immigration, *Immigration Statistics, January to March 2017*, Asylum Data Tables Volume 4, Table as_14_g: Asylum appeal applications and determinations, by country of nationality, at: https://www.gov.uk/government/statistics/immigration-statistics-january-to-march-2017-data-tables

nationalities, such as Eritreans and Afghans in this and previous Reports. We need to see progress in this area and for this to show in future quarterly immigration statistics[6].

The Home Office has sometimes argued that the proportion of decisions overturned cannot act as an indicator of the quality of its decision-making because of additional factors that may arise at appeal, for example, the production of new evidence. The Legal Aid Agency, however, will not normally fund expert evidence prior to the Home Office decision. It is also very difficult to get in touch with the Home Office and to persuade it to reconsider cases prior to the day before the hearing.

The Home Office is required to provide unpublished documents to which reference is made in its reasons for refusal letters to the other party and to the Tribunal, see rule 24(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604 (L. 31). The Home Office has recently been criticised by the Court of Appeal for not producing information known to it, even though that was information published on the Home Office's Country of Origin information web page, see *UB (Sri Lanka)* [2017] EWCA Civ 85[7]:

> *16. In my view there was the clearest obligation on the Secretary of State to serve relevant material and ensure it was before the Tribunals at both levels. In AA (Afghanistan) v SSHD [2007] EWCA Civ 12, Keene LJ made the point clear beyond doubt:*
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> "27. [It was submitted by the appellant that] the attention of the adjudicator should have been drawn by the Secretary of State's representative to the policy on interviewing unaccompanied minors, so as to avoid him being misled: see *R v. Special Adjudicator, ex parte Kerrouche* [1997] Imm AR 610.
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> 28. As a matter of law, that is right. The Secretary of State should draw relevant parts of his policy to the adjudicator's attention. Merely because those policy documents are publicly available in print or on a website is not enough: where issues of risk of persecution are involved, a decision to return a person or not to his country of origin should not depend on the diligence of that person's representatives."
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> *17. The point was reinforced by Lord Wilson in Mandalia v SSHD [2015] 1 WLR 4546 [2015] UKSC 59. Lord Wilson referred to the judgment of Keene LJ in AA (Afghanistan) and re-emphasised the obligation:*
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> "irrespective of whether the specialist judge might reasonably be expected himself to have been aware of it, the Home Office presenting officer clearly failed to discharge his duty to draw it to the tribunal's attention as policy of the agency which was at least arguably relevant to Mr Mandalia's appeal." (paragraph 19)
>
> *18. It is necessary to distinguish the question whether such policy or guidance should be regarded as material to a case in anticipation, before factual findings have crystallised, from whether it is material to the decision actually reached: in other words whether, viewed in retrospect, the guidance might realistically have affected the outcome. I now address the first.*

[6] House of Commons Home Affairs Committee, *Asylum Accommodation*, Twelfth Report of Session 2016/17, HC 637, 17 January 2017, para 19 at: https://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/637/637.pdf
[7] http://www.bailii.org/ew/cases/EWCA/Civ/2017/85.html

19. *In my view, this guidance was clearly material and clearly should have been served in advance. One has only to consider the decision letter itself.* […]

[…]

21. *I deprecate any suggestion that this obligation of service is displaced or diminished by the availability of the material online. Mr Hare for the Secretary of State did not in fact mount this argument, although it seems likely from exchanges before the hearing that he was pressed to do so. He was right to decline such an argument. Apart from the clear obligation in law derived from authority, many appellants in immigration and asylum cases are unrepresented. In a number of cases where there is legal representation, the quality of representation is less than optimal.*

22. *The obligation is clear but must not be taken beyond the proper bounds. There is no obligation on the Secretary of State to serve policy or guidance which is not in truth relevant to the issues in hand, and complaints as to alleged failures of disclosure of material which is truly peripheral or irrelevant should readily be rejected.*

Country guidance

The backdrop to Home Office use of country of origin information is the country guidance system in the tribunal. What Laws LJ in *S and Others* [2002] INLR 416 described as the 'exotic' notion of a factual precedent could equally well be described as confused. Whereas a legal precedent establishes the meaning of a point of law until this is overturned by a higher court, a factual precedent is only good until a new fact emerges, whether one that was not before the tribunal or one that came to light subsequently. Time and energy that could be spent establishing a case is spent bringing it within the ambit of, or distinguishing it from, a country guidance case.

Country guidance cases date, but it is usual not to remove them from the Tribunal website[8] until a subsequent case supersedes them, in an effort to ensure that a judicial decision is not displaced by an administrative one. But the result is that out of date country guidance cases provide fertile ground for those casting around for country of origin information to support a particular argument, rather than to obtain the best possible information.[9] The question of which cases are reported as country guidance is also controversial. The Upper Tribunal has produced a practice note on the question: [10]

The Tribunal's treatment of experts has been such in some cases that highly respected academics who fear that unfounded and *ad hominem* attacks that might damage their standing in the academic community no longer wish to prepare expert reports for immigration cases. On at least one occasion proceedings for libel have been commenced against the Tribunal for its treatment of an expert.[11] At the moment, it is difficult to find experts to write reports on cases from the Democratic Republic of Congo.

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[8] https://tribunalsdecisions.service.gov.uk/utiac?utf8=%E2%9C%93&search%5Bquery%5D=&search%5Breported%5D=all&search%5Bcountry%5D=Eritrea&search%5Bcountry_guideline%5D=0&search%5Bcountry_guideline%5D=1&search%5Bjudge%5D=&search%5Bclaimant%5D=

[9] See Colin Yeo et ors for the Immigration Advisory Service ***Country Guideline cases:*** *benign and practical? http://www.freemovement.org.uk/wp-content/uploads/2012/01/Country-Guideline-cases-benign-and-practical.pdf*

[10] https://www.judiciary.gov.uk/wp-content/uploads/2014/01/guidance-note-2001-no-2-reporting-decisions-july-2015.pdf

[11] https://www.theguardian.com/education/2008/oct/27/alan-george-libel-case

Eritrea

Under the Freedom of Information Act, the Public Law Project obtained information from the Home Office which revealed that officials visited Eritrea in December 2014, at a time when over 85% of Eritrean asylum claims were being allowed by the UK[12] to discuss reducing Eritrean migration to the UK. An appeal challenging the censoring of parts of these documents prior to release will be heard on 4 July 2017. Please see the 12 June 2017 letter of the Public Law Project to the Enquiry, which we summarise here, interpolating some comments of our own.

Following that visit, the Home Office assessed that because of its doubts about the reliability of the statements made by Eritrean government officials, the evidence it had gathered was not enough to lead to a significant reduction in the asylum grant rate. Despite this, in March 2015 it published new guidance on Eritrea,[13] in part based on information obtained during the visit. The inspection could usefully consider the selective use of information gleaned to this visit. Among the matters worthy of consideration:

- The Home Office's failure to make clear to parliament that a/the purpose of the visit was to obtain country of origin information
- The Home Office attempts to resist disclosure of information from the visit in the Freedom of Information Act case described above
- How and on what basis the Home Office decided what information to include in the Eritrea Operational Guidance Note and what oversight senior staff, in particular those involved in the visit, had of this.

The percentage of applications from Eritreans granted asylum fell to 48% by June 2016 but success rates on appeal rose correspondingly.[14] In 2016, the Tribunal overturned 75% of appeals against negative decisions by the Home Office in Eritrean cases. A further 15% of appeals brought were withdrawn.

One effect of the drop in grants from the Home Office was that unaccompanied children from Eritrea were excluded from consideration for being admitted to the UK under s 67 of the Immigration Act 2016 because the criteria for being considered for the scheme made reference to the rate of success at first instance.[15]

The inspection should examine, when the success rate on appeal made clear that Tribunal judges were not accepting the Home Office approach to country of origin information, what consideration did the Home Office give to revising its guidance to staff to take account of these judgments?

