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## EU asylum procedures and the right to an effective remedy

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## 8 | The burden and standard of proof and evidentiary assessment

On the basis of the applicant's statements made during the personal interview and the other evidence available the determining authority shall assess whether the applicant is in need of international protection and whether he qualifies as a refugee or as a person eligible for subsidiary protection. Establishing the facts in asylum cases is not easy. In most asylum cases there is a lack of documentary evidence with regard to the asylum applicant's personal situation. Often the applicant's statements are the only evidence available. The assessment of the credibility of the applicant's asylum account therefore usually takes up an important part of the decision-making process. Cultural and linguistic differences between the applicant and the examining authorities may complicate the establishment of the facts.<sup>1</sup> Furthermore the determining authorities need to assess whether there is a *future risk of refoulement*. This means that there are no certainties which can be established.<sup>2</sup>

Evidentiary rules for asylum cases vary considerably among Member States of the European Union, in particular between common law and civil law systems.<sup>3</sup> Rules concerning the standard and burden of proof and evidentiary assessment are decisive for the outcome of the asylum proceedings. It is argued in this chapter that evidentiary rules or practices which make unreasonable demands on the asylum applicant undermine the effective exercise of the EU right to asylum and the prohibition of *refoulement*. A standard of proof which is set too high, the authorities' refusal to apply the benefit of the doubt, their unwillingness to share the burden of proof, the use of presumptions which are (practically) impossible for the applicant to rebut, a credibility assessment on the basis of details which are not part of the core of the asylum account or a failure to take into account or to recognise the value of certain types of evidence are all examples of such rules or practices.

This chapter examines which standards with regard to the standard and burden of proof and evidentiary assessment follow from EU law. In particular in Article 4 QD (concerning assessment of facts and circumstances) and Article 8 (2) PD (requirement of an appropriate and careful examination of the asylum claim, aim to harmonise the Member State's legislation as regards evidence

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1 See Staffans 2008, pp 621-622 and Thomas 2006, p 84.

2 See Thomas 2006, p 84.

3 See for example UNHCR Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 3, Gorlick 2003, p 361.

to a certain extent. However, they leave many important evidentiary issues untouched. It may be assumed in the light of the importance of evidentiary rules for the effective exercise of the prohibition of *refoulement* that also evidentiary issues which are not explicitly governed by the Qualification or Procedures Directive fall within the scope of EU law. They may therefore be addressed by the Court of Justice in the light of the principle of effectiveness. It follows from the Court of Justice's case-law that any requirement of proof which has the effect of making it virtually impossible or excessively difficult to exercise a right granted by EU law would be incompatible with EU law.<sup>4</sup> The Court of Justice has assessed national evidentiary rules in the light of this principle in several fields of EU law, such as equal treatment, State aid and the Member State's duty to repay charges levied contrary to EU law. The underlying principles emerging from this case-law should be considered relevant in asylum cases.

It is conceivable however, that the specific nature of asylum cases requires special evidentiary rules. Therefore in this chapter relatively important weight is attached to the case-law of the ECtHR and other supervising bodies, which specifically address evidentiary issues in asylum cases. The ECtHR has held that Article 6 (1) ECHR does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.<sup>5</sup> For this reason no attention is paid to the ECtHR's case-law under that provision.

The issues addressed in this chapter are all linked together and sometimes overlap. Therefore it is useful to make some preliminary remarks as to their mutual relationship. Section 8.1 on the standard of proof addresses the question what needs to be proved. In asylum cases the most important question is how likely the risk of future harm should be in order to qualify as a refugee or a person in need of subsidiary protection. Section 8.2 regarding the burden of proof examines who bears the risk (the applicant or the State) if the standard of proof is not met and who bears the burden of producing evidence in support of the asylum claim. A particular heavy burden of proof is placed on the applicant when the Member State makes use of certain presumptions. In section 8.3 the use of such presumptions is examined in the light of the duty to conduct an individual examination of the asylum claim. Finally sections 8.4. and 8.5 address the assessment of the evidence produced by the applicant and the State in the context of the asylum application. They examine which types of evidence should be taken into account and what value should be attributed to them. Section 8.5. particularly concerns the statements of the applicant. It addresses amongst other the question when the determining authority should grant the applicant the benefit of the doubt in the assessment of the credibility

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4 Case C-199/82, *SpA San Giorgio* [1983], para 14.

5 ECtHR 18 March 1997, *Mantovanelli v France*, no 21497/93, para 34.

of the asylum account. Section 8.6. regards other types of evidence such as documentary evidence and expert reports. Some aspects of the asylum claim may have consequences for several of the issues mentioned. The fact that the applicant was persecuted or subjected to serious harm in the past for example makes that the standard of proof is (nearly) met and at the same time causes a shift of the burden of proof from the applicant to the State. Furthermore the importance which should be attributed to this fact arguably requires that evidence, such as medical reports supporting past torture or ill-treatment, may not be ignored by the determining authority.

### 8.1 THE STANDARD OF PROOF: WHAT NEEDS TO BE PROVED?

This section examines the standard of proof which should be met in order to qualify for an asylum status or to be protected from *refoulement*. The central questions with regard to the standard of proof in asylum cases is first of all how likely the risk of persecution or serious harm must be<sup>6</sup> and secondly which indicators should be taken into account in order to assess this risk.

The Qualification Directive does not provide standards with regard to the question regarding the likeliness of the risk.<sup>7</sup> Therefore Member States are in principle allowed to maintain or introduce their own national requirements regarding the standard of proof. However it is submitted in this section that EU law prohibits Member States to set the standard of proof too high, because this will undermine the full effectiveness of the EU prohibition of *refoulement* and the right to asylum.<sup>8</sup> It follows from the principle of effectiveness that Member States cannot require asylum applicants to prove something which is impossible or excessively difficult to prove.<sup>9</sup> In particular it is argued that

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6 Noll 2005-II, p 3. Gorlick states that 'the term 'standard of proof' means the threshold to be met by the claimant in persuading the decision-maker of the truth of his or her factual assertions'. Gorlick 2003, p 367.

7 Noll 2005-II, p 3. The proposal for the Directive provided that there had to be a 'reasonable possibility' of persecution or serious harm. This was however deleted during the negotiations because the Member States could not agree on a risk criteria. Hailbronner 2010, pp 1026-1027.

8 See also Trstenjak and Beysen who state that national rules of evidence may provide for specific requirements concerning the standard of proof, as long as those rules do not make it impossible or excessively difficult to secure the enforcement of the rights at issue. Trstenjak & Beysen 2011, p 101.

9 See Case C-435/03, *British American Tobacco and Newman Shipping* [2005], para 28. In this case the Court of Justice assessed a national rule according to which the victim of a theft of goods could obtain repayment of VAT only if he succeeded in showing that the goods had indeed been stolen and that they had not been put on the market after the theft. The Court held that a requirement of proof of a negative, which is moreover outside the knowledge of the person concerned, makes it virtually impossible to make use of the right to repayment. See also the opinion of A.G. Sharpston with Case C-31/09, *Bolbol* [2010],

Member States may not require that a future risk of persecution or serious harm be *proved*. Also the standard of proof cannot be raised in cases where the applicant is considered a danger to national security.

It is also submitted in this section that the principle of effectiveness requires that all relevant risk factors be taken into account individually as well as in coherence. Furthermore Member States may not always expect an asylum applicant to substantiate that he runs an *individual* risk of serious harm as such risk can (in exceptional circumstances) also emanate from the *general situation* in the country or origin alone. The individual risk should always be assessed in the light of the general situation in the country of origin.

#### *Relevant provisions of the Qualification Directive*

According to the Qualification Directive a person must have a 'well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group' in order to be considered a refugee.<sup>10</sup> This definition refers directly to the refugee definition in the Refugee Convention.<sup>11</sup> For this reason it is conceivable that the interpretation of the standard of proof under the Refugee Convention will inspire the Court of Justice when addressing the standard of proof for qualification as a refugee under the Qualification Directive.<sup>12</sup> For this purpose UNHCR's view as well as legal doctrine will be examined in this section.

According to Article 2 (e) QD a person is eligible for subsidiary protection when 'substantial grounds have been shown' for believing that he, if returned to his country of origin 'would face a real risk of suffering serious harm'. Article 15 QD defines the term serious harm as: (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. These provisions refer to the standard of proof following from the ECtHR's case-law<sup>13</sup> and the views of the Committee against Torture and the Human Rights Committee. It may therefore be assumed that the standard of proof required under EU law may not be set higher than the standard of proof applied by these bodies.<sup>14</sup> This also follows from the Court of Justice's judgment in *Elgafaji* where it considered that the fundamental right guaranteed under Article 3 ECHR forms part of the general

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para 95, where she stated that 'the State may not lay down unrealistic standards for the evidence required'.

10 Art 2 (c) QD.

11 See also Hailbronner 2010, p 1026.

12 See also Staffans 2008, p 638.

13 See also Hailbronner 2010, p 1026.

14 It should however be noted that the case-law of the ECtHR, ComAT and HRC only regards the principle of *non-refoulement*, while, the fact that a person is eligible for subsidiary protection (also) gives him a right to an asylum status.

principles of EU law, observance of which is ensured by the Court and that the ECtHR's case-law is taken into consideration in interpreting the scope of that right in the EU legal order.<sup>15</sup>

Applicants who risk persecution or serious harm upon return may be excluded from the right to an asylum status, for example because they constitute a danger to the community of the Member State.<sup>16</sup> Such applicants will however be protected against expulsion by the EU prohibition of *refoulement*, laid down in Article 21 (1) QD. This provision does not mention the requirements which should be met in order to be protected by this prohibition. It only states that States should respect the principle of *non-refoulement* in accordance with their international obligations. This provision should be interpreted in the light of Article 19 of the Charter, which provides that no one may be removed, expelled or extradited to a State where there is a 'serious risk' that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. On first sight this provision seems to require a higher degree of foreseeability of the risk of *refoulement* (serious risk) than the ECtHR (real risk) does.<sup>17</sup> However, it follows from Article 52 (3) of the Charter as well as the explanations with Article 19 of the Charter that the EU prohibition of *refoulement* incorporates the ECtHR's case-law regarding Article 3 ECHR.<sup>18</sup> Furthermore, as was mentioned above, the Court of Justice has recognised the principle of *non-refoulement* guaranteed by Article 3 ECHR as a principle of EU law. This implies that the standard of proof under Article 21 (1) QD is the same, or at least not more restrictive, than the standard of proof required under Articles 2 (c) and 15 QD.

#### *Likelihood of the risk of persecution or serious harm*

It is argued by UNHCR as well as legal scholars that an applicant should not be required to *prove* a well-founded fear of persecution in order to qualify as a refugee. According to the UNHCR Handbook an applicant's fear of persecution 'should be considered well-founded if he can establish, *to a reasonable degree*, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the [refugee] definition, or would for the same reasons be intolerable if he returned there' (emphasis added).<sup>19</sup> In its 'Note on Burden

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15 Case C-465/07, *Elgafaji* [2009], para 28.

16 Artt 12, 14, 17 and 19 QD.

17 Battjes 2006, p 115.

18 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/24.

19 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979 (reedited in 1992) (UNHCR Handbook), para 42. See also UNHCR Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 17. Gorlick states that 'the flexibility which the decision-maker must take into account in assessing evidence on a refugee application as well as the concern that placing too high an evidentiary burden on refugee applicants is inconsistent with the humanitarian nature of refugee law, supports the view that the standard of proof is satisfied if an applicant has demonstrated a 'serious

and Standard of Proof in Refugee Claims' UNHCR states that a substantial body of jurisprudence 'largely supports the view that there is no requirement to prove well-foundedness conclusively beyond doubt, or even that persecution is more probable than not.<sup>20</sup> Furthermore several scholars contend that the 'reasonable possibility test' is the appropriate test for assessing the risk of persecution.<sup>21</sup> In their view the more restrictive 'balance of probabilities standard', which requires the applicant to establish that persecution will probably take place or is reasonable likely or more likely than not to occur, should be rejected.<sup>22</sup>

On the basis of the foregoing it may be argued that the full effectiveness of the EU right to a refugee status would be undermined if Member States require applicants to prove a well-founded fear of persecution in stead of granting refugee status when such a fear is established to a reasonable degree. As will be shown below the binding judgments of the ECtHR confirm the non-binding view of UNHCR that an asylum applicant should not be required to prove a future risk of a certain treatment.

Article 3 ECHR,<sup>23</sup> Articles 6 and 7 ICCPR<sup>24</sup> and Article 3 CAT<sup>25</sup> prohibit expulsion by a Contracting State where *substantial grounds* have been shown for believing that the person in question, if deported, would face a treatment contrary to these provisions in the receiving country. The applicant is not expected to *prove* that he will be treated in violation with the prohibition of *refoulement*.<sup>26</sup> The ECtHR is of the opinion that to demand direct documentary

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possibility', good reason', valid basis' or 'real or reasonable chance or likelihood' of persecution'. Gorlick 2003, pp 369-370.

20 See on the standard of proof in several countries, Norman 2007, pp 279-280.

21 Hathaway states that 'the "reasonable possibility" test is the appropriate compromise between respect for the Convention's commitment to anchor protection decisions in objectively observable risks and the need simultaneously to avoid the establishment of an inappropriately high threshold of concern'. Hathaway 1991, pp 79-80. See also Wouters 2009, pp 84-85.

22 Wouters 2009, p 85, Hathaway 1991 p 79, Goodwin Gill & McAdam 2007, p 234.

23 See for example ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 125. In several cases the ECtHR applied a higher standard of proof, namely 'beyond reasonable doubt'. See Wouters pp 269-270. He refers to ECtHR 12 April 2005, *Shamayev and others v Russia*, no 36378/02, para 338 and ECtHR 7 June 2007, *Garabayev v Russia*, no 38411/02, para 76. More recent examples are ECtHR (Adm) 10 July 2007, *Achmadov and Bagurova v Sweden*, no 34081/05 and ECtHR 23 September 2010, *Iskandarov v Russia*, no 17185/05. The 'beyond reasonable doubt' standard is used by the Court in cases under Art 3 ECHR, which do not involve *refoulement*.

24 HRC General Comment No 31 (2004), CCPR/C/21/Rev1/Add. 13, para 12.

25 See Art 3 CAT.

26 See ECtHR (Plen) 7 July 1989, *Soering v the United Kingdom*, no 14038/88, where the United Kingdom argued that Mr Soering could be extradited to the United States although there was "some risk", which was "more than merely negligible", that the death penalty would be imposed on him upon extradition. The ECtHR concluded that there were substantial grounds for believing that the applicant faced a real risk of being sentenced to death.



evidence proving that the applicant is wanted for any reason by the authorities of his country of origin 'may well present even an applicant whose fears are well-founded with a *probatio diabolica*'.<sup>27</sup> In *M.S.S v Belgium and Greece* the ECtHR held that persons engaged in an extremely urgent procedure before the Belgian Aliens Appeals Board were prevented from establishing the arguable nature of their complaints under Article 3 of the Convention because they were required to produce 'concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3'.<sup>28</sup>

Article 3 ECHR requires the decision-maker to focus on the 'foreseeable consequences of removal' for each individual applicant.<sup>29</sup> The mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3.<sup>30</sup> The Committee against Torture is of the opinion that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. The risk of torture must be foreseeable, real and personal. However, the risk does not have to meet the test of being highly probable.<sup>31</sup>

It is not always easy to predict on the basis of the facts whether the ECtHR will consider the standard of proof to be met. In some cases the ECtHR seems to apply a higher standard of proof than in others. In *S.H. v UK* the Court accepted that there were substantial grounds for believing that there was a real risk that the applicant would be subjected to ill-treatment if returned to Bhutan, although the existence of this risk was supported by little evidence. The Court considered that none of the experts who had written reports on the applicant's request were able to predict precisely what would happen to the applicant on return. It took into account that there was no evidence that the situation of the ethnic Nepalese in Bhutan had improved following the adoption of the Constitution.<sup>32</sup> In *B.A. v France* on the other hand the Court seems to apply a rather high standard of proof. The Court held that there was no real risk of *refoulement* although it accepted that the applicant was a deserter and that deserters were severely repressed in Chad, the applicant's country

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According to the ECtHR the likelihood of the feared exposure of the applicant to the "death row phenomenon" had been shown to be such as to bring Art 3 ECHR into play.

