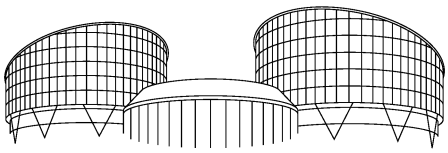

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

NON-REFOULEMENT AS A PRINCIPLE OF INTERNATIONAL LAW AND THE ROLE OF THE JUDICIARY IN ITS IMPLEMENTATION

Assessment of the credibility of asylum-seekers: burden of proof and the limits of the ECHR's examination.

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The question of the establishment of the facts alleged by an asylum-seeker and the assessment of the risk of his or her being exposed to persecution or serious harm is central to the examination of any request for international protection.

This question often presents additional difficulties for the courts. The asylum court will thus be faced, at the outset, with an asymmetrical situation with the State (the decision-making authority) on one side and a foreign national on the other, presenting himself as a victim and often in a vulnerable situation, who will refer to the very conditions in which he fled to explain why he is unable to prove his allegations. The examination of the case will generally concern the truth of events that have occurred in a geographically distant country, and in which it is in practice impossible to check the facts without breaching the cardinal principle of confidentiality of asylum applications and running the risk of endangering the asylum-seeker.

These difficulties, and the extremely wide ranging parameters that have to be taken into account in order to assess the merits of asylum applications, have long sustained the idea that credibility was a subject which defied any kind of theoretical analysis; at the same time, the rules of evidence traditionally applied by the courts such as personal conviction (*intime conviction*) provide equally incomplete answers.

Today, credibility has established itself as a language common to all the institutions and courts that have to assess the country risk (I). This explains why the case-law of the ECHR has acquired such importance for asylum judges (II). This dialogue between judges based on the same language should thus promote a convergence of points of view which will also be achieved by better mutual understanding (III).

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I – Credibility: a common language of asylum judges

1.1 In analysing the country risk

The quantitative and qualitative development of information on the countries of origin, the COI, and its increasing accessibility especially via the Internet, have revolutionised court practice in asylum cases: in the years following the first qualification directive of 29 April 2004[2] various international institutions and associations[3] sought to lay down a basis for specific reflection on the use of country information in asylum proceedings. The ECHR has adopted an identical approach in the application of the *non-refoulement* principle deriving from Article 3 of the European Convention on Human Rights.

The French asylum court, which had for many years based its decisions on updated reports and documents relevant in carrying out its assessment[4], refrained, however, from systematically having the sources used appear in its decisions.

In that context the ECHR observed in 2010, in the case of *Y.P and L.P v. France*[5], that the French asylum authorities had found that the applicants' fears were unfounded, **without referring to any international report on the situation prevailing in their country of origin** and relied, for its part, on various resolutions and reports of the United Nations, the Council of Europe, and governmental and non-governmental organisations in support of their ruling that the deportation of the applicants to their country of origin would entail a violation of Article 3 of the Convention.

References to geopolitical information in the decisions of the National Asylum Tribunal (CNDA) were perceived not just as an effort to state reasons justified by a specific case but as a general requirement allowing the court to establish an objective basis for its assessment of applications and to reflect the transparency of the judicial process by appropriate reasoning.

The *Conseil d'État* held, for its part, in 2012 that the CNDA should seek information relating to the country of origin necessary for the establishment of the facts and use it while complying with the principles of adversarial process[6].

Information on countries of origin plays a decisive role in establishing the alleged facts and the risks incurred in the specific context, as an "external" credibility indicator of the asylum application. A trend towards a systematic and refined use of this information then became the starting point for a process of reflexion centred more on the asylum seeker's personal account.

1.2 In assessing the asylum-seeker's personal account

Substantial efforts to identify objective criteria for assessing the asylum-seeker's personal account have been made over the past years on an European scale[7] with the aim of achieving a better harmonisation of practices. The aim of this has been:

2. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
3. Among which were the European Union, the HCR, the Austrian Centre for Country of Origin and Asylum Research (ACCORD), the Hungarian Helsinki Committee (HHC) and the International Association of Refugee Law Judges (IARLJ).
4. The CNDA has had a division specialised in research on countries of origin since 1995.
5. *Y.P. and L.P. v. France*, no. 32476/06, 2 September 2010.
6. CE 22 October 2012 M. M. no. 328265 A

i) to devise an approach common to the member States as the lack of credibility of applications is the main reason for most of the decisions refusing asylum; and
ii) to establish criteria and methods to be used in assessing the credibility of the asylum-seeker's personal account of events in order to achieve greater equality of treatment of applications for international protection in the European Union.

It was with this aim in mind that the European Asylum Support Office (EASO) published a practical guide in March 2015 called "Evidence Assessment"[8], which sets out a practical approach to assessing credibility, and is now coordinating a project specifically designed for national asylum judges[9] in which the CNDA is actively involved.

This conceptual approach does not answer purely theoretical concerns: it is intended to help national asylum judges with their eminently complex task. This new approach has led the French judges to change paradigm and to abandon an approach centred on personal conviction (*intime conviction*) in favour of establishing an objective basis, of which, in sum, an account can be given.