Why, in contrast to the speed with which it acted after the December 2014 visit, the Home Office did not revise its country of origin information as a matter of urgency following its February 2016 fact-finding mission? The report of that mission[16] was not published until August 2016 (a matter not made clear on the website) and the Home Office did not its revise their guidance until September 2016. An advanced copy of the revised guidance was disclosed to the

[12] See https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2014/immigration-statistics-october-to-december-2014

[13] http://www.refworld.org/publisher,UKHO,,ERI,552779c34,0.html

[14] https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2016/asylum

[15] See version 2 of the Guidance on s 67, which was withdrawn on 10 March 2017 following a legal challenge, which is ongoing:https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/598563/Archived_Implementation_of_section_67_of_the_Immigration_Act_2016_in_France_v2.0.pdf

[16] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/565637/Report-of-UK-FFM-to-Eritrea-7-20-February-2016.pdf

appellants in *MST and others (Disclosure – restrictions – implied undertaking) Eritrea* [2016] UKUT 00337 (IAC)[17] but, as described therein, they were not permitted to share it.

The effect of the *MST* litigation was that in the first quarter of 2017 51% of Eritrean appeals were withdrawn, while 33% of those heard by the Tribunal succeeded, as described above.[18]

The inspection should examine whether the Independent Advisory Group on Country Information was provided with the full notes of what the December 2014 Home Office/Foreign and Commonwealth Office visitors were told by their Eritrean interlocutors that was relevant to the country guidance. In particular, was the group shown the evidence gathered that contradicted the March 2015 guidance, specifically the advice of the Embassy's Honorary Legal Adviser recorded by the Ambassador in his Diptel of 16 December 2014:

> *The Embassy Honorary Legal Adviser told the visitors that the legal provision for National Service, together with the penalties for avoiding it were clear and proportionate, with judges obliged to consider both mitigating and aggravating factors when passing sentence which could range from ten days' to three of more years' detention. However, many of those who avoided National Service were treated informally by local security chiefs, though the penalties in practice varied over about the same range as those provided for in law.*[19]

This seems particularly important given the group's strong criticism of the part of the March 2015 guidance which was contradicted by this evidence:

Finally the HO without any evidence concludes, "Evaders and deserters are unlikely to be considered traitors" (p. 9). It is further stated, "The most up-to date information available from inside Eritrea suggests that those who refuse to undertake or abscond from military/national service are not viewed as traitors or political opponents. It is unlikely that a person would be detained/imprisoned on return as a result" (p. 7). This assertion is a verbatim copy from the discredited Danish report.[20]

The group's position was supported by Human Rights Watch, which on 2 July 2015 wrote to the inspectorate to say:

> *The UK's two March 2015 reports effectively direct decision-makers to dismiss asylum claims based on a fear of persecution on grounds of the applicant's imputed political opinion because, according to the reports, the Eritrean authorities no longer view draft evaders and deserters as political opponents or traitors. The reports also pave the way for a possible refusal to grant Eritreans subsidiary protected status by concluding that Eritreans who left the country without permission can avoid punishment by formally apologising and paying a two percent diaspora tax, that national service will be limited to 18 months and that conditions of national service no longer amount to serious harm.*

[17] https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-337

[18] UK Visas and Immigration, *Immigration Statistics, January to March 2017*, Asylum Data Tables Volume 4, Table as_14_g: Asylum appeal applications and determinations, by country of nationality, at: https://www.gov.uk/government/statistics/immigration-statistics-january-to-march-2017-data-tables

[19] http://www.publiclawproject.org.uk/resources/258/home-office-disclosure-efforts-to-reduce-the-numbers-of-eritrean-nationals-granted-asylum

[20] http://icinspector.independent.gov.uk/wp-content/uploads/2015/06/Eritrea-report-IAGCI-19-May-2015.pdf p 27

> *The preponderance of evidence summarised above indicates that there has been no change in Eritrea's treatment of draft evaders, deserters and people leaving the country without permission, as well as on the length and conditions of national service.*[21]

Once the Home Office has taken a particular position with regard to the country of origin, the Home Office Presenting Officer almost never revisits that position either upon receipt of the country bundle or at the hearing, even in cases where specific representations have been made directly to the Home Office Presenting Officer Unit prior to the appeal hearing, asking them to do so. This is in line with a broader practice within the Home Office at this time not to reconsider decisions once they are made and not to make concessions in the appeal process, which goes beyond country evidence.

In one case, the Presenting Officer told the Tribunal that they do not have the resources to read or consider country evidence and therefore cannot comment on it. In another recent case, counsel instructed by the Home Office stated that she had been "unable to find" country information on a particular aspect of the appellant's risk profile, when the relevant country evidence included the Home Office's own published guidance, which was the first item in the bundle of country evidence lodged in support of the appeal, a month before the hearing. In that particular case, an application for the appellant's costs of the appeal was successful.

Albania

Full details of country guidance on Albanian LGBT asylum cases are provided in No 5 Chambers' note on *LC (Albania) v Secretary of State for the Home Department* [2017] EWCA Civ. 351.[22] This was an unsuccessful appeal by a gay man from Albania. In the course of it, the Secretary of State conceded that she had, unlawfully, continued to rely on the 2009 Country Guidance case of *MK (Lesbians) Albania CG* [2009] UKAIT 00036 despite an Order by the Court of Appeal setting that determination aside in October 2011.

No one emerges covered in glory from this saga: until *LC,* no representative drew attention to the error; it was not until 8 December 2016 that the Upper Tribunal amended the Country Guidance list on its website with a note next to *MK* "Removed from list 08.12.16 in view of the Court of Appeal decision dated 10.10.11." Only following that did the Home Office amend its guidance. For some five years the case, which has implications not only for claims based on sexual identity but also domestic violence and trafficking, has been wrongly relied upon, with the risk that there have been wrongful refusals and removals as a result. Those refused on the basis of *MK* may well have grounds for a fresh claim but some will already have been removed and it is our understanding that in such circumstances the Home Office would oppose bringing persons back to be able to submit such a claim.

It would be helpful for the inquiry to examine the way in which decisions, orders and notes on decisions and orders, of the courts and tribunals are circulated within the Home Office. Are they circulated? By whom? To whom are they sent? Presenting Officers only? Or first-instance decision-makers also.

Sri Lanka

[21] https://www.hrw.org/news/2015/07/01/letter-uk-independent-chief-inspector-borders-and-immigration-flawed-uk-country

[22] https://www.no5.com/news-and-publications/news/1575-lc-albania-home-office-concedes-unlawful-use-of-country-guidance-on-albania-since-october-2011/

See the case of *UB*, to which reference is made above. See also the letter from Freedom from Torture on the Sri Lanka country guidance, annexed hereto. This is not a published document and should not be published.

Somalia

When a chamber of the judgment of the European Court on Human rights gave judgment in the case of *Sufi and Elmi v. the United Kingdom*, Application Nos. 8319/07 and 11449/07, that removals to Mogadishu, Somalia would breach the European Convention on Human Rights the UK the case to the Grand Chamber. While it was pending before the Grand Chamber, the country of information indicated that the Home Office did not accept the decision, and that decision-makers should not apply it. It sets a dangerous precedent. In Hungary, a country teetering on the brink of abandoning the rule of law, the Hungarian State has taken the same approach to the case of *Ilias and Ahmed v. Hungary* (no. 47287/15).

This approach has also been taken before the domestic courts. It is wrong. A party appealing must ask for a stay of the effect of a decision, otherwise it takes immediate effect. If a stay is not asked for, is refused, a party is bound by the judgment of the lower court until the higher court gives judgment.

Other

Medical Country of origin information

A couple of years ago in medical cases, HO would refer to medical country of origin information about the availability of medical care for a particular region. It would be worth the inspection looking at whether this is still used.

Decisions as to whether arrangements can be made for the safety and welfare of a separated child whose claim for asylum has failed on return.