27 ECtHR (Adm) 27 January 2005, *Mawajedi Shikpohkt and Makkamat Shole v the Netherlands*, no 39349/03. See also ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, para 49.

28 According to the ECtHR thereby the Aliens Appeal Board increased the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation. ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 389.

29 ECtHR 28 June 2011, *Sufi and Elmi v United Kingdom*, nos 8319/07 and 11449/07, para 249. The ECtHR often assesses itself whether the 'foreseeable consequences' of extradition or expulsion are such as to bring Art 3 ECHR into play. ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 91, ECtHR 20 July 2010, *N. v Sweden*, no 23505/09, para 54.

30 See for example ECtHR 10 February 2011, *Dzhaksybergenov v Ukraine*, no 12343/10, para 35.

31 ComAT General Comment No 1 (1997), A/53/44, paras 6-7 and ComAT 16 May 2008, *Z.K. v Sweden*, no 301/2006, para 8.3.

32 ECtHR 15 June 2010, *S.H. v the United Kingdom*, no 19956/06, para 71.

of origin. The Court reproached the applicant for not having submitted any documents which concerned him personally and which proved that the authorities in Chad were still looking for him six years after he left the country.<sup>33</sup>

*Likelihood of a risk of refoulement in cases of danger of national security*

The United Kingdom has argued that in cases in which an asylum status was refused on national security grounds a higher standard of proof should apply in order for the person concerned to be protected under the prohibition of *refoulement*. This entails that, if the State adduces evidence that there is a threat to national security, the individual concerned must prove that it is “more likely than not” that he would be subjected to treatment prohibited by Article 3.<sup>34</sup> The ECtHR has ruled that such an approach is contrary to Article 3 ECHR. As a result it should also be considered to undermine the full effectiveness of the EU prohibition of *refoulement*.

The ECtHR observed that requiring a higher standard of proof in cases in which national security concerns are involved is not compatible with the absolute nature of the protection afforded by Article 3 ECHR.<sup>35</sup> It amounts to asserting that, in the absence of evidence meeting a higher standard, protection of national security justifies accepting more readily a risk of ill-treatment for the individual. The ECtHR therefore sees

no reason to modify the relevant standard of proof [...] by requiring in cases like the present that it be proved that subjection to ill-treatment is more likely than not.’ The Court ‘reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary and sufficient for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3.’<sup>36</sup>

*Indicators of a future risk of persecution or serious harm*

There are various factors which may indicate that a future risk of persecution or serious harm exists. It is argued here that the duty to perform an appropriate and careful examination of the asylum claim laid down in Article 8 (2)

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33 ECtHR 2 December 2010, *B.A. v France*, no 14951/09, para 44. The arrest warrant submitted by the applicant only stated that he committed a grave fault and not that he was a deserter.

34 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 122.

35 The Court considered that the prospect that the person concerned may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill-treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.

36 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 140.

PD requires that all relevant factors be taken into account.<sup>37</sup> It should be prevented that such factors are examined only in isolation and are not taken together.

A very important indicator of a future risk of persecution or serious harm is the fact that an applicant was persecuted or suffered serious harm in the past on the condition that such past persecution or serious harm is connected to the grounds on which the applicant claims to fear persecution or risk serious harm in the future.<sup>38</sup> This follows from Article 4 (4) QD, which applies to the assessment of both refugee and subsidiary protection status. This provision states that the fact that an applicant has already been subject to persecution or to direct threats of such persecution is a serious indication of the applicant's well-founded fear of persecution, unless there are *good reasons* to consider that such persecution will not be repeated. Several authors mention that this provision implies that previous (threats of) persecution or serious harm gives rise to a refutable presumption that the applicant qualifies for refugee or subsidiary protection.<sup>39</sup>

The importance of the fact that a person was persecuted, tortured or ill-treated in the past when assessing a future risk of such treatment is confirmed in the case-law of the ECtHR and the Committee against Torture.<sup>40</sup> In *Salah Sheekh* for example the ECtHR established that the applicant suffered inhuman treatment in the past. It considered:

Having regard to the information available [...], the Court is far from persuaded that the situation has undergone such a substantial change for the better that it could be said that the risk of the applicant being subjected to this kind of treatment anew has been removed or that he would be able to obtain protection from the (local) authorities. There is no indication, therefore, that the applicant would find himself in a significantly different situation from the one he fled.<sup>41</sup>

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37 The ECtHR emphasises in *NA v the United Kingdom* that the assessment of whether there is a real risk must be made on the basis of all relevant factors which may increase the risk of ill-treatment. ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 130. See also ECtHR 31 May 2011, *E.G. v the United Kingdom*, no 41178/08, para 72.

38 In *Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Salahadin Abdulla* [2010], para 94 the Court of Justice considered that 'the evidential value attached by Article 4(4) of the Directive to such earlier acts or threats will be taken into account by the competent authorities on the condition, stemming from Article 9(3) of the Directive, that those acts and threats are connected with the reason for persecution relied on by the person applying for protection'. Also in the assessment of a risk of serious harm past ill-treatment is only relevant if it is connected to the reasons why the applicant claims to risk serious harm in the future. See also Hailbronner 2010, p 1037.

39 See Battjes 2006, p 227, Hailbronner 2010, p 1037, Staffans 2008, p 638.

40 See for example ComAT 30 November 2010, *Said Amini v Denmark*, no 339/2008, para 9.8 and ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005. See also General Comment No 1 (1997), A/53/44, para 8 (b).

41 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, paras 146-147. See also ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 55.

The fact that past persecution is an important indicator for a well-founded fear of persecution in the future is recognised by the UNHCR Handbook<sup>42</sup> as well as legal scholars.<sup>43</sup>

In the case-law of the ECtHR and the Committee against Torture past torture or ill-treatment does not automatically make the existence of a future risk of such treatment plausible. An important change of the conditions in the country of origin,<sup>44</sup> the fact that the abuses were applied by individuals and not condoned by the authorities<sup>45</sup> and in some cases the fact that the past persecution or torture occurred a long time ago,<sup>46</sup> may warrant the conclusion that no such future risk exists. Arguably these factors may be considered 'good reasons' that no risk of future persecution or serious harm exists in the meaning of Article 4 (4) QD.

Also other factors such as the applicant's high profile,<sup>47</sup> the fate of his family members, friends or members of the same racial or social group<sup>48</sup> or the existence of systematic human rights violations in the country of origin<sup>49</sup> are indicators of a future risk of persecution or serious harm. On the basis of the ECtHR's case-law, the UNHCR Handbook as well as the view of the Committee against Torture it should be concluded that the duty to perform an appropriate examination of the asylum claim laid down in Article 8 (2) PD requires that risk factors should be taken together and not (only) be assessed in isolation.<sup>50</sup> According to the ECtHR:

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42 UNHCR Handbook, para 45. See also UNHCR Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 19.

43 According to Grahl-Madsen the fact that a person has experienced previous persecution 'should be considered prima facie proof to the effect that he may again become a victim of persecution should he return to his home country, so long as the regime which persecuted him prevails in that country'. Grahl-Madsen 1966, p 176. See also Hathaway 1991, p 88.

44 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 147, which implies that a substantial change for the better, could have taken away the future risk of inhuman treatment and ECtHR, 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 71. In ComAT 27 March 2002, *Y.H.A. v Australia*, no 162/2000, para 7.4, for example the ComAT took into account that a new Transitional government was formed, which included members of the clan to which the applicant belonged. See also UNHCR Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 19 and Hailbronner 2010, pp 1037-1038.

45 ECtHR (Adm) 27 March 2008, *Hakizimana v Sweden*, no 37913/05.

46 See for example ComAT 16 May 2008, *Z.K. v Sweden*, no 301/2006, para 8.4 and ComAT 19 May 2008, *R.K. v Sweden*, no 309/2006, para 8.5. In ECtHR 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 71, the ECtHR considered that the passage of time did not diminish the risk of *refoulement*.

47 See for example ECtHR (GC) 25 October 1996, *Chahal, v the United Kingdom*, no 22414/93, para 106 and ComAT 7 July 2011, *Harjinder Singh Khalsa et al v Switzerland*, no 336/2008, para 11.5.

48 See for example ECtHR 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 73.

49 See for example ECtHR 21 October 2010, *Gafarov v Russia*, no 25404/09, para 130.

50 UNHCR Handbook, paras 53 and 201.

[D]ue regard should also be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken cumulatively and when considered in a situation of general violence and heightened security, the same factors may give rise to a real risk.<sup>51</sup>

In the ECtHR's view both the need to consider all relevant factors taken together and the need to give appropriate weight to the general situation in the country of destination derive from the obligation to consider all the relevant circumstances of the case.<sup>52</sup>

#### *Individual risk or general risk*

The determining authorities in Member States may be inclined to expect an asylum applicant to substantiate that he has a well-founded fear of persecution or faces a real risk of suffering serious harm on individual grounds. Furthermore they may assess the risk emanating from the individual situation of the applicant and that emanating from the general situation in the country of origin separately, instead of taking them together.<sup>53</sup>

It is true that applicants who fear to become the victim of the general situation of (indiscriminate) violence in their country of origin will not qualify as a refugee under the Qualification Directive, in the absence of a persecution ground.<sup>54</sup> However members of a particular group, which is systematically persecuted because of its race, religion, ethnicity or another persecution ground should be considered refugees, without being further singled out.<sup>55</sup>

It follows from the Court of Justice's and the ECtHR's case-law that requiring individual grounds for a risk of serious harm in each case undermines the full effectiveness of the EU right to subsidiary protection and the *prohibition of refoulement*. This case-law shows that a real risk of suffering serious harm may also emanate from the fact that a person belongs to a special vulnerable group or, in exceptional situations, even from the general situation in the applicant's country or region of origin. In the assessment of the risk of serious harm individual factors as well as the general situation in the country of origin should be taken into account. This case-law will now be further examined.

The Court of Justice held in *Elgafaji* that the terms 'death penalty', 'execution' and 'torture or inhuman or degrading treatment or punishment of

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51 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 130. See for an example where the ComAT considered that cumulative factors established a real and foreseeable risk of torture: ComAT 7 July 2011, *Mondal v Sweden*, no 338/2008, para 7.7.

52 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 130. See also ECtHR 20 July 2010, *N. v Sweden*, no 23505/09, para 62 and UNHCR Handbook, para 201.

53 Spijkerboer & Vermeulen 1995, pp 91-93.

54 Wouters 2009, p 71.

55 Hathaway states that 'the historical framework of the Convention makes clear that it was designed to protect persons within large groups whose fear of persecution is generalized, not merely those who have access to evidence of particularized risk.' Hathaway 1991, pp 90-94. Wouters 2009, p 88, Goodwin Gill & McAdam 2007, pp 128-129.

an applicant in the country of origin', used in Article 15(a) and (b) QD cover situations in which the applicant for subsidiary protection is specifically exposed to the risk of a particular type of harm. Article 15 (c) QD on the other hand covers a more general risk of harm.<sup>56</sup> This provision covers

harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.<sup>57</sup>

According to the Court collective factors play a significant role in the application of Article 15(c) of the Directive, 'in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict'.<sup>58</sup> In order to meet the standard of proof required under Articles 2 (e) and 15 QD, the grounds substantiating the risk of suffering the serious harm in the meaning of Article 15 (c) may thus focus (at least to a large extent) on the general situation in the country of origin. According to the Court the system of Article 15 QD entails a sliding scale: 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'.<sup>59</sup> It may be assumed that the opposite is also true: the higher the level of indiscriminate violence in the country of origin, the less important it is for the applicant to show that he is specifically affected by reason of his individual circumstances.

The Court of Justice's approach resembles to the approach taken by the ECtHR.<sup>60</sup> The ECtHR accepted that, if the existence of a real risk of treatment contrary to Article 3 ECHR is established, 'the applicant's removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the two'.<sup>61</sup> In *Sufi and Elmi v the United Kingdom* the ECtHR

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<sup>56</sup> Case C-465/07, *Elgafaji* [2009], paras 32-33.

<sup>57</sup> Case C-465/07, *Elgafaji* [2009], para 35.

<sup>58</sup> Case C-465/07, *Elgafaji* [2009], para 38.

<sup>59</sup> Case C-465/07, *Elgafaji* [2009], para 39. See also paras 36 and 41 of the opinion of A.G. Maduro in this case.

<sup>60</sup> In ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 225, the ECtHR considered that it was not persuaded that Art 3 ECHR does not offer comparable protection to that afforded under the QD. Art 3 CAT does not cover cases of risk of harm because of indiscriminate violence. See for example ComAT 19 May 2008, *R.K. v Sweden*, no 309/2006, para 8.2.

<sup>61</sup> ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 218.

held that the level of violence in Mogadishu was of sufficient intensity to pose a real risk of treatment reaching the Article 3 threshold to anyone in that city. In its assessment of the situation in Mogadishu, the ECtHR took into account the indiscriminate bombardments and military offensives carried out by all parties to the conflict, the unacceptable number of civilian casualties, the substantial number of persons displaced within and from the city, and the unpredictable and widespread nature of the conflict.<sup>62</sup>

The Court also recognised that persons belonging to a group systematically exposed to a practice of ill-treatment, face a real risk of *refoulement*. The protection of Article 3 ECHR enters into play when an applicant establishes that there are *serious reasons to believe* in the existence of such practice of ill-treatment and establishes (proves) that he is a member of the group concerned.<sup>63</sup> To insist in such cases that the applicant show the existence of special distinguishing features would render the protection offered by Article 3 illusory. Moreover, such a finding would call into question the absolute nature of Article 3.<sup>64</sup> Only if the level of violence in the country is not sufficiently intense to and an individual is not a member of a vulnerable group, the applicant must show the existence of 'further special distinguishing features'. Then the focus lies on the individual asylum account of the applicant, which should be assessed in the light of the general situation in the country of origin.<sup>65</sup>

## 8.2 THE BURDEN OF PROOF: WHO NEEDS TO MAKE PLAUSIBLE?

In this section it is examined which party in asylum proceedings (the asylum applicant or the determining authority) bears the burden of proof. The concept 'burden of proof' has different meanings. First of all it may refer to the *objective burden of proof* which determines which party bears the negative consequences if the required standard of proof for the matter to be proved in the individual case is not met.<sup>66</sup> It may also refer to a *subjective burden* of proof which determines the responsibility to produce evidence.<sup>67</sup> In this section both issues will be addressed. It is assumed for the purpose of this section that for the

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62 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 248.