The ECHR's case-law has also developed in this way, as part of a collective movement towards reinforcing the reasoning in decisions.

II – The ECHR's case-law and its impact on the methodology of the national judges for assessing the credibility of asylum applications

Beyond its role regarding the use of country information by national asylum courts, the ECHR's case-law has also induced major developments regarding the assessment of the credibility of applications. Two lines of case-law illustrate this influence.

2.1 The question of documents

The question of the place of documents produced by the applicants in the assessment of credibility can sometimes be a complex matter. The CNDA, like its counterpart courts, frequently has to assess the probative value of documents produced before it in the context of an overall assessment of the application because these are insufficient in themselves to establish the facts alleged by the asylum-seeker. This approach enables the court to verify whether there is overall consistency between the documents and the other materials in the file. Moreover, it appears to be shared by the ECHR, which carries out an overall assessment, on a case-by-case basis, of all the materials submitted to it, as it has recently observed in its judgment in the case of *R.V. v. France*[10].

In this situation the ECHR may arrive at a substantially different assessment from that of the asylum court.

7. Beyond Proof by the UNHCR and CREDO Project (Partnership UNHCR, HHC, Asylum Aid, IARLJ). The CREDO project contains a section specifically devoted to courts: IARLJ, *Assessment of credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards, Credo project*, 2013.
8. EASO, *Practical Guide: Evidence Assessment*, EASO Practical Guides Series, March 2015: This document is designed in particular for officials of administrative authorities responsible for examining asylum applications.
9. IARLJ/EASO *Evidence and credibility assessment in the context of the common European asylum system - A Judicial Analysis*, to be published.
10. *R.V. v. France*, no. 78514/14, 60, 7 July 2016.

This difference derives from the Court's obligation to carry out an *ex nunc* assessment whereby it takes account of subsequent developments in the situation of the country of origin or new facts which could not be alleged in the domestic proceedings. It is also due to the fact that, save in exceptional cases, evidence is not heard from the protagonist in his or her own proceedings. This is a major difference because a comparison between the documents and the oral statements very often sheds decisive light on the probative value to be attached to the documents produced. The ECHR recognises this itself when it reiterates that "as a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned"[11].

This difference in assessment may be due, lastly, to the fact that the national judge has not adequately explained his or her reasons for declaring documents inadmissible in evidence and has referred exclusively to the unconvincing nature of the applicant's statements. In two highly illustrative cases in this respect, delivered in 2013 and 2014 respectively, *Mo. P. v. France* and *S.R. v. France*[12], the ECHR arrived at a similar assessment of the probative value of the documents produced to that of the CNDA, taking care, however, to point out that the asylum court's reasoning was insufficiently explicit. Thus, in *S.R v. France*, the ECHR clearly explained that it could not base its decision on the national court's finding that the documents had no probative value in the absence of convincing statements by the applicant because it did not have any explanation for that finding.

The Court therefore appears to expect the asylum court to explain its assessment of the probative value of the documents produced before it on the basis of objective factors which the Court can assess in terms of relevance.

This point appears to be all the more important for the ECHR as it has held, particularly in 2013 in the cases I*. v. Sweden* and *R.J. v. France*[13], that whilst it shared the reservations of the national authorities regarding the overall lack of credibility of the applicants' personal accounts, that finding alone did not allow it to rule out the risks that might be revealed by the medical certificates in themselves produced by the applicants. These were detailed medical certificates, established shortly after the facts giving rise to the application according to the recommended methodological standards[14], and accordingly prima facie of probative value regarding the infliction of treatment contrary to Article 3 of the European Convention on Human Rights. Accordingly, the general lack of credibility of a personal account could not, in the ECHR's view, rebut a form of presumption; nor could it therefore dissipate "strong suspicions as to the origin of the applicant's injuries" according to the ECHR in *R.J. v. France*.

The *Conseil d'État* based a decision in 2015 on fairly similar reasoning when requiring the CNDA to carry out an autonomous assessment of the probative value of "documents containing detailed evidence regarding the alleged risks", criticising the court in that case for having declared inadmissible a medical certificate containing a detailed record of a number of injuries and traumatic injuries merely on the ground that "the brief, vague and contradictory nature of [the

11. *Ibid.* § 58.
12. *Mo. P. v. France* (dec.), no. 55787/09, 30 April 2013; *S.R. v. France* (dec.), no. 31283/11, 7 October 2014.
13. *I v. Sweden*, no. 61204/09, 5 September 2013, and *R.J. v. France*, no. 10466/11, 19 September 2013
14. In particular the "Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Office of the United Nations High Commissioner for Human Rights, 2005, Professional training series no. 8/Rev.1"

applicant's] account did not enable the court to establish the reality of the risks he would be liable to run were he to return to his country"[15].

The CNDA is thus required to give substantial reasons when deciding not to regard as probative a document produced in respect of the alleged risks since it has to identify the specific facts which, in each case, justify this assessment.