We cite, with permission of the Appellant, from an immigration judge's determination of May 2008. The Home Office did not appeal the decision and recognised the child appellant as a refugee following the determination. In short form the child gave a telephone number stated by the child to be that of the parents in the home country. Local consular staff, at the behest of UK Border Agency officials, tried the number without her informed consent. The person who answered at first confirmed that the speaker was the parent, spoke of being frightened, and hung up. That was the only 'contact' with the supposed adequate reception arrangements. The immigration judge states:

> *…it was [...] clear that the Respondents were aware of some of the circumstances which [the social worker] was able to describe today but had not seen fit to appraise their Presenting Officer of the situation or to include it in the reasons for refusal letter or appraise the Tribunal.*
> *[…]*
>
> *I should first consider the claim made by the Respondents that adequate reception arrangements be made in[…]*
>
> *The whole basis of the Respondents' conclusions in this matter are set out in an email from the British Consulate* […cited in full in the determination]
> …

I do not find that this even begins to approach to any reasonable standard to say that adequate reception arrangements have been made for the Appellant. …

These emails of course need to be read in their entirety so that the true meaning is not distorted. However, having read these emails in their entirety it would appear that the emphasis is on the need to remove the Appellant rather than assessment of either her condition or the conditions to which she would be removed.
…
Of even more concern to me is that the fact that the Respondents are very much aware that the Appellant may have been trafficked….[the social worker] *was able to tell me that following her full asylum interview the Appellant had been interviewed further by officers on behalf of the Respondent from a specialist unit…there had been liaison between the Home Office, social, services and the police in respect of this aspect of the Appellant's circumstances. What concerns me is that the Respondents have not referred to any of this in the reasons for refusal letter and it would also appear that the officers dealing with unaccompanied minor* [gender] *have also not been kept abreast of these developments.'*

…[the social worker] *went on to say that the keenness and persistence of the people trying to get hold of* [the Appellant's] *address led her to believe that the Appellant had been trafficked.*

That information was passed to the port authorities and to the Home Office crime agency and to the airport security…The Respondents have not provided any information about this.'

In the Court of Appeal case, *CL(Vietnam)* [2008] EWCA Civ 1551, Lord Justice Keene describes what the Home Office did in practice to establish that the country was safe for the child.

6. *There is a Home Office document headed "consideration" and dated 22 July 2002 which concludes by stating:*

"Despite the fact that Applicant is a minor it is considered that he can be returned to Vietnam as it has been established that there are adequate care provisions for children returned to Vietnam. See attached letter from the British Embassy in Hanoi."
[….]

8. The British Embassy letter was one dated 4 July 2001. It stated: "The Law on Care, Protection and Education of Children of Vietnam states that all children, including orphans, shall be given appropriate care and education by the state. All children homes are run by the Ministry of Labour, Invalids and Social Affairs. Some receive additional financial assistance from foreign NGOs.

In principle, childcare ceases at the age of 18 but, in practice, continues until individuals have found a job. Vietnam is a secular society with no restriction on religious practices."

Lord Justice Sedley, giving the concurring judgment, stated:

31. ..the Home Office policy…of course designed in large part…to give effect to the United Kingdom's international obligations, here in particular the European Convention on Human Rights and the International Convention on the Rights of the Child

32…I find it disturbing that a document as bland and jejune as the letter which Keene LJ has quoted was relied on by the Home Office when deciding something as important as the safe return of a child to another country. The letter is plainly a recital of a formal answer obtained from the Vietnamese authorities. The Immigration Judge recorded evidence from the Home Office's own in country information which shows that the reality for tens of thousands of Vietnamese children was very different.

Decisions considering there are "insurmountable obstacles" to a couple continuing their family life together abroad, as set out in Paragraph EX of Appendix FM of the Immigration Rules.

It would be useful for the inspection to look at whether and how country of origin information is used in applications made on the basis of rights to family and private life under Article 8 of the European Convention on Human Rights, to understand whether the Home Office is making maximum use of these 'products'. Country of origin information is relevant to the assessment of whether

- it is reasonable to expect a child to leave the UK, in applications made under paragraph 276ADE(1)(iv) and paragraph EX of Appendix FM to HC 395;
- whether there would be very significant obstacles to the applicant's integration into the country of return, in applications made under paragraph 276ADE(1)(vi) of Appendix FM to HC 395, and
- whether there would be insurmountable obstacles to a couple continuing their family life together outside of the UK, in applications made in reliance on paragraph EX of Appendix FM to HC 395.

In cases under paragraph EX one concern is whether there would be insurmountable obstacles to a same-sex couple living together in the migrant's country of origin because:

1. The British or settled partner would not be admitted to that country except as a visitor.
2. The couple's relationship would not be legally recognised.
3. The couple would be at risk of harassment, discrimination, ostracism, or ill-treatment amounting to persecution.

Decision making in this area remains inconsistent. Many applications are granted, and as in asylum cases, we do not know which factors are taken into account in a grant.

Those cases that are refused are often refused not after detailed consideration of the country of origin information, but after a refusal to take it into account at all. Refusals have stated that that "no evidence" was offered of insurmountable obstacles or that, if there is a risk of persecution in the country of origin, the couple's only immigration option is for the migrant partner to claim asylum.

The impression is that, when the evidence is considered, it is more often considered fairly than in the asylum context, but that more training that needs to be done about whether it is necessary to consider country evidence at all in making an assessment under this part of the Immigration Rules. From the language of the refusal letters, the impression is that that some case owners believe that insurmountable obstacles must be something specific to the individual applicant, such as, perhaps, an incurable illness, rather than general country conditions. Are they trained to look at country evidence at all as relevant to the question of 'insurmountable obstacles'?

Feedback loops

ILPA is mindful that UK Visas and Immigration felt that feedback loops were working very well on administrative review, but the inspectorate in its inspection of administrative review revealed the quality of decision-making to be poor. See questions above re to whom information is circulated.

How Country of Origin information fits within wider Home Office transformation projects

We lack information on wider Home Office transformation projects which would be necessary to comment.

Additional comments on the thematic areas

Sexual orientation

See the Home Office Advisory Panel on Country Information An analysis of the coverage of LGBT issues in country of origin information reports produced by the Country of Origin Service, UK Border Agency by Anisa de Jong September 2008.[23]

A member identifies that since the country guidance on claims on the basis of sexual identity from Bangladesh was revised in December 2016 so as to downplay the degree of risk, more and more claims are being refused in the first instance, only to be overturned on appeal, often on the basis of country evidence that was before the individual case owner prior to the decision, but which was ignored in favour of the Home Office's own internal guidance.

A member comments

> *The guidance on LGBT persecution is quite good with regard to many other countries, leading to sustainable decisions following the interview, with obvious benefits financial and otherwise to all sides. The case of Bangladesh seems at the moment to be an outlier. It might be useful to investigate what prompted this change in approach with regard to one country and not others.*

Gender identity

See above.

Unaccompanied asylum-seeking children

See above. The Independent Advisory Panel tendered for a thematic report on children in July 2012, see http://icinspector.independent.gov.uk/2012/07/09/the-independent-advisory-group-on-information-invites-tenders-to-evaluate-the-coverage-of-childrens-issues-in-the-ukbas-coi-reports/

The report is available at http://icinspector.independent.gov.uk/wp-content/uploads/2012/12/IAGCI.Children.COIS_.Final_.pdf It was prepared by Ravi Kholi, who is at the University of Bedfordshire, by Fiona Mitchell and Helen Connolly. We recommend that the inspectorate speak with them.

Adrian Berry
Chair
ILPA
27 June 2017

APPENDIX 1 Sample of Advisory Panel on Country Information material held by ILPA

[23] Anisa de Jong is currently at the Universtiy of Kent at Canterbury.

Immigration Advisory Service (IAS) The APCI legacy: a critical assessment. Monitoring Home Office country of origin information products February 2010

UNHCR comments on the Afghanistan country Report of August 2008 considered at the APCI meeting of 7 October 2008

Advisory Panel on Country Information (APCI), draft minutes of 11th meeting 7 October 2008 Issue number: 12.10.15947

Home Office Advisory Panel on Country Information (APCI) An analysis of the coverage of LGBT issues in country of origin information reports produced by the COI Service, UK Border Agency by Anisa de Jong September 2008

Country of Origin Information Service, BIA to members and observers of the APCI of 24 January 2008 re APCI - amendment to the preface in COI reports

Sussex Centre for Migration Research. Commentary on October 2003 Country Information and Policy Unit (CIPU) report on Somalia. Advisory panel on country information APCI.2.2 by Awa Abdi and Richard Black February 2004

Advisory Panel on Country Information (APCI) minutes of 1st meeting 2 September 2003

Appendix 2

ILPA paper for the September 2016 Home Office National Asylum Stakeholder Forum Strategic Engagement Group on the Rule of Law (extracts)

RULE OF LAW

The points that follow do not purport to be an exhaustive description of the components of the rule of law. For that, see Tom Bingham's masterly *The Rule of Law*. Instead they are aspects of the rule of law on which it is suggested that there is a very high degree of agreement but where the courts have on occasion (sometimes on many occasions) found the Home Office wanting. This is a version of the paper presented at the Strategic Engagement Group on 21 September but has been updated, including with subsequent developments (to 7 November 2016).