63 Zahle calls these two evidentiary aspects of a refugee case 'risk-group existence' and 'risk-group affiliation'. Zahle 2005, p 18.

64 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 217.

65 ECtHR (GC) 4 February 2005, *Mamatkulov and Askarov v Turkey*, no 46827/99, para 67.

66 See Staffans 2008, p 629. See also Popovic 2005, p 36.

67 See Staffans 2008, p 630. See also UNHCR Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 5, which states that the duty to produce evidence in order affirmatively to prove the alleged facts is termed "burden of proof".

assessment whether a person qualifies as a refugee or as a person eligible for subsidiary protection, the same EU standards regarding the burden of proof apply. This also follows from the fact that Article 4 QD, which concerns the assessment of facts and circumstances, applies to both assessments. Therefore the standards which may be derived from the Refugee Convention and those which follow from the ECHR, ICCPR and CAT are discussed in coherence.

### 8.2.1 Adducing evidence and dispelling doubts

The Qualification Directive does not explicitly mention that the asylum applicant bears the risk if the standard of proof for qualification as a refugee or person eligible for subsidiary protection is not met.<sup>68</sup> However, it may be assumed in particular on the basis of the Court of Justice's case-law,<sup>69</sup> State practice and principles of international law<sup>70</sup> that the objective burden of proof is on the applicant.<sup>71</sup> This section only addresses the general burden of proof with regard to the risk of *refoulement* upon return. The burden of proof with regard to more specific aspects of the assessment of the asylum claim, such as the reliance on a safe country of origin, a safe third country, an internal flight alternative or the effectiveness of diplomatic assurances will not be examined.<sup>72</sup>

The case-law of the Court of Justice, which will be addressed below shows that the principle of full effectiveness of EU law may require a shift of the burden of proof from the applicant to another party, even if no EU legislation with regard to the burden of proof exists. Furthermore the ECtHR's recent case-law has made clear that in *refoulement* cases the burden of proof needs to shift to the determining authority if the applicant has adduced evidence capable of proving that there are substantial grounds for believing that there is a real risk of treatment in violation with Article 3 ECHR upon return. Also the Committee against Torture and the Human Rights Committee apply such a shift of the burden of proof when the applicant has substantiated (an important part) of the asylum claim. On the basis of this case-law it is argued in this section that the full effectiveness of the EU right to asylum and the prohibition

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68 See also Noll 2005-II, p 5.

69 See for example Case C-381/99, *Brunhofer* [2001], para 52, Case C-127/92, *Enderby* [1993], para 13.

70 See for example ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 129, ComAT General Comment No 1 (1997), A/53/44, para 5 and UNHCR Handbook, para 196.

71 See Staffans 2008, p 629. She states that 'both customary law, international law and also regional law quite without hesitation allocate the objective burden of proof to the applicant in the asylum procedure. It is thus commonly agreed that it indeed, as a starting point, is the task of the applicant to prove his or her status as a refugee'.

72 See with regard to safe countries of origin Art 31 (1) PD, with regard to safe third countries and first countries of asylum Art 27 (1) PD and Art 26 PD (which refers to Art 27 (1) PD) and with regard to internal flight alternatives, Art 8 QD.



of *refoulement* require a shift of the burden of proof to the determining authority in a number of specific situations.

*Shifting the burden of proof in EU equal treatment cases*

The Court of Justice has recognised in several cases that national rules concerning the burden of proof are capable of undermining the full effectiveness of EU law. According to the Court, Member States may be obliged to apply and interpret their national rules on the burden of proof in the light of the purpose of the applicable EU legislation.<sup>73</sup> In equal treatment cases (mostly concerning equal pay between men and women) the Court requires a shift of the burden of proof from the applicant (the worker) to the defending party (the employer) in order to guarantee the full effectiveness of the right to equal treatment, where there is a *prima facie* case of discrimination.<sup>74</sup> The employer then has to show that there are objective reasons for the difference in pay. There is a *prima facie* case of discrimination for example when significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men.<sup>75</sup>

When establishing whether a *prima facie* case of discrimination has been made out, the Court of Justice takes into account difficulties encountered by the applicant in adducing evidence of discrimination. In *Danfoss* for example the employer applied a system of pay which was wholly lacking in transparency, which made it very difficult for female employees to prove that they were paid less than their male colleagues, who were doing the same work and that this was at variance with the Equal Pay Directive.<sup>76</sup> Female employees could establish differences only so far as average pay was concerned. The Court therefore required a shift of the burden of proof to the employer, if a female worker established, in relation to a relatively large number of employees, that the average pay for women was less than that for men. The employer had to prove that the differentiation in pay between men

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73 Joined Cases C-253/96 to C-258/96, *Kampelmann and others* [1997], paras 32-34 and Case C-350/99, *Lange* [2001], paras 31-32. Note that in these cases Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ 288/32 provided that the Directive shall be without any prejudice to national law and practice concerning proof as regards the existence and content of a contract or employment relationship.

74 Case C-127/92, *Enderby* [1993], para 18, Case C-381/99, *Brunnhofner* [2001], para 58. In Case C-54/07, *Feryn* [2008], para 31, which concerned discrimination on the grounds of racial or ethnic origin a 'presumption of a discriminatory recruitment policy' caused the shift of the burden of proof.

75 Case C-127/92, *Enderby* [1993], para 19.

76 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L045/19.

and women was not the result of discrimination.<sup>77</sup> The Court considered that the concern for effectiveness which underlies the Equal Pay Directive 'means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality'.<sup>78</sup> The Court's case-law in equal treatment cases has been codified in EU legislation, in particular in a special directive on the burden of proof in cases of discrimination based on sex.<sup>79</sup>

*Cases before the ECtHR, Committee against Torture and Human Rights Committee*  
In the case-law of the ECtHR, the Committee against Torture and the Human Rights Committee it is accepted that the burden of proof should shift from the asylum applicant to the determining authority when the applicant has made out a *prima facie* case of a risk of *refoulement*.<sup>80</sup> The burden of proof shifts back to the applicant if these authorities have sufficiently disputed the evidence or arguments submitted by the applicant. The ECtHR uses the following standard as regards the burden of proof:

It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. [...] Where such evidence is adduced, it is for the Government to dispel any doubts about it.<sup>81</sup>

It is impossible to point out exactly when the burden of proof needs to shift to the determining authority. In most *refoulement* cases the ECtHR, Committee against Torture or Human Rights Committee did not indicate that the burden

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77 See also Case C-196/02, *Nikoloudi v Organismos Tilepikonion Ellados AE* [2005], para 74 and Case C-400/93, *Specialarbejderforbundet i Danmark* [1995], paras 24-27. In Case C-381/99, *Brunnhofner* [2001], para 58 the normal burden of proof applied because there were no special circumstances such as those established in *Danfoss*. The worker had to prove that the pay she received was less than that of her chosen comparator and that she did the same work or work of equal value comparable to that performed by him.

78 Case C-109/88, *Danfoss* [1989], para 14. Art 6 of the Equal Pay Directive provides that Member States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed.

79 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1997] OJ L 14/6. See also Art 8 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 and Art 10 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

80 See also Spijkerboer 2009-II, pp 61-62.

81 See for example ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 129.

of proof had shifted and for which reasons.<sup>82</sup> However on the basis of their judgments several circumstances can be identified which may trigger a shift of the burden of proof.

*Past persecution or serious harm*

A first example is the fact that the applicant was subjected to ill-treatment in the past. In the previous section it was already submitted that past ill-treatment or torture is an important factor which indicates that a future risk of persecution or serious harm exists. It follows from Article 4 (4) QD<sup>83</sup> as well as the ECtHR's and Committee against Torture's case-law that this factor also requires a shift of the burden of proof to the decision-making authorities. In *R.C. v Sweden* the ECtHR considered:

Having regard to its finding that the applicant has discharged the burden of proving that he has already been tortured, the Court considers that the onus rests with the State to dispel any doubts about the risk of his being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeds.<sup>84</sup>

The Court then assessed the future risk of a treatment in violation with Article 3 ECHR in the light of the very tense situation in Iran at the time. Furthermore the Court considered that the applicant would face a specific risk upon return as he could not produce evidence of his having left that country legally. The Court observed that the Government had not rebutted the applicant's claim that he left Iran illegally. Therefore the Court found it probable that the applicant, being without valid exit documentation, would come to the attention of the Iranian authorities and that his past was likely to be revealed. The Court concluded that the expulsion of the applicant to Iran would violate Article 3.

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82 In non-asylum cases under Artt 2 and 3 ECHR the ECtHR did set out more precisely which circumstances lead to a shift of the burden of proof to the State authorities. It considered for example that where the events lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of the death of a person within their control in custody, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation of, in particular, the causes of the detained person's death. See for example ECtHR (GC) 6 July 2005, *Nachova and others v Bulgaria*, nos 43577/98 and 43579/98, para 157. See similarly HRC 16 August 2007, *Kimouche v Algeria*, no 1328/2004.

83 See also Noll 2005-II, p 8. He states that the Member State must show on an individual basis, why earlier persecution or harm will not entail renewed persecution or harm after rejection of the application and *refoulement*.

84 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 55. See also ECtHR 10 December 2009, *Koktysh v Ukraine*, no 43707/07, para 64.

*Plausible statements and reliable proof*

The burden of proof may also shift to the determining authority if the applicant substantiated to a certain extent that there is a future risk of *refoulement* by submitting credible statements and/or documents in support of their asylum account. In *S.H. v the United Kingdom* for example the applicant had adduced several expert reports (Amnesty International, the Human Rights Council of Bhutan, Human Rights Watch and two individual experts) which supported his claim that he would be at risk of imprisonment and ill-treatment upon return to Bhutan. Furthermore human rights reports indicated that the ethnic Nepalese in Bhutan were afforded discriminatory treatment on account of their ethnicity. The Court was satisfied that there were substantial grounds for believing that there was a real risk that the applicant would be subjected to ill-treatment contrary to Article 3 if returned to Bhutan. It noted that the Government had not adduced any evidence capable of dispelling the Court's concerns. In particular the Government had accepted that there was no evidence that the situation of the ethnic Nepalese had improved following the adoption of the Constitution in Bhutan.<sup>85</sup> In *Chedli Ben Ahmed Karoui v Sweden* the Committee against Torture found it impossible to verify the authenticity of some of the documents provided by the complainant. 'However, in view of the substantive reliable documentation he has provided, including medical records, a support letter from Amnesty International Sweden, and an attestation from the Al-Nahdha chairman, the complainant [...] has provided sufficient reliable information for the burden of proof to shift'.<sup>86</sup>

*Serious human rights violations in the country of origin*

When reports of human rights organisations submitted by the applicant or taken into account by the ECtHR of its own motion, show the existence of serious human rights violations, it is up to the determining authority to dispute that information. The burden of proof with regard to the risks emanating from the general situation in the country of origin thus shifts to the State. In *Garayev* for example the applicant claimed that he would be tortured in prison upon extradition to Uzbekistan. The ECtHR considered that the Government had not adduced any evidence or reports capable of rebutting the credible reports by human rights organisations of torture, routine beatings and use of force against criminal suspects or prisoners by the Uzbek law-enforcement authorities. No evidence had been produced of any fundamental improvement in the protection against torture in Uzbekistan in recent years.<sup>87</sup>

<sup>85</sup> ECtHR 15 June 2010, *S.H. v the United Kingdom*, no 19956/06, paras 69-71.

<sup>86</sup> ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, no 185/2001, para 10. See also ComAT 15 February 2001, *A.S. v Sweden*, no 149/1999, para 8.6 and HRC 9 December 2004, *Jonny Rubin Byahuranga v Denmark*, no 1222/2003, paras 11.2-11.4.

<sup>87</sup> ECtHR 10 June 2010, *Garayev v Azerbaijan*, no 53688/08, para 73. See also ECtHR 19 November 2009, *Kaboulov v Ukraine*, no 41015/04, para 111. ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 98.

*The applicant belongs to a group at risk*

It follows from *Sufi and Elmi v the United Kingdom* that the determining authority should prove that an individual is not at risk, when it is established on the basis of human rights reports that the violence in a country or region of origin is of such a level of intensity that in principle anyone in that region or country would be at real risk of treatment prohibited by Article 3 of the Convention. In this case the Court concluded that such a situation occurred in Mogadishu. It accepted that some persons who were exceptionally well-connected to “powerful actors” could find protection in Mogadishu. However it was for the Government to show that a person could find protection for such reasons.<sup>88</sup> On the basis of this judgment it is conceivable that, if it is established that a person belongs to a group systematically exposed to a practice of ill-treatment (such as the Ashraf minority in the case of *Salah Sheekh*<sup>89</sup>), it is up to the determining authorities to prove that this person can find protection against persecution or serious harm.

*No burden of proving negative facts*

Potentially it should be derived from *M and others v Bulgaria* that the asylum applicant should not be expected to prove negative facts. In this case the Bulgarian Supreme Court acknowledged the existence of a risk of death and ill-treatment of the applicant, who converted to Christianity, upon return to Afghanistan. However it refused the applicant’s claim because the applicant had not proved that those risks stemmed from the Afghan authorities and that those authorities would not guarantee his safety. The ECtHR considered under Article 13 ECHR:

[B]y dealing with such a serious issue summarily and by placing on the first applicant, without any explanation, the burden of proving negative facts, such as the lack of State guarantees in Afghanistan, the court practically deprived Mr M. of a meaningful examination of his claim under Article 3.<sup>90</sup>

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88 ECtHR 28 June 2011, *Sufi and Elmi v United Kingdom*, nos 8319/07 and 11449/07, paras 249-250. See similarly ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 359 where the Court held that the State authorities should have concluded on the basis of the available human rights reports that the applicant faced a real and individual risk of *refoulement*.

89 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04.

90 ECtHR 26 July 2011, *M. and others v Bulgaria*, no 41416/08, para 127. See also ECtHR 24 May 2011, *Abou Amer v Romania*, no 14521/03, para 58, where the State placed on the applicant the burden of proving that he had not been involved in any activities threatening national security. According to the ECtHR such proof seems impossible to produce, notably because the applicant was not informed of the concrete suspicions against him.

This case is quite specific because of the number of deficiencies in the Supreme Court's review of the asylum claim.<sup>91</sup> However, it does show that, in particular when a risk of treatment contrary to Article 3 is found real, no burden to prove negative facts can be placed on the applicant.

*Shifting the burden of proof back to the applicant*

If the examining authorities provide well-founded reasons to contest the statements or the evidence submitted by the applicant, the burden of proof shifts back to the applicant.<sup>92</sup> The determining authority may for example have submitted good reasons to consider that past ill-treatment will not be repeated, by showing that the situation in the country of origin has improved to an important extent.<sup>93</sup> Furthermore the burden of proof may shift back to the applicant if the determining authority gave strong reasons to question the information submitted by the applicant<sup>94</sup> or the authenticity of documents provided by him.<sup>95</sup>

*Subconclusion: the objective burden of proof*

It should be derived from the Court of Justice's case-law in equal treatment cases that the principle of effectiveness requires a shift of the burden of proof from the applicant to the State if this is necessary to ensure the purpose of the Procedures and Qualification Directive, namely respect for the right to asylum and the prohibition of *refoulement* and the full and inclusive application of the Refugee Convention.<sup>96</sup> It is contended on the basis of the ECtHR's case-law that such a shift of the burden of proof is necessary if the applicant adduced evidence capable of proving that he has a well-founded fear of persecution or that there are substantial grounds for believing that he faces a real risk of suffering serious harm. It may be derived from the ECtHR's case-law that this condition is met in the following situations:

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91 The Supreme Administrative Court failed to carry out a proper examination of the executive's assertion that the applicant presented a national security risk. According to the ECtHR this undermined the effectiveness of this remedy with regard to the requirements of Art 13 in conjunction with Art 3. Furthermore the Court placed excessive reliance on the question whether the ill-treatment risked in the receiving State would emanate from State or non-State sources. Finally the remedy before the Supreme Court did not have suspensive effect.