2.2 Second illustration: objective risk above procedural contingencies?

The Grand Chamber judgment of 23 March 2016 in the case of *F.G. v. Sweden*, which ruled on the scope of the factual circumstances which the decision-making authority and the asylum court must take into account – by virtue of the obligations incumbent on the States under Articles 2 and 3 of the European Convention on Human Rights –, contains unprecedented implications for the examination of asylum applications.

Whilst the ECHR has already had occasion to examine the conformity of particular procedural mechanisms – accelerated proceedings for example – with the safeguards provided for in the Convention or to reiterate that the application of the rules of national procedure must not lead to a violation of those safeguards[16], it does not appear to have ever prescribed a positive obligation to that end as clearly as appears in paragraph 156 of that judgment[17].

It is an objective-risk logic, as already appears in the case-law regarding risks arising from a general situation[18], which appears to impose on the national authorities dealing with asylum applications a duty to assess all the factors of which they have, or ought to have, knowledge, irrespective of the choices expressed by the asylum-seekers as a basis for their application.

The need for such an examination of the Court's own motion derives, in the ECHR's view, not only from the absolute nature of Articles 2 and 3 of the Convention but also from the vulnerable situation in which asylum-seekers often find themselves.

This judgment is clearly a sign for the national courts in so far as, here again, the criticism expressed concerns the application of broadly shared working methods. The national courts will have to determine how to take that development into account in carrying out their duties and in their daily work.

III – The dialogue between judges thus implemented must enable a convergence of different points of view to be achieved while taking account of the realities and constraints affecting each one:

3.1 Mutual enrichment...

15. CE 10 avril 2015 M. B. n°372864 B
16. *M.D. and M.A. v. Belgium*, no. 58689/12, 19 January 2016, regarding the consequences of application of the rules on review of asylum applications in Belgium.
17. "It follows therefore that, regardless of the applicant's conduct, the competent national authorities have an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on [the applicant's] removal".
18. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012.

The undeniable influence of the ECHR on the practice of the national asylum courts is sometimes perceived as paradoxical on account of the substantial differences in the respective applicable law and position of these courts in asylum proceedings. Thus it is frequently observed that the Court's case-law cannot be regarded as directly prescriptive for the assessment of the merits of asylum applications under the legal provisions relating to international protection.

More rarely is mention made of the many factors that I have just attempted to illustrate which draw the ECHR and the asylum courts closer together. These courts examine disputes on the merits, which are partly similar in that they concern risks of serious violations of fundamental rights, while relying on the same sources of information.

It is noteworthy in this regard that, in assessing the seriousness and the likelihood of the risks relied on under Article 3 of the Convention, the ECHR applies operational criteria resembling those used in determining eligibility for international protection: risks emanating from non-State actors, assessment of the protection available in the country of origin or in part of that country, seriousness of the acts feared.

This similarity of criteria was recently illustrated in the Grand Chamber judgment of 2016 *J.K. v. Sweden*, which lays down a mechanism of presumption of a future risk of violation of Article 3, a risk resulting from prior ill-treatment, very similar to that described by Article 4(4) of the Qualification Directive [19] regarding international protection. Over time the ECHR's case-law seems to have become enriched with numerous references to judgments of the CJEU and to judgments delivered on asylum matters at domestic level and symmetrically; the decisions of the CNDA rely, where necessary, on the Court's decisions regarding their assessment of the situation prevailing in a country of origin.

3.2 ... but also a challenge for a court dealing with cases on the ground: the example of the CNDA

Whilst the growing interrelation between the ECHR's case-law and that of asylum courts is most certainly a factor of mutual enrichment, the developments just described tend to modify the very conditions in which the asylum judges perform their duties. They constitute in many respects a challenge for the courts dealing with asylum cases on a daily basis.

The CNDA is the biggest French administrative court in terms of the number of applications received per year: 40,000 in 2016. It is important to mention that fact in order to get an idea of the scope of the task faced by the French court, so that the effort in terms of reasoning and wider regard for the risk factors is reflected, equally, in the treatment of all applications and is carried out while also ensuring consolidation of the procedural guarantees.

The considerable number of judges – nearly 300[20] whether this be professional judges or not – and rapporteurs (nearly 200) involved in the process of decision-making at the CNDA justifies the development, internally, of training strategies based on assessment of credibility and swift

19. "The fact that an applicant has already been subject to persecution or serious harm, or direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

20. Of whom 13 are permanent judges, the other asylum judges being temporary court judges who sit in at least 13 hearings per year.

dissemination of decisions representative of good practices in this area. This will of course be a lengthy process, but one whose benefits are, I hope, clear to us all.

The stakes involved in this development are considerable for the judges and those applying to the courts and beyond that for the public perception of asylum law itself.

For asylum-seekers, clearly, it means a more attentive ear, increased regard in the proceedings for the intrinsic vulnerability of their situation, but also a real enhancement of their rights as applicants to the courts. For judges, this major effort will contribute to promoting a better understanding of the practical application of asylum law and to harmonising solutions. For everyone, it is designed to strengthen this wholly fundamental right.