Alison Harvey

1. Case law and statute are both binding expressions of the law.

2. The judgment of the court is binding not only in the instant case but in cases that turn on the same points of law.

3. Where a case is conceded by a party on the basis that a particular interpretation of the law is correct, the terms of the concession bind the party in other cases that turn on the same question of interpretation of the law.

4. A party cannot argue that the law means one thing in one case, and argue that it means something different in another case where the same point is at issue.

5. The judgment of the court binds from the moment it is given, including where permission to appeal is given on the spot. A party that considers that problems would arise from the judgment's having immediate effect must address arguments on the point to the judge and ask for a stay.

6. Parties have a duty to the court and should not bring cases they know to have no prospects of success or that they have not examined to verify whether or not they have any prospect of success.

7. A party must draw to the attention of the court authorities (cases) which are against it, as well as those in its favour.

8. A party has a duty of candour. The duty is to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. Documents must be disclosed insofar as that disclosure is necessary for fairly and justly disposing of a specific issue.

9. Parties must comply with orders of the court.

10. A party must not act in an oppressive manner.

DETAIL

What follows concentrates on examples from the past two years. For earlier examples see

- ILPA's 30 September 2009 Submission to Joint Committee on Human Rights (implementation of Strasbourg Judgments and Declarations of Incompatibility;
- 22 October 2010 evidence to the Joint Committee on Human Rights for its *Review of the Government's response to judgments identifying breaches of human rights in the UK*, Submission to Joint Committee on Human Rights (implementation of Strasbourg Judgments and Declarations of Incompatibility) [24]
- Alison Harvey's paper *The UK Border Agency and the Rule of Law* for the 21 July 2009 Immigration Advisory Service conference, appended hereto. Lin Homer, the then Chief Executive of the UK Border Agency, also presented a paper at that conference but the paper was not circulated.

See also The Bingham Centre for the Rule of Law's meeting report of its meeting on the Immigration Bill 2015 and the rule of law of 20 October 2015[25] at which Alison Harvey, Dr Hugo Storey of the Upper Tribunal, Professor Elspeth Guild and Caroline Robinson of Focus on Labour Exploitation all presented papers.

1. Case law and statute are both binding expressions of the law

[…]

Refusals to consider country evidence
Of current concern are refusals to consider country evidence, often on the grounds that the client is not named in it, in violation of paragraph 339J of the immigration rules. This is a case of the Home

[24] Both available from http://www.ilpa.org.uk/pages/parliamentary-briefings-other-than-bills.html
[25] http://www.biicl.org/documents/817_20_october_2015_appg_meeting_report_v_2.pdf?showdocument=1

Office failing to apply a law it is challenging, but expressly disregarding the law as written – so frequently that it cannot be considered an individual caseworking error.
A typical sentence from a letter of May 2016 stated

> *These news reports, articles and statements are not specific to you. At best it can be described as information describing how political activists are treated in* [XXX country].

Similarly, in a refusal letter in June 2014:

> *…you have submitted numerous internet articles* [evidence submitted included Home Office Country of Origin Information Reports, reports, Amnesty International reports, US State Department Reports, and Human Rights Watch reports] *however as these articles do not relate to you specifically they do not add any weight to your asylum claim.*

An assessment of a claim must be carried out only after due consideration of all relevant country evidence. The API *Considering Asylum Claims and Assessing* Credibility states at paragraph 3.4.6:

- *The plausibility of a fact is assessed on the basis of its „apparent likelihood or truthfulness in the context of the general country information relevant to the applicants country of origin and/or their own evidence (see MM (Directorate plausibility) Democratic Republic of Congo [2005] UKIAT 00019) . . . . In order for a particular material claimed fact to be rejected because it is not plausible, it is not enough to simply say that the event could not have happened.* [Emphasis added]

Paragraph 339J similarly requires the consideration of independent country evidence:

> *339J. The assessment by the Secretary of State of an asylum claim, eligibility for a grant of humanitarian protection or a human rights claim will be carried out on an individual, objective and impartial basis. This will include taking into account in particular:*
>
> *(i) all relevant facts as they relate to the country of origin or country of return at the time of taking a decision on the grant . . .*

Similarly, paragraph 339JA provides that

> *339JA. Reliable and up-to-date information shall be obtained from various sources as to the general situation prevailing in the countries of origin of applicants for asylum*

It would not be lawful to decline to consider the country evidence on the grounds that it is publicly available or the applicant not mentioned by name in it.

See the Home Office's own Operational Guidance Notes. According to Home Office policy,

> *Decision makers must consider claims on an individual basis, taking into account the case specific facts and all relevant evidence, including: the guidance contained with this document; the available COI . . . .*

One representative was told in writing by a caseworker's supervisor, in response to a formal complaint, that they are allowed to disregard all of the country evidence if they do not find the claimant credible (which they had done in that case because they found his claim implausible – partly because they did not refer to the country evidence).
In another case the Home Office dismissed the claimant's account of being arrested because he had attended a demonstration as implausible/speculative, at a time when all of the country evidence reported that over 7,000 political activists had been arrested in that week.

There has been a recent trend not to engage with the "best interests" of children, but instead to assert that these have been taken into account, and then to assert that because there is someone else who could care for the children, the decision is in the child's best interests – conflating the unduly harsh tests from the criminality guidance with the assessment of the children's best interests, including in cases where there is no criminality at all.

…

2. The judgment of the court is binding not only in the instant case but in cases that turn on the same points of law.

Failing to follow Country Guidance cases
Failing to follow Country Guidance cases and making refusal decisions (and/or adverse fresh claim decisions) on which the Home Office cannot sensibly hope to succeed in the light of those country guidance cases. Failing to withdraw appeals or refusals which turn on the same point. Sri Lanka and Eritrea are good examples. Currently the success rate on appeal in Eritrean cases is over 80%.

3. Where a case is conceded by a party on the basis that a particular interpretation of the law is correct, the terms of the concession bind the party in other cases that turn on the same question of interpretation of the law

…

4. A party cannot argue that the law means one thing in one case, and argue that it means something different in another case

WK v Secretary of State for the Home Department, C4/2015/3883 Dublin Italy cases (hearing March 2015)
The Secretary of State continues to set removal directions for returns to Italy, despite individuals having outstanding claims before the Court of Appeal which were being/had been stayed behind *MS & Others*.

In this case removal directions were stayed by Beatson LJ, further to an application notice being filed with the Court of Appeal. Lord Justice Beatson sets out in the reasons of the order that:

> *…the decision of the Secretary of State to have a policy in respect of first instance proceedings has enabled those advising the Secretary of State that giving the Court of Appeal time to consider whether a case discloses MS grounds before setting removal directions would reduce by an unspecified period the time during which the Secretary of State might successfully effect an applicant's removal to Italy under the Dublin arrangements because the six month period prescribed by the Dublin arrangements is not suspended. The consequence will be that individuals will have to apply for stays of removal and the court will have to consider them*.

Such applications put a burden on the Court of Appeal and for this reason an urgent expedited hearing was listed to consider the treatment of the cases before the Court of Appeal stayed behind *MS and Others* and the application of Article 20(1)(e) of the Dublin regulation.

Home Office decision-makers and presenting officers should be presenting a consistent position and differences should be resolved as soon as possible. For this reason it is extremely problematic when no guidance is available on a point. The most striking example was the case of *Metock* (C-127/08), where it took many months to produce guidance on the correct approach to family members of EEA nationals. ILPA members were relying on an internal Home Office note to staff in posts overseas which had been leaked to us and acknowledged to be the instruction to which staff were working.

Many will recall the *ZO(Somalia) [2009] EWCA 442* case on whether those whose fresh claim for asylum had been outstanding for more than a year had permission to work. Despite the lead case, the Home Office continued to refuse others permission to work, forcing them to bring a judicial review and make an application to the court to obtain permission to work. This conduct was criticised by judges. Quite apart from anything else this places a strain on the legal aid and court budgets.

5. The judgment of the court binds from the moment it is given, including where permission to appeal is given on the spot. A party that considers that problems would arise from the judgment's having immediate effect must address arguments on the point to the judge and ask for a stay

See above. It is possible to ask for a short adjournment to deal with the effects of a judgment, but the court is unlikely to be sympathetic where the case was known to the party, as cases will be to the Secretary of State, and the outcome was always going to be clear cut, one way or the other. Representatives frequently sit through the night reworking skeleton arguments because a judgment has been given that means the arguments put no longer work.