92 See also Zahle 2005, pp 19-20.

93 See Art 4 (4) QD, ECtHR (Adm) 4 July 2006, *Karim v Sweden*, no 24171/05 and ComAT 27 March 2002, *Y.H.A. v Australia*, no 162/2000, para 7.4.

94 See for example ECtHR (Adm) 8 July 2008, *A.J. v Sweden*, no 13508/07, para 56, ECtHR (Adm) 2 September 2008, *A.A. v Sweden*, no 8594/04, para 66, ECtHR (Adm) 27 March 2008, *Hakizimana v Sweden*, no 37913/05.

95 ECtHR (Adm) 21 June 2005, *Matsiukhina and Matsiukhin v Sweden*, no 31260/04, ComAT 26 November 2008, *M.F. v Sweden*, no 326/2007, para 7.7.

96 According to Recital 8 of the Preamble PD and Recital 10 Preamble QD, the Qualification Directive and the Procedures Directive aim to ensure these rights. See also section 2.1.2.

- it is established that the applicant was subjected to torture or ill-treatment in the past.
- the applicant has substantiated to a certain extent that there is a future risk of *refoulement* by submitting credible statements and or documents in support of the asylum account.
- human rights organisations report the existence of serious human rights violations in the applicant's country of origin. The burden of proof shifts to the State authorities with regard to the risk emanating from the general situation in the country of origin.
- it is established that in the applicant's country or region of origin the violence is of such intensity that anyone is at risk of torture or ill-treatment or that the applicant belongs to a special vulnerable group

Finally the ECtHR's judgment in *M and others v Bulgaria* may indicate that the applicant may not be required to prove negative facts.

### 8.2.2 Producing evidence: a shared duty

Most Member States impose upon the applicant the duty to produce evidence in support of his asylum claim.<sup>97</sup> This is allowed by Article 4 (1) QD, which provides that the Member States may consider it the duty of the applicant 'to submit as soon as possible all elements needed to substantiate the application for international protection'.<sup>98</sup> Also according to the ECtHR's case-law<sup>99</sup> and the views of the Committee against Torture,<sup>100</sup> the Human Rights Committee<sup>101</sup> and UNHCR<sup>102</sup> the applicant bears the burden of providing evidence in support of his asylum claim.

97 According to the Commission in 2010 Art 4 (1) first sentence was transposed by all Member States except for Belgium, the Czech Republic, Cyprus, Finland, Hungary, Lithuania and Romania. Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC, 8 September 2010, COM (2010) 465 final, p 4.

98 Note that the Member States are not *required* to place the burden of proof on the applicant. This also follows from Art 4 (5) QD, where rules are provided for the situation where Member States apply Art 4 (1) first sentence. See also Hailbronner 2010, pp 1027-1028.

99 According to the ECtHR it is 'incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail'. ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, para 49.

100 See for example ComAT 2 May 2007, *E.R.K. and Y.K. v Sweden*, no 270 & 271/2005, para 7.4 and ComAT 5 May 2009, *X v Australia*, no 324/2007, para 7.4.

101 The HRC has declared several cases inadmissible because the person concerned failed to substantiate his claims under Art 7 ICCPR. See for example: HRC 28 April 2009, *Moses Solo Tarlue v Canada*, no 1551/2007, para 7.4.

102 UNHCR Handbook, para 195.

This section argues however that the duty to conduct an appropriate examination of the asylum claim prescribed by Article 8 (2) PD read in the light of the principle of full effectiveness of EU law entails a positive obligation for the Member States to investigate certain aspects of the asylum claim. Potentially the Member States' duty to assess the relevant elements of the application in cooperation with the applicant laid down in Article 4 (1) QD also entails such a positive obligation.<sup>103</sup>

This interpretation of Articles 8 (2) PD and 4 (1) QD would be in line with the ECtHR's case-law concerning Article 3 ECHR. According to the ECtHR Article 3 ECHR entails an obligation for the State to carry out a meaningful or adequate assessment of the applicant's claim of a risk of *refoulement*.<sup>104</sup> It follows from this obligation that the State authorities must address the applicant's allegations of past torture and the future risk of *refoulement*.<sup>105</sup> In a number of complaints against Turkey the ECtHR concluded that the State authorities failed to carry out a meaningful assessment of the risk of *refoulement*. The ECtHR took into account amongst others that the State authorities did not interview the applicants. In these cases the ECtHR concluded on the basis of the evidence submitted by the applicants and the fact that UNHCR recognised the applicants as refugees that expulsion would violate Article 3 ECHR.<sup>106</sup>

It will be argued in this section that it follows in particular from the duty to an adequate assessment of the asylum claim that Member States are obliged to gather reliable country of origin information from different sources. Furthermore the State is required to request a medical report by an expert, if the applicant makes out a *prima facie* case that the scars on his body or other medical problems suffered by him are caused by ill-treatment in his country of origin. Finally it is argued that the determining authority should gather evidence which is only obtainable by this authority and not by the asylum applicant. The authority examining the asylum claim is thus not allowed to

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103 According to Boeles and others the Member States' duty to assess the asylum application in cooperation with the asylum applicant laid down in Art 4 (1) QD implies that the Member State must actively contribute in gathering the necessary evidence for status determination and allow the asylum applicant to participate in that process as soon as the applicant has provided the initial necessary elements in support of his asylum claim. Boeles and others 2009, p 338. Under the ECtHR such positive obligation follows from the duty of a 'close scrutiny' of the asylum claim following from Artt 3 and 13 ECHR. See ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 293.

104 See for example ECtHR 21 October 2010, *Gaforov v Russia*, no 25404/09, para 122, ECtHR 15 June 2010, *Ahmadpour v Turkey*, no 12717/08, para 38, ECtHR 19 January 2010, *Z.N.S. v Turkey*, no 21896/08, para 48 and ECtHR, 11 July 2000, *Jabari v Turkey*, no 40035/98, para 40.

105 ECtHR 21 October 2010, *Gaforov v Russia*, no 25404/09, para 123.

106 See for example ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, ECtHR 13 April 2010, *Tehrani and others v Turkey*, nos. 32940/08, 41626/08, 43616/08, ECtHR 13 July 2010, *Dbouba v Turkey*, no 15916/09.



sit back and limit itself to the assessment of the statements and evidence adduced by the applicant.<sup>107</sup>

*The duty to gather reliable country of origin/transit country information of different sources.*

Article 8 (2) (b) PD states that in the context of their duty to conduct an appropriate examination of the asylum claim Member States must ensure that 'precise and up-to-date information is obtained from various sources', such as the UNHCR, 'as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited'. Such information should be made available to the personnel responsible for examining applications and taking decisions'.<sup>108</sup> The duty to gather relevant country of origin information is important in all asylum cases and in particular in the context of the assessment of the right to subsidiary protection on the basis of Article 15(c) QD. In this assessment collective factors play a significant role. The determining authority should examine whether the person concerned 'belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict'.<sup>109</sup>

It also follows from the ECtHR's case-law that the determining authority should carry out an adequate assessment of the situation in the country of origin which is sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources.<sup>110</sup> The ECtHR has reproached Governments because they failed to include any country of origin information in the assessment of the asylum claim or to refer to such information in their asylum decision.<sup>111</sup> In *M.S.S v Belgium and Greece* the ECtHR considered that the Belgian Governments should have been aware of the general situation in Greece and therefore of the applicant's fears in the event of his transfer back to this country, although the applicant failed to voice those fears at his interview. The Court in this context referred to the numerous reports concerning the situation in Greece. According to the Court the applicant should in this situation not be expected 'to bear the entire burden of proof'.

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107 See also Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures, para 5, which states that 'when examining an application for asylum the competent authority must, of its own initiative take into consideration and seek to establish all the relevant facts.'

108 See also Art 4 (3) QD.

109 Case C-465/07, *Elgafaji* [2009], para 38.

110 See ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136.

111 ECtHR 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 70, ECtHR 21 October 2010, *Gafarov v Russia*, no 25404/09, para 125. See also ComAT Concluding Observations on Hungary, 6 February 2007, CAT/C/HUN/CO/4, para 10, where it recommended that Hungary should expand and update its country of origin (COI) information database and take effective measures to certify that the internal regulation about the obligatory use of the COI system is respected.

The ECtHR did not explain which part of the burden of proof still rested on the applicant.<sup>112</sup> It did address however what was expected of the Belgian authorities: the reports concerning the general situation in Greece should have urged them to verify how the Greek authorities applied their legislation on asylum in practice. They could not assume that the applicant would be treated in conformity with the ECHR's standards.<sup>113</sup> The Court concluded that the Belgian authorities knew or ought to have known that the applicant had no guarantee that his asylum application would be seriously examined by the Greek authorities.<sup>114</sup>

It should be concluded that it follows from Article 8 (2) (b) PD read in the light of the ECtHR's case-law that the determining authority should gather and assess of its own motion reports concerning the general situation in the country of origin (or transit). The value which should be attached to country of origin or transit country information, in particular reports issued by human rights organisations will be examined in section 8.6.2. below.

*The duty to request medical expert reports*

EU legislation does not explicitly require the determining authority of the Member States to request an expert to write a medical report if the applicant claims to have scars or other medical problems as a result of past torture or ill-treatment. However it is submitted here that the duty to conduct an adequate examination of the asylum claim following from Article 8 (2) PD read in the light of the ECtHR's judgment in *R.C. v Sweden* does entail such a duty. The ECtHR held in this case that the State authorities have a duty to direct that an expert opinion be obtained as to the probable cause of the applicant's scars, if the applicant submitted a medical certificate, which makes out a *prima facie* case as to the origin of scars on the body of the applicant (namely torture or ill-treatment).<sup>115</sup> In section 8.6.3. it will be contended that medical reports should be considered very important evidence for the assessment of the asylum claim.

*The duty to gather evidence obtainable by the State authorities, but unavailable to the applicant*

It may be contended on the basis of the case-law of the Court of Justice and the ECtHR that the duty to conduct an appropriate examination of the asylum

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112 See also Battjes 2011, sub 6.2.1.

113 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 359.

114 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 358. See also ECtHR 23 February 2012, *Hirsi Jamaa and others v Italy*, no 27765/09, paras 131-133 and 156-157.

115 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 53. See also ComAT 23 October 1997, *A. v the Netherlands*, no 91/1997, para 6.6 where the Committee considered that the State party had failed to explain why the applicant's claims were considered insufficiently substantial as to warrant a medical examination.

claim as well as the principle of full effectiveness of EU law entails a positive obligation for the determining authority to investigate aspects of the asylum claim, where it has access to the relevant information and the asylum seeker has not. Arguably State authorities are better placed than the applicant to produce for example decisions on the asylum claims of relatives of the applicant in other Member States, information of judicial proceedings against the applicant pending in the country of origin or information on the fate of returnees to the applicant's country of origin, who are monitored by the State authorities.<sup>116</sup>

The Court of Justice accepted in its case-law that requiring a party to produce evidence which it cannot obtain is contrary to the principle of effectiveness.<sup>117</sup> The national court should instead use all the procedures available to it, including ordering measures of inquiry, in order to obtain the evidence for example from third parties. This was decided in the judgment in *Laboratoires Boiron*. In this case *Laboratoires Boiron*, a pharmaceutical laboratory, claimed the reimbursement of taxes, arguing that wholesale distributors, which were the laboratory's direct competitors, were not liable to pay those taxes. *Laboratoires Boiron* claimed that this constituted State aid. According national law it was *Laboratoires Boiron*'s duty to prove this claim. At the same time, the national courts had wide (discretionary) powers to order of its own motion all measures of inquiry permissible in law. The question before the Court was whether these rules of evidence were in compliance with the principle of effectiveness. The Court considered:

[I]f the national court finds that the fact of requiring a pharmaceutical laboratory such as *Boiron* to prove that wholesale distributors are overcompensated, and thus that the tax on direct sales amounts to State aid, is likely to make it impossible or excessively difficult for such evidence to be produced, since inter alia that evidence relates to data which such a laboratory will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.<sup>118</sup>

The ECtHR has not explicitly considered that the burden of producing evidence should rest with the authorities of the State when they are better placed to obtain certain relevant information in an asylum case. However the Court seems to suggest that a duty to investigate certain aspects of the asylum claim

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116 E.g. in the context of Art 8 (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

117 Case C-310/09, *Accor* [2011], para 100.

118 Case C-526/04, *Laboratoires Boiron SA* [2006], para 55. See also para 57 of this judgment. See also Case C-264/08, *Direct Parcel Distribution Belgium* [2010], paras 31-37.

may indeed exist in *Bader v Sweden*. In this case the ECtHR found it surprising that the first applicant's defence lawyer in Syria was not contacted by the Swedish embassy during their investigation into the case, even though the applicants had furnished the Swedish authorities with his name and address and he could, in all probability, have provided useful information about the case. In this case the applicant had submitted an original judgment of a Syrian Court in which he was sentenced to death in absentia on account of murder.<sup>119</sup>

The UNHCR Handbook states that, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application.<sup>120</sup> UNHCR here seems to refer to cases of minors<sup>121</sup> and mentally disturbed or traumatised persons.<sup>122</sup>

### 8.3 INDIVIDUAL ASSESSMENT AND THE USE OF PRESUMPTIONS

According to Article 4 (3) QD and Article 8 (2) (a) PD the assessment of an application for international protection is to be carried out on an individual basis.<sup>123</sup> When assessing asylum claims the determining authority of the Member States sometimes applies certain presumptions to groups of asylum applicants. An important example of such presumption is: persons originating from a certain country (a safe country of origin) do not have protection needs.<sup>124</sup>

119 ECtHR 8 November 2005, *Bader v Sweden*, no 13284/04, para 45. See also Wouters p 274.

120 UNHCR Handbook, para 196. See also Zahle 2005, p 26.

121 UNHCR states in its annotated comments on the QD that in the case of asylum seeking children the burden of proof should be applied flexibly and liberally, by fact-finding and gathering supporting evidence in any manner possible. UNHCR Annotated Comments on the Directive 2004/83/EC, UNHCR January 2005, p 16.

122 See UNHCR Handbook, para 210, which states that in case of a mentally disturbed person it will 'be necessary to lighten the burden of proof normally incumbent upon the applicant'. Information that cannot easily be obtained from the applicant may have to be sought elsewhere, e.g. from friends, relatives and other persons closely acquainted with the applicant, or from his guardian, if one has been appointed. It may also be necessary to draw certain conclusions from the surrounding circumstances. If, for instance, the applicant belongs to and is in the company of a group of refugees, there is a presumption that he shares their fate and qualifies in the same manner as they do.

123 See also Art 19 (4) QD, which requires that the State authorities demonstrate on an individual basis that the person concerned has ceased to be or is not eligible for subsidiary protection.