6. Parties have a duty to the court and should not bring cases they know to be hopeless or that they have not examined to verify whether or not they are hopeless

The Upper Tribunal has been very critical of the Home Office for a failure to be selective in the appealing. Resisting even a hopeless challenge can draw on the legal aid and court budgets.

MR (permission to appeal: Tribunal's approach) Brazil [2015] UKUT 00029 (IAC)

On behalf of the Secretary of State, the application for permission to appeal was launched on a wing and a prayer. It was manifestly devoid of any substance or merit ….

VV (grounds of appeal) [2016] UKUT 53 (IAC) (13 November 2015)

Headnote

(1) An application for permission to appeal on the grounds of inadequacy of reasoning in the decision of the First-tier Tribunal must generally demonstrate by reference to the material and arguments placed before that Tribunal that

(a) the matter involved a substantial issue between the parties at first instance and

(b) that the Tribunal either failed to deal with that matter at all, or gave reasons on that point which are so unclear that they may well conceal an error of law.

(2) Given that parties are under a duty to help further the overriding objective and to co-operate with the Upper Tribunal, those drafting grounds of appeal

(a) should proceed on the basis that decisions of the First-tier Tribunal are to be read fairly and as a whole and without excessive legalism;

(b) should not seek to argue that a particular consideration was not taken into account by the Tribunal when it can be seen from the decision read fairly and as a whole that it was (and the real disagreement is with the Tribunal's assessment of the evidence or the merits); and

(c) should not challenge the adequacy of the reasons given by the First-tier Tribunal without demonstrating how the principles in (1) above have been breached, by reference to the materials placed before that Tribunal and the important or substantial issues which it was asked to determine in that particular case.

(3) Where permission to appeal is granted, an Appellant should review whether the grounds of appeal are genuinely arguable in the light of any response from the Respondent to the appeal. Whether or not the original grounds are pursued, it is generally inappropriate to seek to raise new grounds of appeal close to the date of the hearing if, for example, that would cause unfairness to a Respondent or result in the hearing being adjourned.

The text of the judgment says

Unless practitioners considering grounds of appeal adhere to established legal requirements for demonstrating inadequate reasoning, and more generally on what may qualify as an error of law, there is a real likelihood of appeals to the Upper Tribunal being pursued without any genuine legal merit. That

would represent an improper use of the Tribunal's limited resources and generally extend the time for which litigants would have to wait before their cases can be determined.

We should also refer to another matter. In this case, and in others, we have observed the Secretary of State obtaining permission to appeal on grounds which are not pursued at the hearing in the Upper Tribunal, because it is eventually acknowledged that they are unarguable. Plainly an Appellant should review the arguability of grounds of appeal, for example in the light of any response from the Respondent to the appeal. An Appellant should not continue to pursue points which are not properly arguable. But where points are abandoned, there is a tendency then to seek to rely upon a skeleton argument, served only just before or even on the day of the hearing, so as to advance one or more new arguments not previously notified either to the other party or to the Tribunal. Raising new points in this manner plainly can cause unfairness to the opposing party and, if so, the Upper Tribunal may well refuse to allow the new point to be argued. That is even more likely to be the case where a new point could not fairly be dealt with without adjourning the hearing so that the opposing party has a proper opportunity to deal with it. The resources of this Tribunal are finite and have to be allocated fairly and proportionately as between all cases before it and not wasted. These are important considerations which those who draft, or advise upon, grounds of appeal must keep well in mind.

In this case it appears to us that those launching or pursuing the appeal cannot have applied basic principles on what an Appellant needs to demonstrate in order to establish an error of law.

[…]

7. A party must draw to the attention of the court authorities (cases) which are against it, as well as those in its favour

Some Home Office representatives are failing to assist the tribunal by producing relevant case law and making submissions which are consistent with it: advocates are supposed to be there to assist the tribunal, which means making submissions which are realistic and based on a correct understanding of the law as it is, not the law as they would like it to be. […]

8. A party has a duty of candour. The duty is to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide. Documents must be disclosed insofar as that disclosure is necessary for fairly and justly disposing of a specific issue

Concerns:

Failure to abide by the duty of candour in judicial proceedings. The Home Office very frequently does not produce all relevant materials in its possession and often tries to deflect enquiries by insisting that a Data Protection Act 1998 request should be made.

[…]

R (on the application of Das) v Secretary of State for the Home Department [2014] EWCA Civ 45, [2014] All ER (D) 186 (Jan)
The judge records

> *…the absence of any evidence on behalf of the Secretary of State...to explain her decision-making in this case* (para 79).

Counsel for the Home Secretary 'urged the court not to punish the Secretary of State for not filing evidence,"pointing to the workload of the Secretary of State (para 80). The court pointed out that the Secretary of State is not punished, but is not privileged either '[t]he basis for drawing adverse inferences of fact against the Secretary of State...will be particularly strong' in a case where she has not advanced any evidence (Beatson LJ para 80).

[…]

9. Parties must comply with orders of the court

Failure to comply with orders of the court and/or undertakings given to the court, in particular to do certain things (make a fresh decision etc) within a specific period.

Both times that a Minister of the Crown has been found in contempt of court this has been in immigration cases. […]

11. A party must not act in an oppressive manner.

R (on the application of JM (Zimbabwe)) v Secretary of State for the Home Department [2016] EWHC 1773 (Admin)
The Home Office may not lawfully require the Claimant, under section 35 of the 2004 Act, to tell Zimbabwean officials that s/he agrees to return voluntarily when s/he does not.
JM had been prosecuted under s 35 for telling the Zimbabwean authorities he did not wish to return.
Mr. Justice Jay

> *any notion that section 35 could be used "as many times as it takes" is so Kafkaesque as to be inimical to the rule of law.*

The Home Office is appealing.

[…]

APPENDIX

The UK Border Agency and the law

Alison Harvey, General Secretary, ILPA for Immigration Advisory Service Conference 21 July 2009.

Does the UK Border Agency respect the rule of law? I suggest that the evidence suggests that shortcomings are sufficiently widespread as to call into question the UK Border Agency's respect for the rule of law. The law is something that happens to other people – your clients, and you, their representatives. How many of you have sat up all night following a House of Lords judgment because you have to go into court and argue on the basis of it the following morning? That is the rule of law, not taking months to think about it, as the UK Border Agency seems to suggest it can do. It is open to the UK Border Agency to appeal a decision with which it does not agree. It is open to the Government of the day to go to parliament to seek to reverse a decision of the courts that it does not like. It is not, I suggest, open to the UK Border Agency not to comply with the law.

I would cite:

- Failure to give effect to the judgments of the courts in a timely manner or, in some cases, at all
- Being economical with the information provided to courts and tribunals
- Failure to ensure consistency of approach – conceding one case on a particular point, only to decide and/or fight another on the same point
- Secret and unpublished instructions, including unlawful instructions.
- Reliance on Operational Guidance Notes which are treated as country guidance for the purpose of cases such as *RN (Zimbabwe)* and as policy instructions for the purposes of prohibiting their scrutiny by those appointed to provide independent scrutiny of such information
- Failure to respect principles of fairness and as to the conduct of legal proceedings.
- Failure to respect provisions of the general law, for example as pertaining to data protection and defamation. I am talking of course, of the Home Office press releases.

One can add to this the Home Office's maintaining[26], until forced to back down[27], that it was appropriate for it to make the Procedure Rules for the Tribunals Service, as indeed it has always done for the Asylum and Immigration Tribunal.

These give rise to the following questions:

- Does the Agency perceive a difference between statute law and the judgments of the courts in terms of whether they must be followed?
- What is the Agency's understanding of precedent - e.g. if the Agency concedes a case/pays damages on the basis that it should not have done what it did to the individual in the particular case does this affect the Agency's view of whether it can do the same thing to someone else?
- When a court judgment says that the Agency is doing something unlawful, what delay does the Agency consider acceptable in complying with the judgment.
- When the Agency loses a court case for how long does it consider it is reasonable for it to continue doing what it has always done while its lawyers consider the judgment?
- How can it be said that the Agency is considering a judgment when e.g. its Presenting Officers are going into court and putting forward an interpretation (or different interpretations of that judgment) or caseowners making a decision (or different decisions) on the basis of that judgment?
- When the Agency considers that there is a scope for creating a new legal precedent on a point, does it consider that it can start to act as though that precedent had been created in determining cases? Is this affected by whether there is a case before the Court or a gleam in somebody's eye.

All those questions, and all the points I am going to make, have been put to the UK Border Agency by ILPA. You can find the relevant letters in your ILPA mailings.

I am going to draw, insofar as time permits, on the cases of *Metock v Ireland* ECJ C-127/08 , *R (Baiai et ors)v SSHD* [2008] UKHL 53, *RN (Zimbabwe*) [2008] UKAIT 00083 CG , *R (Abdi) et ors* [2008] EWHC 3166 (Admin) judicial review of removals, case of *X v SSHD* X v SSHD CO/9617/2008 (Administrative Court), EU registration certificates and residence cards, UK Border Agency press releases, failure to publish guidance to make good my points. To these my audience will be able to add many of their own examples, such as *Z0 (Somalia)* [2009] EWCA Civ 442 on permission to work.

The implications for the Legal Aid budget of having to embark on litigation again and again to win a point you have already won are all too obvious. We are accused of using too great a share of the Legal Aid budget, but we have to fight the same case again and again.

As legal representatives, our recourse is

- Raising the matter on appeal
- Judicial review
- Claims for damages

There are other things that can and should be tried – publicity, statements in parliament, freedom of information requests. If the UK Border Agency does not respect the rule of law, it can at times feel a very lonely endeavour to try to use the law to challenge it. But, as my examples illustrate, it is possible to have some success, and in the long run we shall have success.

[…]

4. *RN (Zimbabwe)*) [2008] UKAIT 00083 CG

On 14 April 2009 ILPA wrote to the then Home Secretary to protest at the handling of cases following *RN (Zimbabwe)*:

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[26] *Immigration Appeals: Fairer Decisions, Faster Justice – a consultation paper,* 21 August 2008, http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/immigrationappealsconsultation?view=Binary

[27] *Immigration Appeals: Fairer Decisions, Faster Justice –Response to Consultation* Undated (20 May 2009) see http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/immigration-appeals-response.pdf?view=Binary

14 April 2009

Jacqui Smith MP
Home Secretary
2 Marsham Street
London SW1P 4DF

Dear Home Secretary

Thank you for your letter of 3rd February 2009 responding to my letter of 5th December 2008 about reviewing cases in light of the new Country Guidance on Zimbabwe in RN.

You confirmed in that letter that you accepted the new Country Guidance. However, ILPA has received an undated letter addressed to stakeholders from the Chief Executive of UKBA, Lin Homer, circulated by email on 24th March 2009. It is accompanied by a new 'Operational Guidance Note' (OGN) and gives notice of your advice to officials no longer to comply with the new Country Guidance.

The justification offered is that "the RN determination took place against the backdrop of widespread and indiscriminate political violence that attended the Zimbabwean presidential elections last summer" which has not been repeated since then.

ILPA is deeply concerned that this displays either a cavalier approach to Country Guidance or a failure to understand the Country Guidance.

The Tribunal concluded in November 2008 that "there can be no doubt at all" as to the risk category they identified (see attached summary, para 3). Its consideration of the issues included an additional hearing on 30th October 2008 to enable you to present your argument that the general risk was restricted to summer 2008. Your argument was rejected.

It was open for you to appeal against the rejection of your case in this regard. You did not do so and expressly confirmed your acceptance of the Country Guidance in your letter of 3rd February 2009. The limited circumstances in which it is lawful to depart from Country Guidance are well established. Your officials have identified no change of circumstance since November 2008 which could provide a legal basis for failing to comply with RN.

You further represented to stakeholders and the Court of Appeal in January, February and March 2009 that you accepted the Country Guidance. Indeed, you persuaded the Court of Appeal to reject a challenge to the previous 2007 Country Guidance in March 2009 without consideration of the merits based on a commitment given to the Court that you would reconsider cases in light of RN. That was less than a fortnight before you announced that you would not comply with RN. This leads to serious concern about whether the Court and the parties were misled - it is doubtful that any change of circumstance occurred in less than a fortnight which could justify your conduct.

Your new stance will lead to further delay and unnecessary appeals for claimants who have already been in limbo for an unacceptable period and who will have to appeal to the AIT in order to obtain a decision in accordance with the current Country Guidance. ILPA considers this unreasonable.

<u>Statements in 2009 that you would comply with RN</u>

In my letter to you of 5th December 2008, I said that:

> *We were informed yesterday that the Treasury Solicitor has confirmed that the Home Secretary will not appeal against the Asylum and Immigration Tribunal (AIT)'s new Zimbabwean Country Guidance determination, RN (Returnees) Zimbabwe CG [2008] UKAIT 83.*
>
> *This effectively concludes three and a half years of continuous litigation about the risk of returning Zimbabwean asylum seekers. While the Home Office has undertaken to the courts to suspend returns since July 2005, very many Zimbabwean asylum seekers have been left in limbo as a result of their cases being stayed.*

Whereas previously, the Home Office has argued that the issue is primarily about those who are deported and handed over to the security forces, the important change in the AIT's Country Guidance relates to the risk inside Zimbabwe, whether or not a someone returns voluntarily and whether they return to their home or seek refuge in a different part of Zimbabwe.

The AIT has held that:

> *'258. The evidence establishes clearly that those at risk on return to Zimbabwe on account of imputed political opinion are no longer restricted to those who are perceived to be members or supporters of the MDC but include anyone who is unable to demonstrate support for or loyalty to the regime or Zanu-PF. To that extent the country guidance in HS is no longer to be followed.'*

Those Zimbabweans who have been left in limbo in the UK will be in an especially difficult position. Unlike people travelling to the UK now, they have lived in the UK for many years. The AIT observed that "such a person is in general reasonably likely to be assumed to be a supporter of the MDC and so, therefore, someone who is unlikely to vote for or support the ruling party, unless he is able to demonstrate the loyalty to Zanu-PF or other alignment with the regime that would negate such an assumption." (para 259) See also para 231 where the Tribunal held that:

> *'having made an unsuccessful asylum claim in the United Kingdom will make it very difficult for the returnee to demonstrate the loyalty to the regime and the ruling party necessary to avoid the risk of serious harm at the hands of the War Veterans or militias that are likely to be encountered either on the way to the home area or after having returned there. This is because, even if such a person is not returning to one of the areas where risk arises simply from being resident there, he will be unable to demonstrate that he voted for Zanu-PF and so he may be assumed to be a supporter of the opposition, that being sufficient to give rise to a real risk of being subjected to ill-treatment such as to infringe article 3.'*

The AIT rejected submissions by the Home Office that now was not the right time to conclude the litigation and give 'Country Guidance'. On the contrary, it held that 'the events of 2008 demand an authoritative assessment from the Tribunal in the form of country guidance' (paragraph 33) It observed that while some international intervention or 'unforeseen upheaval', for example 'giving the MDC real control of the police' may occur in the future justifying departure from the Court Guidance, at present: 'we do not see that there can be said to be an end in sight to the real risk of violence being perpetrated on those identified as disloyal to the regime and therefore as potential supporters of the MDC.' (para. 220)

Given that you have decided to accept this decision, we call on you to respect it and to deal promptly with all those previously in limbo who are now confirmed as refugees. We remind you that the Immigration Rules require the issue of a residence permit as a refugee to those who qualify for asylum, a requirement reflecting the UK's obligations under the EU asylum Qualification Directive (Council Directive 2004/83/EC of 29 April 2004).

Those Zimbabwean asylum seekers who can nevertheless return safely because they can 'demonstrate allegiance to or association with the Zimbabwean regime' must be identified on an individual factual basis.

However, there are thousands of limbo cases where an individual factual assessment of the asylum seeker's history has already been carried out and from which it will be easy to check whether the facts found indicate that the person will be in a position to demonstrate allegiance/ association with the regime.

Investigations by our members reveal that an extraordinary 1000 or so cases are presently stacked up in the High Court and Court of Appeal alone. There are of course many more pending in the AIT. It is regrettably common in this jurisdiction for the Home Office to litigate genuine asylum cases only to concede at the full hearing. Not does this pile more human misery on those already left in limbo for years, but it clogs up the courts and wastes public money which could be far better spent on the asylum system.

We therefore call on you to ensure that there is an immediate review of all Zimbabwean cases currently before the courts, starting with those who have already had a factual assessment by an

immigration judge and to whom the RN guidance can easily be applied.