124 Other presumptions applied in asylum cases which do not fall within the scope of this study are: all Member States operate equivalent protection systems which comply with human rights standards (the presumption underpinning the Dublin Regulation), all Members of a certain organisation are individually responsible for actions giving rise to exclusion from an asylum status according to Artt 12 and 17 QD or all persons convicted to a certain sentence for a particular offence are a danger to the security or community of the Member State. See also Noll 2005-II, p 8.

The Procedures Directive allows for the use of a presumption of safety of countries of origin or third countries under certain conditions.<sup>125</sup> Member States are for example allowed to designate a country as a safe country of origin where it can be shown that there is generally and consistently no persecution as defined in Article 9 QD, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.<sup>126</sup> If a country is designated a safe country of origin it is presumed that asylum applicants originating from this country do not have a well-founded fear of persecution or face a real risk of serious harm. According to the Procedures Directive the presumption of safety of the country of origin may be rebutted by the applicant. The third country designated as a safe country of origin may only be considered as a safe country of origin for a particular applicant if he has not submitted any serious grounds for considering the country not to be a safe country of origin in his particular circumstances and in terms of his qualification as a refugee. If the country of origin is considered safe for the individual applicant, this has some serious consequences. According to Article 23 (4)(c)(i) PD the application may be dealt with in an accelerated procedure and Article 28 (2) PD provides that the application may be considered manifestly unfounded. This will generally reduce the asylum applicant's chances of rebutting the presumption of safety.

Asylum applicants may in practice find it (almost) impossible to prove that a presumption, such as the one mentioned above, does not apply in his particular case. In several cases the Court of Justice has held that the use of a presumption which is impossible or excessively difficult to rebut, is contrary to the principle of effectiveness. It is argued in this section on the basis of this case-law as well as the case-law of the ECtHR and the views of the Committee against Torture and UNHCR that in asylum cases the use of presumptions is permissible, but only if it is possible to rebut them and if the asylum applicant is granted sufficient opportunity to do so.<sup>127</sup> It should be examined on a case-by-case basis whether such presumption must be considered rebutted. The use of conclusive (irrebuttable) presumptions should be considered contrary to the duty of an individual assessment of the asylum claim laid down in Article 4 (3) QD and Article 8 (2) (a) PD. Furthermore such practice should be considered to undermine the effectiveness of the EU right to asylum and the prohibition of *refoulement*.

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125 Artt 26, 27, 30-31, 36 PD.

126 See Art 30 (1) PD and Annex II to the PD.

127 Noll states that the requirement of an assessment on an individual basis means that 'if a Member State applies presumptions in the procedure, it must be possible to confute the presumption in the asylum procedure'. Noll 2005-II, p 8. See also Hailbronner 2010, p 1031.

*Case-law by the Court of Justice*

The Court of Justice's case-law shows that the principle that asylum claims should be assessed on an individual basis does not preclude the use of presumptions. However the use of irrebuttable presumptions violates this requirement as well as the principle of effective judicial protection. In *Samba Diouf* the Court of Justice held that in order for the right to an effective remedy to be exercised effectively,

the national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons.<sup>128</sup>

In this case the Luxembourg authorities and the Luxembourg court disagreed on the extent to which the reasons for rejecting an asylum claim in an accelerated procedure could be reviewed by the national court in the context of the appeal against the final rejection of the claim.

In *NS and ME and others* the Court of Justice recognised the importance of the presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights in the context of the European Union as well as CEAS. However it considered that an application of the Dublin Regulation on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply the Dublin Regulation in a manner consistent with fundamental rights. The asylum applicant must, according to the Court of Justice, be able to submit evidence in order to rebut this presumption.<sup>129</sup>

The Court of Justice addressed the use of a presumption of responsibility for certain crimes which give rise to the exclusion from an EU asylum status on the basis of Article 12 QD in its judgment in *B and D*. The Court established that the exclusion from refugee status of a person who has been a member of a terrorist organisation is conditional on an individual assessment of the specific facts.<sup>130</sup> The Court accepted that any authority which finds in the course of this assessment that the person concerned has occupied a prominent

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<sup>128</sup> Case C-69/10, *Samba Diouf* [2011], para 61.

<sup>129</sup> Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and others* [2011], paras 99-105. The Court considered that Art 36 PD indicates that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions. The same principle is applicable both to Member States and third countries. See also opinion of A.G. Trstenjak with this case of 22 September 2010.

<sup>130</sup> The Court considered that it follows from the wording of Art 12 QD that the determining authority should carry out an assessment of the specific facts within their knowledge with a view to determining whether there are serious reasons for considering that the acts committed by the person in question are covered by the exclusion clauses.

position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period. Nevertheless the Court deems it necessary that all the relevant circumstances be examined before a decision excluding that person from refugee status can be adopted.<sup>131</sup> It should thus be derived from this judgement that the requirement of an individual assessment laid down in Article 4 (3) QD and Article 8 (2) (a) PD does not preclude the use of presumptions. However, such presumption may not prevent the determining authority to assess the specific circumstances of the case. This implies that the individual must be able to rebut the presumption while referring to his individual circumstances.

*Cases concerning the repayment of charges levied by a Member State contrary to EU law*

In several cases concerning the repayment of charges levied by a Member State contrary to EU law the Court of Justice reached the conclusion that a presumption used by State authorities violated the principle of effectiveness, because this presumption could in practice not be rebutted by an individual party. In *SpA San Giorgio* a company brought an action before the Italian court, reclaiming amounts unduly paid. In these proceedings the State invoked Italian law, which stated that import duties or taxes would not be repaid, when the charge in question had been passed on in any way whatsoever to other persons. This charge was presumed to have been passed on, whenever the goods, in respect of which the payment was effected, had been transferred, in the absence of documentary proof to the contrary. *SpA San Giorgio* questioned the compatibility of these provisions with principles of EU law. The question put before the Court of Justice was whether the requirement of negative documentary proof rendered the exercise of rights, which national courts are under a duty to protect, virtually impossible. The Court of Justice considered that the conditions for repayment of charges levied by a Member State contrary to EU law, may not be contrary to the principles of equivalence and effectiveness. The Court recognised that the Member States may take certain measures to prevent unjust enrichment of the recipients. The Court considered however:

[A]ny requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons [...].<sup>132</sup>

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131 Joined Cases C-57/09 and C-101/09, *B and D* [2010], paras 94 and 98. See also para 77 of the opinion of A.G. Mengozzi with this case.

132 Case C-199/82, *SpA San Giorgio* [1983], para 14. See also Case C-147/01, *Weber's wine world* [2003], paras 109-117.

The Court thus held that a presumption that the duties and charges unlawfully levied or collected, have been passed on to third parties and the requirement for the plaintiff to rebut that presumption, are contrary to EU law.<sup>133</sup>

*Presumptions in the ECtHR's case-law and the views of the Committee against Torture and UNHCR*

The ECtHR and the Committee against Torture have accepted in its case-law that certain rebuttable presumptions may be used in asylum cases. Like the Court of Justice the ECtHR held that it needs to be presumed that States comply with their obligations under international treaties.<sup>134</sup> In the context of the Dublin Regulation it must be presumed in the absence of any proof to the contrary, that the Member States of the EU will comply with their obligations under the ECHR and under EU law.<sup>135</sup> However according to the ECtHR State parties are required to assess on a case-by-case basis whether there is evidence which rebuts the presumption that the State party will comply with its obligations stemming from international or EU law.<sup>136</sup> The ECtHR held in several cases that the presumption that a State Party with the ECHR complies with its obligations under this Convention should be considered rebutted. The most important example of such as case is the judgment in *M.S.S. v Belgium and Greece*. In this case the Court based its judgment on numerous reports issued by human rights organisations which pointed at human rights violations by Greece (see further section 8.3.1 above).<sup>137</sup> Furthermore the ECtHR has held in the context of the assessment of the reliability of diplomatic assurances that 'the existence of domestic laws and accession to international treaties guar-

133 See for comparable judgments: Case C-343/96, *Dilexport* [1999], para 48, Joined Cases C-441/98 and C-442/98, *Kapniki Michailidis* [2000], paras 36-37 and Case C-129/00, *Commission v Italy* [2003] paras 36-40.

134 ECtHR (Adm) 1 September 2009, *Harutioenyan and Others v the Netherlands*, no 43700/07 and ComAT 3 September 2000, *S.C. v Denmark*, no 143/199 and ComAT 28 November 2003, *E.J.V.M. v Sweden*, no 213/2002.

135 ECtHR (Adm) 2 December 2008, *K.R.S. v Greece*, no 32733/08. ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 345.

136 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, paras 341-343, ECtHR (Adm) 7 March 2000, *T.I. v the United Kingdom*, no 43844/98. The judgment in *R.U. v Greece* made clear that the ECtHR itself assesses on a case-by-case basis whether such a presumption is rebutted: 'Il n'en reste pas moins que la Cour ne peut pas fonder son appréciation sur le seul fait que le renvoi du requérant peut se produire vers une Haute Partie contractante à la Convention. Elle doit en même temps se pencher sur les éléments concrets du dossier pour évaluer s'il existe des moyens sérieux de penser qu'un danger de torture ou de peines ou de traitements inhumains ou dégradants menace l'intéressé en cas de renvoi en Turquie.' ECtHR 7 June 2011, *R.U. v Greece*, no 2237/08, para 79.

137 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09. See also ECtHR 12 April 2005, *Shamayev and others v Georgia and Russia*, no 36378/02, where the Court concluded that expulsion from Georgia to Russia amounted to a violation of Art 3 ECHR and ECtHR 7 June 2011, *R.U. v Greece*, no 2237/08, para 82 where the Court held that there was a *prima facie* serious risk that the applicant would become the victim of a treatment contrary to Art 3 ECHR upon return to Turkey.



anteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where [...] reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention'.<sup>138</sup> It may thus not be presumed that a country complies with national law and human rights treaties where reliable sources show the contrary.

Both the Committee against Torture and the UNHCR have criticised the use of presumptions of safety of countries in asylum procedures. They stress the need for an effective opportunity to rebut this presumption and for an individual assessment of the case.<sup>139</sup> UNHCR states that

given the need for an individual assessment of the specific circumstances of the case and the complexities of such a decision, best State practice does not apply any designation of safety in a rigid manner or use it to deny access to procedures. Rather, it bases any presumption of safety on precise, impartial and up-to-date information and admits the applicant to the regular asylum procedure, so that s/he has an effective opportunity to rebut any general presumption of safety based on his/her particular circumstances.<sup>140</sup>

#### 8.4 ASSESSING THE CREDIBILITY OF THE APPLICANT'S STATEMENTS

Most asylum applicants arrive in the EU Member States without documents or evidence supporting their asylum account. In most cases therefore, the asylum application should be examined largely on the basis of the statements of the asylum applicant and his family members made during interviews or in writing, in the light of the available country of origin information.<sup>141</sup> In these cases the assessment of the credibility of the asylum account is often decisive.<sup>142</sup> Once the credibility of the individual asylum account is (seriously) called in question, it is usually concluded that there is no well-founded fear of persecution or that no substantial grounds have been shown for believing

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138 ECHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 147. See also ECtHR 24 March 2009, *O. v Italy*, no 37257/06, para 40 and ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 98.

139 See ComAT Concluding Observations on Estonia (19 February 2008, CAT/C/EST/CO/4, p 3) and France (3 April 2006, CAT/C/FRA/CO/3, p 4). and UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 10 February 2005, p 40.

140 UNHCR Global Consultations on international protection Asylum Processes (Fair and efficient asylum procedures), 31 May 2001, paras 39-40.

141 This follows from Art 4 (2) and (3) QD, which state that the applicant's statements and relevant facts as they relate to the country of origin at the time of taking a decision on the application are elements which should be taken into account in the assessment of the asylum claim. See also for example Herlihy, Gleeson & Turner 2010, pp 351-352.

142 See for example Popovic 2005, p 18 and Thomas 2006, p 79.

that there is a real risk of serious harm.<sup>143</sup> It is argued below that if the *general credibility* of the applicant is established, the Member States should, according to Article 4 (5) QD, be required to consider the facts stated by the applicant established, even if no evidence is submitted in support of these facts (apply the benefit of the doubt).

Assessing the credibility of asylum applicant's account is a very complex and difficult task.<sup>144</sup> EU legislation does not contain any specific standards with regard to the credibility assessment. However some guidance as to the factors which should be taken into account when performing such assessment, may be derived from Article 23 (4) PD. This provision mentions the circumstances in which an asylum application may be processed in an accelerated procedure and may be deemed manifestly unfounded. Member States and human rights bodies such as the ECtHR, Human Rights Committee and the Committee against Torture often take these circumstances into account when examining the credibility of an asylum account:

- the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his identity and/or nationality that could have had a negative impact on the decision
- the applicant has filed another application for asylum stating other personal data
- the applicant has not produced information establishing with a reasonable degree of certainty his identity or nationality
- it is likely that, in bad faith, he has destroyed or disposed of an identity or travel document that would have helped establish his identity or nationality
- the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his having been the object of persecution.

It is argued in this section that national procedural rules or practices which have as a consequence that it is concluded too easily that an asylum account is not credible, undermine the full effectiveness of the EU right to asylum and the principle of *non-refoulement*. From the ECtHR's case as well as the views of the Human Rights Committee and the Committee against Torture several standards emerge which should be complied with in order to ensure the effectiveness of the prohibition of *refoulement*. It follows from this case-law,

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143 UNHCR stated in 2010 that 'a common trend identified through the audit of decisions in several states was that negative decisions were often made on credibility grounds, and did not apply the criteria of the Qualification Directive to facts'. UNHCR, *Improving Asylum Procedures, Comparative Analysis and Recommendations for Law and Practice*, Geneva: March 2010, p 14.

144 See for example Thomas 2006, p 96.

which will be examined more extensively below in this section that the determining authority should focus on the credibility of the essence of the asylum account and that asylum applicants should be granted the opportunity to provide a reasonable explanation for the alleged shortcomings in their account.

*Credibility assessment by the ECtHR, Human Rights Committee and Committee against Torture*

An asylum account is usually deemed credible when the applicant's statements are coherent, detailed and plausible and consistent with information concerning his country of origin.<sup>145</sup> Human rights bodies often consider an asylum account credible when the State authorities have not presented any information which rebuts the applications allegations.<sup>146</sup>

There are many factors which affect the credibility of the asylum account.<sup>147</sup> Often it is a combination of such factors which lead to the conclusion that the asylum account is insufficiently substantiated. First of all contradictions or inconsistencies in the asylum seeker's statements, which are not satisfactorily explained by the applicant<sup>148</sup> or a lack of detail in the asylum applicant's account are generally considered to undermine the credibility of the applicant's statements.<sup>149</sup> In *S.M. v Sweden* the applicant had claimed to have been a courier for the Congolese ambassador in Sweden and a friend, transferring money between them. The Court observed in this case that she had only given very general information about this activity and had failed to specify, for example, how she came to be entrusted with such a secret and dangerous task and the circumstances surrounding her arrest, as well as how exactly she had been able to escape from a hospital where she was guarded by a soldier. This was one of the reasons why the ECtHR concluded in this case that the asylum account was not sufficiently substantiated.<sup>150</sup>

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145 See for example ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, paras 52 and 54, ECtHR 21 October 2010, *Gaforov v Russia*, no 25404/09 para 135, ECtHR 10 June 2010, *Garayev v Azerbaijan*, no 53688/08, para 72. See also UNHCR Handbook, para 204.