In your response of 3rd February 2009, you observed that "The Tribunal [in RN] have refined what they believe are the current risk factors [for Zimbabwean asylum seekers]." You confirmed that "We have accepted their findings and have issued new guidance to caseworkers." Similar assurances were given in other correspondence and other fora.

Four days prior to your letter, on 29th January 2009, Andrew Elliot, the Deputy Director of Operational Policy wrote to ILPA giving further details of how you would consider Zimbabwean cases following the Tribunal's country guidance in RN in response to ILPA's requests. He also observed that the Tribunal had "refined what they believe to be the current risk factors". He announced that:

> *Accepting the Tribunal's findings [in RN], we have now revised our guidance on how Zimbabwean claims are to be considered and have, exceptionally, started a review of all outstanding Zimbabwean asylum cases which have not yet been concluded.*
>
> *... The review will be conducted across our business by case-owners and presenting officers, depending on where cases are currently held within the asylum system. Everyone reviewing cases will be doing so using exactly the same guidance... In cases where we believe that the applicant should benefit from the new guidance we will withdraw our original decision and grant leave to remain...*
>
> *Due to the particular circumstances of the last few years there are many unresolved Zimbabwean cases which we need to process... Working our way through these cases will take some time though we are working to complete this as soon as possible.*

Mr Elliot stated that "We recognise that at the point we changed our policy position in response to the Tribunal's findings in RN that many cases were in the appeals system." As to cases in the Court of Appeal and the Court of Session, he stated that you will be withdrawing the immigration decision so as to enable you to take a fresh decision in light of RN. He explained that this course was being adopted because the Court of Appeal "will not be able to look at the question of whether the decision remains valid in the light of the new country guidance case".

He said that you recognised that the review of the "several hundred" appeals before the AIT in light of RN may lead to cases being conceded shortly before the substantive hearing.
He explained that you have considered addressing this problem by withdrawing the immigration decisions in appeals before the AIT prior to reconsidering in light of RN. You concluded that this would be a slower and more expensive way of reviewing cases in light of RN.
All this confirms that developments since the determination in November 2008 were not thought in January or February 2009 to justify failing to comply with RN.

The policy set out in Mr Elliot's letter in relation to cases stayed in the Court of Appeal was considered at a hearing on 11th March 2009 in HS, the lead case in the Court of Appeal (and the previous Country Guidance from 2007).

HS rejected your request to withdraw her appeal on the basis that a fresh immigration decision would be made in light of RN. She argued this would delay reconsideration and that the best way to obtain a prompt reconsideration in light of RN would be to agree a remittal to the AIT.

You opposed this course and argued that permission should be refused without consideration of the merits on the basis that the withdrawal of the immigration decision permitted a more expeditious reconsideration in light of RN.

The Court of Appeal listed the matter for hearing on 11th March 2009. You stated that you would not begin to reconsider the case in light of RN until the appeal was disposed of and on 10th March 2009, the day before the hearing, you formally withdrew the immigration decision.

Your position as set out in the form of consent that you submitted to the Court of Appeal was that you undertook "to reconsider the Appellant's circumstances in light of the new country guidance determination".

The judgment of the Court of 11th March 2009 was explained by the Court of Appeal in a "standard letter"

issued by the Court the following week in the many Zimbabwean appeals stayed behind HS.

The Court of Appeal explained in the letter that HS had refused to consent to your position that "the application should be withdrawn on the basis that the SSHD agreed to make a fresh decision in the light of the new country guidance in RN" and further objected to your request for six months to reach that decision. The Court accepted your offer. The standard letter states that

> *The Court held that there was no point now deciding whether there had been a material error of law given that the country guidance in HS had been superseded in RN. The renewed application in HS was refused not on the merits but to enable the fresh decision making process to take place, this being considered to be the most reasonable and practical of the courses proposed. The timetable of 6 months which the SSHD proposed did not militate against it.*

The Court indicated that cases stayed behind HS in which the appellant did not accept your proposal would be decided by the Court in light of its determination in HS.

The Court of Appeal was persuaded to dismiss the lead Zimbabwean appeal without consideration of the merits because it was persuaded that your undertaking to make a new decision "in the light of the new country guidance in RN" within six months was "the most reasonable and practical of the courses proposed". It was for that reason that it declined to reach a decision on the legal challenge to the previous Country Guidance given in 2007.
You gave no indication whatsoever to the Court of Appeal or the other side that instead, you would announce less than a fortnight thereafter that you would not in fact comply with the new Country Guidance in reaching your decision.

There was plainly nothing that occurred in the intervening days that could justify reneging on your agreement. Had you told the Court and the other side that you had no intention of reconsidering in accordance with the Country Guidance, this would have been at least highly relevant in consider whether the lead case should proceed.

<u>The law as to the authoritative status of Country Guidance</u>

The authoritative status of County Guidance is provided for in s.107(3) of the Nationality, Immigration and Asylum Act 2002 and the related Practice Direction to the effect that

> *unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, ... a country guidance case is authoritative in any subsequent appeal, so far as that appeal: (a) relates to the country guidance issue in question; and (b) depends upon the same or similar evidence.*

The authoritative nature of Country Guidance is now well known and has been confirmed repeatedly by the higher courts. The Court of Appeal has described it as an application of "the fundamental principle of justice which requires that people should be treated equally and like cases treated alike." It permits for an authoritative view to be taken on countries and issues upon which rational decision makers might otherwise reasonably disagree. In SI (Ethiopia) [2007] UKAIT 00012, the Tribunal summarised the position as follows:

> *21... [A] a country guidance case should continue to be treated as an authoritative finding on the country guidance issue(s) identified until it is removed from the AIT website list of CG cases. If a case remains on the website as a CG case, it continues to furnish country guidance unless a later case expressly supersedes or replaces it as CG. That does not, however, prevent that case not being followed on a relevant issue if, in the context of a particular case, there is fresh evidence compelling a different view, albeit "[t]he wider the risk category posited the greater the duty on an Immigration Judge to give careful reasons [for not following a CG case] based on an adequate body of evidence" (MK (AB & DM confirmed) Democratic Republic of Congo CG [2006] UKAIT 00001).*

In MK, the case referred to in the above passage, the Tribunal established that

> *Very clear and cogent reasons have to be given for departing from country guidance on an issue which, by its very nature, requires consideration in the context of comprehensive evidence and argument.*

While the immigration judge in that case had relied on fresh evidence on the basis of which he concluded he

was entitled to regard the Country Guidance as out of date, the Tribunal emphasised that the fresh evidence must be 'dissimilar' from that which was available to the Tribunal whereas the fresh evidence relied on by the judge of reports of ill-treatment of returnees was not dissimilar to evidence which had been considered in the Country Guidance.

It warned against refusing to follow current Country Guidance which had been based on a comprehensive assessment including evidence from leading experts based simply on the basis that reports had been published since. It said that:

> *to approach the reversal of Country Guidance in so cavalier a fashion undermines the purpose and validity of Country Guidance as endorsed by the Court of Appeal in R (Iran) [2005] EWCA Civ 982. The AIT Practice Directions make clear what an Immigration Judge needs to do if he is minded to depart from existing country guidance. The wider the risk category posited the greater the duty on an Immigration Judge to give careful reasons based on an adequate body of evidence.*

The Court of Appeal has also emphasised that the AIT's authoritative role in issuing Country Guidance on the facts must be respected and has also warned judges against failing to comply with Country Guidance on the basis of limited evidence (Madan [2007] EWCA Civ 770).

Where the issue is covered by current authoritative Country Guidance, as published on the AIT's website, it must be followed unless it is shown not simply that some reports have been published since the Country Guidance but that that the fresh evidence is 'dissimilar' from the evidence available to the Tribunal and compels a different conclusion.

<u>Whether you have established a lawful basis to decline to comply with the Country Guidance</u>

As indicated, the letter from Ms Homer suggested that RN was concerned with risk in the summer of 2008. Your new guidance also argues that

> *3.6.14 In the period immediately before the AIT heard the country guidance case of RN, there was already evidence that the very high levels of political violence that were seen in the period between the first and second presidential polls had abated. This is still the case up to the present. Human rights abuses continue at levels broadly comparable to those which have existed in Zimbabwe for the past several years outside periods of heightened tension such as at election times.*

Consistently with that, you relied at the first hearings of RN in September 2008 upon the proposition that violence had dropped since the summer. Mindful of the fact that it was giving guidance which would be authoritative for the future, the Tribunal arranged for further evidence to be considered on 30th October where you again relied on the fact that violence had not continued at the same level as in the summer to argue for restrictive risk categories to be identified.

I attach a summary of the relevant Country Guidance in RN. While the AIT considered that it should not be assumed that Zimbabwean asylum seekers were not aligned with Zanu-PF and this should be determined as a matter of fact in the individual case, where this was found as a fact, then the risk arose not from the formal organs of the state but local militia in respect of whom having sought asylum in the UK would be an aggravating factor.

The Tribunal was not reliant simply on publicly available reports but observed that it had available to it the evidence of experts and senior figures within Zimbabwe (many of whom the Tribunal protected by orders under the Contempt of Court Act prohibiting publication of their identity) both as to the factual position on the ground and expert and informed opinion which the Tribunal for the most part accepted (see eg paras 30-31, 88, 112, 118). It concluded that public reports were an unreliable guide to the level of risk from local militia.

It observed that some upheaval at the level of "giving the MDC real control of the police" may occur in the future justifying changing the Country Guidance but your officials have presented no evidence, nor have they even claimed that there has been any such significant change of circumstance since November 2008 or, a fortiori, since January, February and March 2009 when you presented to the Court of Appeal your agreement to reconsider cases in light of RN.

Your decision to accept RN appeared to reflect your acceptance that there was no arguable error of law in the determination and its comprehensive assessment on the facts was final notwithstanding that it rejected your repeated submissions that there was no future risk to returnees given that the election violence had not

continued at the same level after summer 2008.

That your change of policy amounts to no more than disagreement with the Country Guidance rather than a significant change of circumstances in the country or origin is demonstrated by your failure to point to any dissimilar evidence.

Your OGN has been established as 'certainly nothing more than ... submissions and are the Respondent's view(s) on issues only' (LP (LTTE area - Tamils - Colombo - risk?) Sri Lanka CG [2007] UKAIT 76, para 70).

Indeed, you have consistently opposed the OGNs being reviewed by the Advisory Panel on Country Information on the basis that they were not country of origin information but rather policy documents and the country of origin information in those documents was selected to support policy and did not purport to be a balanced factual assessment.

Members report that your presenting officers have presented nothing more to immigration judges since 24th March than the OGN and your latest Country of Origin Information Report which plainly does not constitute evidence dissimilar from that which was available when the Country Guidance was given in November and does not show a significant change of circumstances since November. It merely observes that actual violence dropped after the summer of 2008, the fact that formed the centrepiece of your submissions in RN which the Tribunal rejected.

You are entitled to disagree and you were entitled to appeal but you accepted the Country Guidance and persuaded the Court of Appeal last month to dismiss cases challenging the previous Country Guidance on the basis of your undertaking to reconsider on the basis of the current Country Guidance.

I hope you will reconsider your stance as a matter of urgency and comply with the Country Guidance.

Yours sincerely

Sophie Barrett-Brown
Chair, ILPA

The Minister of State for Borders and Immigration replied on 26 May 2009:

Dear Ms Barrett-Brown

UK Border Agency's revised Zimbabwe Operational Guidance Note

Thank you for your letter of 14 April about the updated UK Bordere Agency (UKBA) Operational Guidance Note (OGN) for Zimbabwe, which was issued on 24 March 2009 to provide updated guidance for caseowners on country specific asylum policy in relation to Zimbabwe.
Country specific policies and operational guidance are kept under regular revbiew and updated or modified as necessary to reflect changes in country conditions. Although UKBA amends OGNs when the AIT gives country guidance that is inconsistent with its existing policy, it will also initiate changes when country conditions change either positively or negatively.

UKBA has changed the Zimbabwe OGN because the situation in Zimbabwe has changed. The previous guidance as set against a backdrop of reports of widespread and indiscriminate political violence that attended the Zimbabwean presidential run-off elections last summer. Evidence now available from NGOs and the FCO shows that the political violence that now exists is at a lower level and is less indiscriminate than as reflected in the situation on the which the Asylum and Immigration Tribunal based judgment.

I do not accept that there is any question of the Court of Appeal or the parties having been misled. It is one of the guiding principles of asylum decision-making process that claims are considered against the country conditions prevailing at the time of the decision. The change in policy in respect of Zimbabwe was made in light of the different conditions that now exist in Zimbabwe compared with those at the time the AIT gave its Determination in RN in November 2008

Yours sincerely

Phil Woolas

Phil Woolas MP

[…]

ARH

APPENDIX 2 USE OF COUNTRY OF ORIGIN INFORMATION IN OTHER COUNTRIES

Information on other countries has been provided by members of the European Legal Network on asylum. Information provided June 2017

Countries where lawyers and others use Home Office information

Cyprus (lawyers and Cyprus Asylum Service)
Denmark (Lawyers and Danish Immigration Service)
Greece (lawyers)
Iceland (lawyers and Icelandic authorities)
Italy (lawyers; mainly at appellate stage)
Netherlands (lawyers)
Spain (lawyers)
Sweden (lawyers and authorities)
Switzerland (lawyers)

Countries that use information from the European Asylum Support Office

Cyrpus (lawyers)
Denmark (lawyers)
Iceland (lawyers)
Italy
Netherlands (lawyers)
Malta (lawyers)
Spain (lawyers)
Sweden (authorities)
Switzerland (lawyers)

Comments

Cyprus

(Lawyers) European Asylum Support Office (EASO) country of origin information tends to be a collection of already published sources and lawyers would rather go to the original source them since we're not too happy with information that's clearly influenced by political considerations or based on UK policy. E.g. the reports on Iraq or Turkey.

Denmark

We use UK Home Office reports very often and so do the Danish Immigration Service (in a very different way I might add). The Danish Immigration Service tends to like reference to UK Home Office Reports, so we use them as often as it makes sense.

We also use the reports from EASO – especially because there are some pretty good reports on the countries that are being processed in the manifestly unfounded procedure in Denmark (e.g. the Balkan countries).

Greece (lawyer; former member of Appeals' Committee)

Before the Appeals' Committees in Greece in period 2010 to 2015 UK reports were used when the information provided was in favour of applicants). EASO information was not used so much (mainly reports on Afghanistan for subsidiary protection).

Some UK reports were very useful (mainly when they mention UK jurisprudence on different cases). EASO's reports are not my favourite as they are based on information already published. So, I was using them when I did not have time to check the different sources for COIs.

Iceland (lawyers)

We use UK Home Office reports quite often, mainly because so do the Icelandic authorities (albeit in a more negatively selective way), so they seem to consider them as reliable.

We also use the reports from EASO, but cite them less often as they tend to be a secondary source, but a useful source nonetheless.

Italy

EASO reports are the primary source for administrative bodies in charge of evaluating asylum application. There is an increase in the use of EASO due also to the availability of some reports in Italian.

Malta (lawyers)

We used to use UK Home Office reports on a regular basis, yet we've stopped using them since we're not too happy with information that's clearly influenced by political considerations or based on UK policy. E.g. the reports on Iraq or Turkey.

We use EASO reports since they are very comprehensive and contain lots of additional sources, so they're also good base for further research. Since we only have a handful of reports from EASO, we mainly use the use the ones on Somalia and Pakistan.

Netherlands (lawyers)

> *We use both sources alongside each other. EASO and UKBA are a different type of COI. While the UKBA provides block quotes, EASO often synthesizes information. Both methods have different assets that we use in our COI responses. In the UKBA reports we especially appreciate the correspondences with experts and diplomatic missions that are sometimes included, and the fact that they provide an easy overview of available COI per topic. EASO is mostly drawing from existing sources, although they have been including some expert sources in their more recent reports.*
>
> *The Dutch Council for Refugees is very active* […] *to provide commentaries to the EASO reports, reviewing their synthesis and included COI in the reports. Their reports were sometimes not meeting the COI standards (especially when EASO just started to produce reports), but have been improving vastly. With the more frequent publication of EASO and improvement of quality they have become more commonly used in our responses, and we notice the Dutch immigration service also relies on them.*

Not COI but maybe still interesting to know, the Dutch government often follows the UKBA changes in Guidance Notes (e.g. re Iraq Baghdad belts generalized violence)

Sweden

Authorities do use EASO reports a lot. Maybe authorities have shifted a little from Home Office to EASO in recent years.