146 See for example ECtHR, 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 68, HRC 9 December 2004, *Jonny Rubin Byahuranga v Denmark*, no 1222/2003, para 11.3.

147 See Thomas 2006, p 81.

148 See for example ECtHR (Adm) 8 July 2008, *A.J. v Sweden*, no 13508/07, paras 59-60 and ECtHR 5 March 2002, *Hemat Kar v Sweden*, no 62045/00. See also ComAT General Comment No 1 (1997), A/53/44, para 8 (g) and ComAT 21 June 1999, *M.B.B. v Sweden*, no 104/1998, para 6.6.

149 See ECtHR (Adm) 10 July 2007, *Achmadov and Bagurova v Sweden*, no 34081/05, where the Court considered that no specific details had been provided amongst others regarding the alleged ill-treatment to which the applicants maintained that they were subjected. See also ECtHR 20 January 2011, *N.S. v Denmark*, no 58359/08, para 94.

150 ECtHR (Adm) 10 February 2009, *S.M. v Sweden*, no 47683/08, para 33.

Furthermore it is accepted that the use of a false name or false identity documents without explanation<sup>151</sup> or the applicant's failure to submit identity documents or information on the travel route may undermine the credibility of the asylum account.<sup>152</sup> In *E.N. v Sweden* the ECtHR considered that the applicant gave a false name and date of birth and submitted a forged identity card to the Swedish authorities. Moreover, he alleged that he had used a fake passport and did not know the travel route while, in reality, he had travelled legally to France on his own passport and with a valid entry visa to study in France. 'These untruths clearly affect the applicant's general credibility negatively in the eyes of the Court.'<sup>153</sup>

The applicant is often reproached for a total absence of evidence supporting the asylum claim or of crucial parts of it, in particular when there are already doubts as to the credibility of the asylum account.<sup>154</sup> In *Achmadov and Bagurova v Sweden* the ECtHR for example took into account that the applicants were not in possession of any receipts of police reports or any copies of letters to or from public authorities, lawyers or human rights organisations relating to harassment allegedly suffered by them. Nor did they present any medical statements, despite the fact that one of the applicants visited a doctor after an assault, just weeks before the applicants entered Sweden. The ECtHR found this rather remarkable. It particularly referred to the fact that one of the applicants and her adult son had experience with the German and Italian immigration authorities as a result of an earlier asylum application. Therefore the ECtHR found that they must have been aware that any kind of evidence would have been of significant value to the asylum proceedings.<sup>155</sup>

The Committee against Torture has reproached applicants for a lack of medical evidence supporting an account of past torture or ill-treatment.<sup>156</sup> Also when documents submitted by the applicant, such as arrest warrants,

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151 ECtHR (Adm) 8 July 2008, *A.J. v Sweden*, no 13508/07, para 59 and ECtHR (Adm) 8 December 2009, *E.N. v Sweden*, no 15009/09, para 30.

152 ECtHR (Adm) 10 February 2009, *S.M. v Sweden*, no 47683/08, para 33.

153 ECtHR (Adm) 8 December 2009, *E.N. v Sweden*, no 15009/09, para 30.

154 ECtHR (Adm) 10 July 2007, *Achmadov and Bagurova v Sweden*, no 34081/05, ComAT 21 November 2007, *K.A. and others v Sweden*, no 308/2006, para 7.3. and ComAT 26 November 2008, *L.J.R. v Australia*, no 316/2007, para 7.5.

155 ECtHR (Adm) 10 July 2007, *Achmadov and Bagurova v Sweden*, no 34081/05

156 ComAT 15 May 2008, *M.X. v Sweden*, 311/2007, paras 9.4-9.6, ComAT 2 May 2007, *E.V.I. v Sweden*, no 296/2006, para 8.6, ComAT 2 May 2007, *E.R.K and Y.K. v Sweden*, no 270 & 271/2005, para 7.4 and ComAT 19 May 1998, *A.L.N. v Switzerland*, no 90/1997, para 8.4. The absence of physical evidence of torture should however not be (automatically) held against the applicant. See the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) paras 161 and 172.

court summons or judgments, turn out to be forgeries, this is generally held against the applicant.<sup>157</sup>

Finally an important factor which is generally considered to undermine the credibility of the asylum account is the fact that the asylum applicant submitted new statements or evidence in a late stage of the asylum proceedings. The ECtHR noted for example in *A.A. v Sweden* that the applicant did not mention being threatened by the LLTE in his first two interviews with the migration authorities although one of the interviews lasted approximately six hours. It was not until after the Migration Board had refused to grant him asylum that the applicant claimed to be in danger of revenge from the LLTE. More than two years later after the refusal of the Swedish authorities to reassess the asylum claim, the applicant submitted some documents which allegedly concerned the threats that he had received from the LLTE. The Court stated that, taking these circumstances into account, it could not but endorse the national authorities' observations as to the applicant's credibility. In the same judgment the Court also took into account that the applicant further extended his reasons for seeking asylum, adding that he would be punished as a deserter upon return to Sri Lanka after his asylum application had been rejected twice.<sup>158</sup>

The ECtHR's judgment in *Hilal v the United Kingdom* shows that the ECtHR does not base its conclusion that the applicant's asylum account is not credible only on the fact that statements or evidence were submitted in a late stage of the procedure. In this case the applicant mentioned that he was tortured in his second interview, which took place more than a month after the initial interview. Furthermore he waited almost two years to submit significant evidence, such as the death certificate of his brother, medical reports and a police summons. The ECtHR found no reasons to reject these documents as forged or fabricated, referring to an expert opinion submitted by the applicant which concluded that the documents were genuine. On the basis of these documents and the applicant's statements the ECtHR concluded that there was a real risk of *refoulement*.<sup>159</sup>

#### *Focus on the core of the asylum account*

Inconsistencies, vaguenesses or lack of documents and evidence supporting the asylum account cannot always lead to the conclusion that the asylum account should not be believed. The determining authority sometimes puts too much weight on minor defects and refuse to recognise that the asylum

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157 See for example ECtHR (Adm) 21 June 2005, *Matsiukhina and Matsiukhin v Sweden*, no 31260/04 and ComAT 21 June 1999, *M.B.B. v Sweden*, no 104/1998, para 6.6.

158 ECtHR (Adm) 2 September 2008, *A.A. v Sweden*, no 8594/04, paras 66-68. See also ECtHR 4 December 2008, *Y v Russia*, no 20113/07, ECtHR (Adm) 27 March 2008, *Hakizimana v Sweden*, no 37913/05 and ECtHR 20 January 2011, *T.N. v Denmark*, no 20594/08, para 101.

159 ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99.

applicant's basic story is credible and provides substantial grounds for believing that there is a real risk of *refoulement*.<sup>160</sup> The case-law of the ECtHR and Committee against Torture show that the *general credibility* of the asylum account should be assessed, while attaching less weight to inconsistencies, vaguenesses or uncertainties in less relevant parts of the account.<sup>161</sup>

In particular in the ECtHR's case-law some important examples can be found in which the Court found a violation of Article 3 ECHR although there were doubts about certain parts of the applicant's asylum account.<sup>162</sup> In *Said v the Netherlands* for example the Dutch authorities found the applicant's account of his arrest, of the reasons for it, and of his escape, so implausible as to invalidate his claim of having deserted from the army. The Court proceeded however to an assessment of the general credibility of the statements made by the applicant before the Netherlands authorities and during the proceedings before the Court. The Dutch authorities had not disputed that the applicant had served in the Eritrean army following a general mobilisation. The Court considered that a strong indication that the applicant was indeed a deserter lied in the fact that he applied for asylum in the Netherlands at a time when demobilisation had not yet begun and would not begin for another year. It considered that it was difficult to imagine by what means other than desertion the applicant might have left the army. 'Even if the account of his escape may appear somewhat remarkable [...] it does not detract from the overall credibility of the applicant's claim that he is a deserter'. The Court concluded that being a deserter, Said faced a real risk of *refoulement* upon return to Eritrea.<sup>163</sup>

In *R.C. v Sweden* the Court also ignored inconsistencies in the applicant's escape story, although in this case this part of the asylum account could easily be considered essential for the asylum claim. The applicant claimed that friends had helped him to escape from the revolutionary court, where he would be tried for his participation in demonstrations against the Iranian regime. The Government questioned this story while referring to international sources which stated that there was very little public control of these courts, that the proceedings were only open to the parties and, exceptionally, to some family members, and that people who entered and exited the court building were carefully checked. The ECtHR found however that 'the applicant's basic story was consistent throughout the proceedings and that notwithstanding some

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160 See for example Wouters pp 268-269 and Gorlick 2003, p 371-372.

161 ComAT 3 June 2010, *Njamba and Balikosa v Sweden*, no 322/2007, para 9.5, CAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97 and ComAT 8 May 1998, *A.F. v Sweden*, no 89/1997. See also ComAT General Comment No 1 (1997), A/53/44, para 8 (g) and UNHCR Handbook, para 204, which also speaks of the 'general credibility' of the applicant.

162 See also Spijkerboer 2009-II, p 59.

163 ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, paras 50-53. See also ECtHR 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 69.

uncertain aspects, such as his account as to how he escaped from prison, such uncertainties did not undermine the overall credibility of his story'.<sup>164</sup>

Also in *N v Finland* the Court held that the applicant's basic story was credible although it had 'certain reservations' about the applicant's own testimony before the Delegates of the ECtHR which it considered to have been evasive on many points.<sup>165</sup> The Court was not prepared to accept every statement of his as fact. It found in particular the applicant's account of his journey to Finland not credible. The Finnish authorities had rejected the asylum claim amongst others because of inconsistencies in the applicant's asylum account, which was not supported by documents.<sup>166</sup> Furthermore the applicant's identity could not be ascertained as the applicant used several names and had not presented any identity documents.<sup>167</sup>

It should furthermore be noted that when the risk of *refoulement* follows from the general situation in the country of origin the credibility of the individual asylum account (except for the person's nationality or State of habitual residence) is of no importance.<sup>168</sup> If a person claims to face a real risk of *refoulement* because he belongs to a vulnerable group, it is sufficient to substantiate that there are serious reasons to believe in the existence of a systematic practice of ill-treatment of that group and that he is a member of the vulnerable group concerned to fall within the scope of Article 3 ECHR.<sup>169</sup> In those situations inconsistencies regarding other elements of the asylum account (e.g. past experiences, age, travel route) cannot lead to refusal of protection.

#### *Explanations for alleged inconsistencies or late statements*

If the examining authorities present information which gives strong reason to question the veracity of an applicant's submissions, the individual must

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164 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, paras 44 and 52.

165 The Court considered credible that the applicant belonged to President Mobutu's and the *Division Spéciale Présidentielle* (DSP) commander's inner circle. Furthermore the Court found sufficiently credible the applicant's statement that as an official in the DSP he took part in various events during which dissidents seen as a threat to President Mobutu were singled out for harassment, detention and possibly execution.

166 The applicant's statements made during the Finnish asylum procedure differed from his statements made in the context of an earlier asylum procedure in the Netherlands. According to the Finnish authorities the applicant's statements concerning his role during the overthrow of President Mobutu and his escape to Finland had been inconsistent and imprecise.

167 ECtHR 26 July 2005, *N v Finland*, no 38885/02, paras 152-157. Wouters states that in *N v Finland* elements could have seriously undermined the claim. Wouters 2009, p 268.

168 See ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07 paras 301-304. In this case the ECtHR did not consider relevant whether the applicant made plausible that he belonged to a minority clan.

169 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 132.

provide a satisfactory explanation for the alleged discrepancies.<sup>170</sup> This implies that the applicant must be offered the opportunity to rebut the determining authority's findings and that his explanations must be seriously assessed. In *Hilal v the United Kingdom* for example the applicant failed to mention the fact that he was tortured in his first interview. The ECtHR accepted the applicant's explanation for his failure, namely that that he did not think he had to give all the details until the full interview a month later. The ECtHR considered that this explanation had become far less incredible in the light of the medical report submitted by the applicant which confirmed that the applicant was tortured.<sup>171</sup>

#### *Psychological trauma*

Notably, it is accepted by the Committee against Torture that inconsistencies or vaguenesses in the asylum account may be the result of psychological problems caused by past torture. In that case these inconsistencies and vaguenesses may not be held against the asylum applicant. The Committee against Torture has held in many cases that 'complete accuracy is seldom to be expected by victims of torture'.<sup>172</sup> This applies in particular when the asylum seeker is suffering of a post traumatic stress syndrome.<sup>173</sup> Also the fact that it has been claimed or established that a person was tortured or detained, is taken into account by the Committee.<sup>174</sup> In this regard the Committee against Torture attaches importance to medical evidence provided by the author.<sup>175</sup> In *Falcon Ríos v Canada* for example the national authorities concluded that the complainant's testimony contained significant gaps. The Committee noted that, according to the psychologist's report, the complainant displayed 'great psychological vulnerability' as a result of the torture to which he had allegedly been subjected. The same report stated that Mr. Falcon Ríos was 'very destabilized by the current situation, which presents concurrent difficulties', and that he was 'bruised, weakened by the torture he had undergone and

170 See ECtHR (Adm) 8 March 2007, *Collin and Akaziebie v Sweden*, no 23944/05, ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 50. See also Gorlick 2003, p 371.

171 ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 64.

172 See for example ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, para 7.6, ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, no 185/2001, para 10, ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97, para 6.6, ComAT 8 May 1996, *Kisoki v Sweden*, no 41/1996, para 9.3 and ComAT 8 May 1995, *Alan v Switzerland*, no 21/1995, para 11.3.

173 In ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97, para 6.6 and ComAT 15 November 1996, *Kaveh Yaragh Tala v Sweden*, no 43/1996, para 10.3.

174 ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, paras 7.5-7.6.

175 ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97, para 6.6 and ComAT 8 May 1998, *A.F. v Sweden*, no 89/1997, para 6.5. In ComAT 3 June 1999, *N.P v Australia*, no 106/1998, para 6.6 the ComAT held against the applicant that he failed to submit medical evidence, which could have explained the important inconsistencies in the author's statements before the Australian authorities.



events associated with trauma'. In the Committee's view, the vagueness referred to by the State party could be seen as a result of the psychological vulnerability of the complainant mentioned in the report; moreover, the vagueness was not so significant as to lead to the conclusion that the complainant lacked credibility.<sup>176</sup> Also the ECtHR acknowledged that complete accuracy as to dates and events cannot be expected in all circumstances from a person seeking asylum.<sup>177</sup> However, the Committee against Torture and ECtHR do not accept that major inconsistencies can be explained by the fact that the person concerned is a victim of torture or ill-treatment.<sup>178</sup>

Also the late submission of statements or evidence may be the result of psychological trauma. In that case the tardiness of the submissions does not affect the credibility of the asylum account.<sup>179</sup> The ECtHR has considered that 'it may be an ordeal to talk about experiences of torture'<sup>180</sup> and that it 'would not deny that symptoms of post-traumatic stress disorder may indeed materialise years after events'.<sup>181</sup> However, the ECtHR has decided in several cases that late statements could not be explained by the applicant's psychological problems. In *Cruz Varas v Sweden* the Court stated that:

[E]ven if allowances are made for the apprehension that asylum-seekers may have towards the authorities and the difficulties of substantiating their claims with documentary evidence, the first applicant's complete silence as to his alleged clandestine activities and torture by the Chilean police until more than eighteen months after his first interrogation by the Växjö Police Authority casts considerable doubt on his credibility in this respect.<sup>182</sup>

The applicant in this case stated two years after the asylum application that he was subjected to sexual abuse. He said that he tried to suppress this event and that he found it very painful to talk about. Furthermore he submitted a medical report which concluded that nothing had been established which contradicted the assumption that Cruz Varas had been subjected to such torture and sexual abuse as he alleged and that there were strong indications that

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176 ComAT 17 December 2004, *Enrique Falcon Ríos v Canada*, no 133/99, para 8.5.

177 ECtHR (Adm) 17 January 2006, *Bello v Sweden*, no 32213/04.

178 See ECtHR (Adm) 17 January 2006, *Bello v Sweden*, no 32213/04, where the ECtHR was 'struck by the number of major inconsistencies in the applicant's story' and ComAT 22 November 2004, *S.U.A. v Sweden*, no 223/2002, para 6.5. The ComAT considered however in ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97, para 6.7, 'that the principle of strict accuracy does not necessarily apply when the inconsistencies are of a material nature'. See also Wouters 2009, p 267.

179 See with regard to this issue Bruin & Reneman 2006, pp 87-109. See on the potential influence of psychological factors on a person's ability to recount past events: Bloemen, Vloeberghs & Smits 2006, pp 43-85, Herlihy 2005, p 123-137 and Rhys Jones, p 383. See also UNHCR, *Improving Asylum Procedures*, s 5, pp 23-24.

180 ECtHR (Adm) 16 March 2004, *Nasimi v Sweden*, no 38865/02.

181 ECtHR (Adm) 10 November 2005, *Paramsothy v the Netherlands*, no 14492/03.

182 ECtHR (Plen) 20 March 1991, *Cruz Varas v Sweden*, no 15576/89, para 78.

he suffered from post traumatic stress syndrome. Also in more recent cases the ECtHR refused to recognise that psychological trauma provided an acceptable explanation for new statements which were made considerable time (a year or more) after the first asylum application. In those cases the Court considered that the applicant had not substantiated that his mental problems were caused by experiences in the country of origin.<sup>183</sup>

The Committee against Torture seems to be more sensitive to the circumstances which may prevent victims of sexual violence to talk about their experiences to the authorities examining the asylum claim.<sup>184</sup> In *V.L. v Switzerland* the Committee against Torture stated in a case of a woman who submitted almost two years after her arrival in Switzerland that she was raped in her country of origin:

The complainant's explanation of the delay in mentioning the rapes to the national authorities is totally reasonable. It is well-known that the loss of privacy and prospect of humiliation based on revelation alone of the acts concerned may cause both women and men to withhold the fact that they have been subject to rape and/or other forms of sexual abuse until it appears absolutely necessary. Particularly for women, there is the additional fear of shaming and rejection by their partner or family members.<sup>185</sup>

The Committee considered in this case that the complainant's allegation that her husband reacted to the complainant's admission of rape by humiliating her and forbidding her to mention it in their asylum proceedings added credibility to her claim. It noted that as soon as her husband left her, the complainant who was then freed from his influence immediately mentioned the rapes to the national authorities. The Committee against Torture considered further evidence of her psychological state or psychological obstacles, as called for by the State party, unnecessary. The Committee concluded:

The State party's assertion that the complainant should have raised and substantiated the issue of sexual abuse earlier in the revision proceedings is insufficient basis upon which to find that her allegations of sexual abuse lack credibility, particularly in view of the fact that she was not represented in the proceedings.<sup>186</sup>

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183 ECtHR (Adm) 10 November 2005, *Paramsothy v the Netherlands*, no 14492/03, ECtHR (Adm) 31 May 2005, *Ovdienko v Finland*, no 1383/04, ECtHR (Adm) 16 March 2004, *Nasimi v Sweden*, no 38865/02.

184 See also UNHCR Handbook, para 198, which states that a person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.

185 ComAT 22 January 2007, *V.L. v Switzerland*, no 262/2005, para 8.8.

186 ComAT 22 January 2007, *V.L. v Switzerland*, no 262/2005, para 8.8.

*The minor age of the applicant*

It was argued in sections 7.1.2 and 7.2.5 that Article 12 read in the light of Article 24 of the Charter requires that unaccompanied as well as accompanied minors have the right to a personal interview in order to present their asylum claim. It also follows from Article 24 (1) of the Charter that the statements made by a minor in such an interview should be taken into consideration in accordance with the age and maturity of the child. On the basis of the views of the Committee on the Rights of the Child and UNHCR it is argued here that account should be taken of the age and maturity of the child when assessing the credibility of the minor's statements. Inconsistencies or vaguenesses in the child's asylum account may well be explained by the child's young age or immaturity.

According to the Committee on the Rights of the Child the requirement that due weight must be given to the child's views in accordance with his age and maturity means that 'the views of the child have to be seriously considered when the child is capable of forming her or his own views'.<sup>187</sup> This capacity should be assessed on a case by case basis. In the context of Article 12 CRC concerning the right to be heard, 'maturity' is 'the capacity of a child to express her or his views on issues in a reasonable and independent manner'.<sup>188</sup> The Committee states: 'The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of that child'.<sup>189</sup>

UNHCR in its Guidelines on Child Asylum Claims points at the fact that children recount their experiences differently than adults and that this has implications for the assessment of the credibility of their statements:

Children cannot be expected to provide adult-like accounts of their experiences. They may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions, lack of education, fear of State authorities or persons in positions of power, use of ready-made testimony by smugglers, or fear of reprisals. They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that is easily understandable to an adult. Some children may omit or distort vital information or be unable to differentiate the imagined from reality. They also may experience difficulty relating to abstract notions, such as time or distance. Thus, what might constitute a lie in the case of an adult might not necessarily be a lie in the case of a child. It is, therefore, essential that examiners have the necessary

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187 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 28.

188 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 30.

189 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 30.

training and skills to be able to evaluate accurately the reliability and significance of the child's account.<sup>190</sup>

*Applying the benefit of the doubt*

As was stated above a (total) lack of evidence can undermine the credibility of the applicant's asylum account, in particular if no reasonable explanation is offered for such a lack of evidence. However, Member States should not require proof of each and every statement submitted by the applicant.<sup>191</sup> This follows from Article 4 (5) QD, which only applies if the Member State has made use of the option provided for by Article 4 (1) QD to place the burden of producing evidence in support of the asylum claim on the asylum applicant.<sup>192</sup> Under certain conditions the applicant should be granted 'the benefit of the doubt' and his statements should be accepted as fact although no or insufficient proof is available.<sup>193</sup> Article 4 (5) QD states that where Member States place the burden of proof on the applicant and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, if the following conditions are met:

- a) the applicant has made a genuine effort to substantiate his application;
- b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
- c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
- d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
- e) the general credibility of the applicant has been established.

It is submitted here that a strict application of the conditions mentioned in 4 (5) QD is capable of undermining the effectiveness of the EU right to asylum and the prohibition of *refoulement*. It was argued above that the principle of effectiveness requires Member States to focus on the credibility of the core or the asylum account (general credibility of the asylum applicant). The con-

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190 UNHCR, Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Geneva: 22 December 2009, para 72.

191 See also Boeles and others 2009, p 338.

192 According to Battjes this provision means that if the credibility of the applicant's statements has been established, these statements should be accepted as facts for the purpose of the assessment of the asylum claim. If the conditions listed in Art 4 (5) QD are not met 'the relevant aspect of the claim may be regarded as not "substantiated" [...]. Battjes p 228.

193 According to Gorlick the application of the benefit of the doubt has been widely adopted in national determination procedures and as part of UNHCR's practices in the field. Gorlick 2003, p 366.

ditions mentioned in Article 4 (5) (a) -(d) QD may affect the general credibility of the asylum applicant, but this is not necessarily the case. The clearest example of a condition which on its own cannot undermine the credibility of the core of the asylum account is the condition mentioned under (d). The fact that the asylum application was not lodged at the earliest possible time in itself does not exclude that a person has a well-founded fear of persecution or runs a real risk of serious harm.<sup>194</sup> It would be contradictory if the Member States are allowed to refuse the benefit of the doubt on (one of) the conditions mentioned under (a)- (d), while they did not consider them to undermine the general credibility of the asylum applicant. Therefore the only condition which should be considered a self-standing ground to refuse the benefit of the doubt is the fact that the general credibility of the applicant could not be established.

Such explanation would be in line with the views of the ECtHR,<sup>195</sup> the Committee against Torture and UNHCR. They seem to be of the opinion that the benefit of the doubt should be applied if the asylum account is generally credible or 'sufficiently substantiated and reliable'.<sup>196</sup> UNHCR points at the fact that, even if the applicant made genuine efforts to substantiate his story, there may still be a lack of evidence of some of his statements. According to UNHCR

it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.<sup>197</sup>

UNHCR states that the benefit of the doubt should only be given if all available evidence has been obtained and checked. This seems to be a procedural requirement, which ensures that a careful examination has been carried out before the benefit of the doubt is applied. The only material condition which must be fulfilled is that the examiner is satisfied as to the applicant's general credibility. 'The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.'<sup>198</sup> UNHCR mentions that there

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194 See for example ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 101.

195 The ECtHR acknowledged that, owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt in assessing the credibility of their statements and the supporting documents. See for example ECHR (Adm) 8 March 2007, *Collin and Akaziebie v Sweden*, no 23944/05 and ECtHR (Adm) 8 July 2008, *A.J. v Sweden*, no 13508/07, para 56.

196 ComAT 29 May 1997, *Aemei v Switzerland*, no 34/1995, para 9.6. See also ComAT 3 June 1999, *H.D. v Switzerland*, no 112/1998, para 6.4.

197 UNHCR Handbook, para 203.

198 UNHCR Handbook, para 204. See also para 196 of the Handbook. UNHCR's Note on Burden and Standard of Proof in Refugee Claims, Geneva, 16 December 1998, para 12 states that the benefit of the doubt should be granted 'where the adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim'. See also Gorlick 2003, pp 364 and 366.

may be 'good reasons' to refuse the benefit of the doubt even though the applicant's account appears to be credible. It does not explain however what could be considered such good reasons. UNHCR is of the opinion that a liberal application of the benefit of the doubt may be called for in cases of unaccompanied minors.<sup>199</sup>

An example of a judgment in which the ECtHR seems to have granted the benefit of the doubt is *NA v the United Kingdom*. In this case the Court accepted that the detention of the applicant was recorded by the authorities in Sri Lanka (one of the risk factors identified by the Court) although there were many uncertainties about this record. The document signed by the applicant's father in order to secure his son's release was not available to the parties and therefore its precise nature was not known. The Court held that, whatever the nature of that document, at the very least it amounted to a record of the applicant's detention. The Court took into account in its assessment that the credibility of the applicants account was not disputed by the government of the State Party.<sup>200</sup> In *Gaforov v Russia* the Court accepted as a fact the applicant's submission that he had already experienced ill-treatment at the hands of the Tajikistani law enforcement officials. The Court observed that the applicant did not adduce certain evidence to support his submission, but it considered nonetheless that the applicant's account of events was consistent and detailed.<sup>201</sup> In *N v Sweden* finally the Government contended that the applicant's claim that her family had rejected her and that she had no social network or male protection in her home country was unsubstantiated. The Court noted, however, that although there were divergences as to whether the applicant's last contact with her family was in the summer of 2005 or in October 2005, no information had been presented which gave strong reasons to question the veracity of her submissions that she had had no contact with her family for almost five years, which did support her claim that she no longer had a social network or adequate protection in Afghanistan.<sup>202</sup>

*Subconclusion: assessing credibility*

It should be concluded on the basis of the case-law examined above that Member States may refuse an asylum claim in case of a lack of evidence and major deficiencies in an applicant's asylum story. However the full effectiveness of the EU right to asylum and the prohibition of *refoulement* is seriously undermined if Member States focus on marginal issues such as non-compliance

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199 UNHCR Handbook, para 218 and UNHCR, Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Geneva: 22 December 2009, para 73.

200 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 143.

201 ECtHR 21 October 2010, *Gaforov v Russia*, no 25404/09, para 135.

202 ECtHR 20 July 2010, *N. v Sweden*, no 23505/09, para 61.

with procedural rules or inconsistencies in parts of the applicant's account which do not relate to the essence of the asylum claim.

Asylum applicants should be granted the opportunity to explain the alleged deficiencies in their asylum account. It follows from the ECtHR's case-law and the Committee against Torture's views that inconsistencies in an asylum account or late statements by the applicant, which are caused by psychological trauma should not be held against the applicant. However, the ECtHR is reluctant to accept that inconsistencies and in particular late statements are the result of psychological problems, while the Committee against Torture is more ready to accept such problems as an explanation. It was explained in chapter 4 that more weight should be attached to the ECtHR's case-law as a source of inspiration of EU fundamental rights than the view of the Committee against Torture. However arguably this should be different if it concerns the weight which should be attached to the late statements of persons suffering from psychological problems. The Committee against Torture is specialised in the examination of cases of victims of torture, and therefore potentially more sensitive to the potential difficulties encountered by such persons when talking about their experiences. Furthermore it should be noted that the ECtHR does not deem an asylum account not credible, only because of the fact that the applicant made new statements concerning his asylum motives or provided evidence in a late stage of the procedure. In the case of *Hilal* the ECtHR was convinced that there was a risk of *refoulement*, even though the applicant did not mention that he was tortured in his first interview and provided crucial evidence his asylum claim considerable time after the asylum application had been lodged. It follows from the views of the Committee on the Rights of the Child and UNHCR that account should be taken of the age and maturity of the child when assessing the credibility of the minor's statements.

As soon as the general credibility of the asylum applicant is established, his statements should according to Article 4 (5) QD be accepted as facts, without requiring further evidence. Refusing the benefit of the doubt in such a situation, for example because the applicant did not comply with certain procedural requirements, should be considered to undermine the effectiveness of the EU right to asylum and the prohibition of *refoulement*.

## 8.5 EVIDENTIARY ASSESSMENT

Asylum applicants may submit all kinds of documents or evidence in order to support their asylum claim. In this section the question is addressed which types of evidence should be taken into account in the assessment of the asylum claim and how this evidence must be valued. The determining authority of the Member States may regard certain types of evidence as irrelevant or attach very limited weight to them. According to Dutch case-law for example statements of the applicant's family members or friends who are still residing in

his country of origin are considered to be of no value because they do not originate from an 'objective source'.<sup>203</sup> Documents of which the authenticity cannot be established by the Dutch authorities, because of a lack of reference documents, are not taken into consideration in subsequent asylum applications as they are not considered to be new facts or circumstances.<sup>204</sup>

In this section it is argued that the automatic exclusion of specific types or forms of evidence or the fact that very little weight is attributed to them, may violate the duty to conduct an appropriate examination of the asylum claim, which follows from Article 8 (2) PD read in the light of the principle of full effectiveness of EU law.

Section 8.6.1 addresses the weight which must be granted to expert reports. In this section two types of expert reports are specifically addressed: country of origin information and medical reports.

#### *EU standards regarding evidentiary assessment*

Article 4 QD mentions the elements which should be taken into account in the assessment of the asylum claim and therefore also gives some general indications as to which types of documents or other evidence should be considered relevant. It may be derived from Article 4 (2), (3) and (4) QD that evidence concerning the following elements should be into consideration: the position and personal circumstances of the applicant,<sup>205</sup> in particular the reasons for applying for asylum including previous persecution to which he was exposed,<sup>206</sup> the situation in the country of origin,<sup>207</sup> the applicant's activities in the country of refuge, which may lead to a risk of *refoulement* upon his return to the country of origin<sup>208</sup> and the availability of safe third countries.<sup>209</sup> As the Qualification Directive does not address which specific types of evidence should be included or excluded from the assessment of the asylum claim, the determining authority has wide discretion in the evaluation of all materials adduced by the applicant. However it is conceivable that the ex-

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203 These statements may regard their own observations or experiences or concern the risk the applicant faces upon return. See for example Administrative Jurisdiction Division of the Council of State 18 November 2008, no 200805862/1, where the Council of State considered that the statements made by the applicant's father could not be regarded as new facts as they did not originate from an objective source and were not supported by any other concrete evidence.

204 See for example Administrative Jurisdiction Division of the Council of State 26 May 2009, no 200902200/1/V2.

205 Art 4 (3) and (4) refer to background, gender and age, identity, nationality, country(ies) and place(s) of previous residence and previous asylum applications.

206 See Art 4 (4) QD.

207 See Art 4 (2) and (3) QD.

208 Art 4 (3) QD mentions 'the applicant's activities since leaving the country of origin' as a relevant element.

209 Art 4 (3) QD mentions 'whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship' as a relevant element.



clusion of relevant evidence from the assessment of the asylum claims or the fact that little value is attributed to this evidence is capable of undermining the effectiveness of the EU right to asylum and the principle of *non-refoulement*. Such exclusion should therefore be considered contrary to the duty to conduct an appropriate examination of the asylum claim following from Article 8 (2) PD and the effectiveness of the EU prohibition of *refoulement* and the right to asylum.

The Court of Justice has ruled in several cases that the requirement of a particular type of evidence in support of a claim may undermine the effectiveness of EU law. In *Bolbol* the Court held that in order to prove that a person availed himself of the assistance of UNWRA, registration with UNWRA is sufficient proof. However, as such assistance can be provided even in the absence of such registration, the beneficiary must be permitted to adduce evidence of that assistance by other means.<sup>210</sup> A.G. Sharpston in her opinion with this case stated that ‘the State is entitled to insist on some evidence, but not on the best evidence that might be produced in an ideal world’.<sup>211</sup>

The principle that national authorities are not allowed to accept only the best possible evidence in support of a claim under EU law can also be found in the case-law concerning other fields of EU law, in particular tax law. In *SpA San Giorgio*, the Court of Justice considered that requirements of proof having the effect of making it virtually impossible or excessively difficult to exercise a Community right may include ‘special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence’.<sup>212</sup> In *Meilicke* the Court of Justice held under the principle of sound administration and the principle of proportionality<sup>213</sup> that the tax authorities of a Member State are entitled to require the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for a tax advantage provided

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210 Case C-31/09, *Bolbol* [2010], para 52. See also the opinion of A.G. Sharpston with this case, in which she stated that UNRWA sometimes provides assistance without registering a person. Sometimes, the administrative records may lag behind the event; or may themselves have been destroyed during hostilities. She therefore rejected the French Government’s submission that only actual proof of UNRWA registration will suffice (para 98).

211 A.G. Sharpston, opinion with Case C-31/09, *Bolbol* [2010], para 102.

212 Case C-199/82, *SpA San Giorgio* [1983], para 14. See section 8.4. for a description of the case. See also Case C-228/98, *Dounias* [2000], paras 71-72, where the Court of Justice held that Community law does not preclude a provision of national law under which, in judicial proceedings in which it is sought to establish State liability with a view to obtaining compensation for damage caused by a breach of Community law, witness evidence is admissible only in exceptional cases, provided that such a provision does not prevent individuals from asserting rights which they derive from the direct effect of Community law.

213 The case concerned a measure ensuring the effectiveness of fiscal supervision which restricted free movement of capital. Such measure is only justified if the principle of proportionality is observed. See paras 40-42 of the judgment.

for in the legislation applicable to the case at issue have been met and, consequently, whether or not to grant that advantage. However according to the Court such assessment must not be conducted too formalistically. The tax authorities of the Member State of taxation should accept documentary evidence which enables them to ascertain, clearly and precisely, whether the conditions for obtaining a tax advantage are met. Evidence should be taken into account even if it lacks the degree of detail and is not presented in the form of a corporation tax certificate, which is usually required. Only if no such evidence is produced may the relevant tax authorities refuse the tax advantage sought.<sup>214</sup> It follows from these judgments that the (automatic) exclusion of particular forms of evidence may be contrary to the principle of effectiveness.<sup>215</sup>

*Evidentiary assessment in asylum cases before the ECtHR, Committee against Torture and Human Rights Committee*

More specific guidance as to the relevance and value of certain types of evidence is offered by the case-law of the ECtHR, Committee against Torture and Human Rights Committee. These bodies have not excluded specific types of evidence when ruling in *refoulement* cases.<sup>216</sup> Documents which they considered particularly relevant are for example: court summons,<sup>217</sup> police summons,<sup>218</sup> judgments entailing a criminal conviction of the applicant<sup>219</sup> and death certificates of family members.<sup>220</sup> Letters written by representatives of political parties or other organisations of which the applicant claims to have been a member or for which he claims to have been active have also been taken into account.<sup>221</sup> The same applies to statements by human rights organisations<sup>222</sup> or relatives<sup>223</sup> regarding the position of the applicant. In *Klein v*

214 Case C-262/09, *Meilicke and others* [2011], paras 43-47. See also Case C-310/09, *Accor* [2011], paras 99-101.

215 See also Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures, para 4, which states that 'recognition of refugee status is not dependent on the production of any particular formal evidence'.

216 ComAT General Comment No 1 (1997), A/53/44, para 7 states that all pertinent information may be introduced by either party in order to establish whether the applicant would be in danger of being tortured.

217 ComAT 11 May 2007, *A.A. v Switzerland*, no 268/2005, para 8.5.

218 ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 65.

219 ECtHR 8 November 2005, *Bader v Sweden*, no 13284/04, para 44, ECtHR 22 June 2006, *D and others v Turkey*, no 24245/03, para 48.

220 ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 64.

221 ComAT 22 January 2007, *El Rgeig v Switzerland*, no 280/2005, para 7.4, ComAT 5 December 2005, *Dadar v Canada*, no 258/2004, para 8.6 and ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, 185/2001, para 10.

222 ECtHR, 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 68, ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 71 and 144, ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, paras 4.7, 5.8 and 7.6, ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, 185/2001, para 10.

Russia important weight was attached to a statement of the Vice-President of Colombia printed in a Russian news paper, although the source of the information was unknown.<sup>224</sup> In *Hilal v the United Kingdom* and *N. v Finland* the ECtHR took into account the statements of the applicant's wife.<sup>225</sup>

Documents are only considered relevant if they contain information relating to the applicant personally<sup>226</sup> and support the risk of *refoulement*.<sup>227</sup> In *Mawajedi Shikpohkt and A. Makkamat Shole v the Netherlands*, the ECtHR noted that the documents which had been submitted in support of the applicant's allegations contained little of any direct relevance to the applicant herself. In so far as they expressed any fears on her behalf, they were, in the ECtHR's view, vague and speculative.<sup>228</sup> In *Minani v Canada* the Committee against Torture took into consideration that the letter of the President of a Burundian human rights organisation only mentioned the risk of being detained and not the real and personal risk of the applicant being tortured upon return to Burundi. It concluded that the applicant did not submit objective elements of such real and personal risk.<sup>229</sup>

The ECtHR seems to consider copies of documents less valuable than original documents.<sup>230</sup> However copies have been taken into account by the supervising bodies.<sup>231</sup> The fact that there is no official translation of a document may also work to the applicant's detriment.<sup>232</sup> As was explained in section 8.5

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223 ECtHR 21 October 2010, *Gaforov v Russia*, no 25404/09, para 135.

224 ECtHR 1 April 2010, *Klein v Russia*, no 24268/08, para 54.

225 ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 66. In this case the applicant's wife applied for asylum in the United Kingdom several years after the applicant had applied for asylum there. In ECtHR 26 July 2005, *N v Finland*, no 38885/02 the ECtHR took statements from the applicant's common law wife, who he met in Finland in a reception centre for asylum applicants.

226 ECtHR (Adm) 6 September 2007, *M. v Sweden*, no 22556/05, para 92.

227 ECtHR (Adm) 16 June 2009, *A.M. and others v Sweden*, no 38813/08. See also ECtHR (Adm) 6 September 2007, *M. v Sweden*, no 22556/05, para 59, where the Court considered a letter issued by the chairman of a political party insignificant because it was issued three years after the applicant had left Tunisia, it contained no information as to what political activities the applicant had engaged in, when, or how the issuer knew each sympathiser and member of the party, or the applicant for that matter.

228 ECtHR (Adm) 27 January 2005, *Mawajedi Shikpohkt and Makkamat Shole v the Netherlands*, no 39349/03. See also ComAT 19 May 1998, *K.N. v Switzerland*, no 94/1997, para 10.3.

229 ComAT 10 December 2009, *Minani v Canada*, no 331/2007, para 7.7. See also ECtHR (Adm) 20 October 2008, *M.H. v Sweden*, no 10641/08, para 39. where the ECtHR considered that the alleged death threats appeared to be letters informing the applicant's family that he should be careful rather than actual threats.

230 ECtHR (Adm) 10 February 2009, *S.M. v Sweden*, no 47683/08, para 34.

231 ComAT 18 November 1994, *Khan v Canada*, no 15/1994, para 12.4. See also ECtHR (Adm) 10 July 2007, *Achmadov and Bagurova v Sweden*, no 34081/05, where the ECtHR held against the applicants that they were not in possession of any receipts of police reports or any copies of letters to or from public authorities, lawyers or human rights organisations relating to the harassment at issue.

232 ECtHR (Adm) 12 October 2010, *A.M. v France*, no 20341/08.

if a document submitted by the applicant turns out to be a forgery, this is taken into account in the assessment of the credibility of the asylum account. The ECtHR and Committee against Torture attach important weight to the findings by the examining authorities, often the embassy in the country of origin, as to the veracity of documents. This applies in particular when these findings are not addressed by the asylum applicants.<sup>233</sup> In *Mehdi Zare v Sweden* the Committee against Torture noted that the complainant had adduced what he alleged were two summonses to attend a court. According to the Committee the State party had provided extensive reasons, based on expert evidence obtained by its consular services in Tehran, why it questioned the authenticity of each of the documents. In reply the complainant argued that, apparently, the criminal procedure was not applied in this case. The Committee considered that the complainant had failed to disprove the State party's findings in this regard, and to validate the authenticity of any of the documents in question.<sup>234</sup>

Also the fact that documents are submitted late in the asylum proceedings without valid explanation, generally reduces their value as evidence.<sup>235</sup> In *Nasimi v Sweden* for example the ECtHR took into account that a copy of purported revolutionary court summonses were submitted to the Swedish Aliens Appeals Board one year and eight months after its date of issuance. The Court stated that 'notwithstanding the difficulties of obtaining a copy of such a document in Iran, the applicant has acknowledged, in his submissions to the ECtHR, that he was aware of the existence of the summons long before he received a copy of it'. In these circumstances, the ECtHR found it remarkable that he apparently failed to even mention the document to the immigration authorities earlier. It also noted, that the applicant submitted the summons at a time when he had already had two asylum applications rejected.<sup>236</sup> In *Chahin v Sweden* the Committee against Torture considered that the complain-

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233 See for example ECtHR (Adm) 21 June 2005, *Matsiukhina and Matsiukhin v Sweden*, no 31260/04, where the ECtHR considered that the Swedish authorities had given a very detailed account of alleged inaccuracies in the content of the document submitted by the applicants and that the applicants had not responded to these allegations except to state that the findings consisted of disinformation from the Belarusian authorities.

234 ComAT 17 May 2006, *Mehdi Zare v Sweden*, no 256/2004, para 9.5. See also ComAT 8 July 2011, *M. S. G. et al. v Switzerland*, no 352/2008, para 11.4 and ComAT 2 May 2007, *E.V.I. v Sweden*, no 296/2006, para 8.6, ComAT 2 May 2007, *E.R.K and Y.K. v Sweden*, no 270 & 271/2005, para 7.5. In ComAT 16 December 1998, *J.U.A. v Switzerland*, no 100/1997, the ComAT noted that it had not been clearly established that the arrest warrant furnished by the applicant was an authentic document, although the applicant was acquitted by a Swiss criminal court for falsifying documents.

235 ECtHR (Adm) 6 September 2007, *M. v Sweden*, no 22556/05, para 92, where the ECtHR considered a letter issued by the chairman of a political party insignificant, amongst others because it was issued three years after the applicant had left his country of origin. See also ComAT 16 May 2003, *H.B.H. et. al v Switzerland*, no 192/2001, para 6.8.

236 ECtHR (Adm) 16 March 2004, *Nasimi v Sweden*, no 38865/02.

ant had provided satisfactory explanations for the delay in submitting a translation of a court judgment and medical reports.<sup>237</sup> The Committee took into account that the complainant's asylum application had been prepared by a non-lawyer and that it was only after receiving funds that he was able to obtain the translation and the medical reports.<sup>238</sup>

*Subconclusion: evidentiary assessment*

It should be concluded that Articles 8 (2) PD and 4 QD, read in the light of the principle of effectiveness require that the determining authority of the Member State take into account all documents or other evidence which concern:

- the position and personal circumstances of the applicant
- the reasons for applying for asylum, including previous persecution
- the situation in the country of origin
- the applicant's activities in the country of refuge, which may lead to a risk of *refoulement*
- the availability of safe third countries.

It follows from the Court of Justice's case-law that the principle of effectiveness precludes that the assessment of the evidence submitted in an asylum case be conducted formalistically. The (automatic) exclusion of certain types of relevant and reliable evidence or the fact that they are only given very limited weight should be considered to undermine the effectiveness of the EU right to asylum and the prohibition of *refoulement*. The case-law of the ECtHR and the views of the Committee against Torture and the Human Rights Committee show that a wide variety of documents and (witness) statements should be considered capable of substantiating an applicant's claim of a risk of *refoulement*. Only documents, which according to an expert report submitted by the State authorities, are considered forgeries can be excluded from the assessment of the asylum claim. The late submission of documents may undermine their credibility, but may never lead to their automatic exclusion.

### 8.5.1 Expert reports

In asylum proceedings the determining authority as well as the asylum applicant may submit expert reports in order to support or refute the applicants' claims. Examples of such expert reports are language analysis reports, reports in which the authenticity of documents, such as passports or arrest warrants is assessed, country of origin information reports and medical reports. Some Member States refuse to take certain expert reports adduced by the asylum

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<sup>237</sup> The medical reports were dated September 2004, while the asylum application was lodged in May 2003.

<sup>238</sup> ComAT 8 July 2011, *Chahin v Sweden*, nr 310/2007, para 9.5.

applicant into account, or attach very little value to them. It is contended in this section that the exclusion from the assessment of the asylum claim of an expert report containing relevant and reliable information in support of the applicant's asylum claim, may render the applicant's EU right to asylum and the prohibition of *refoulement* ineffective.

It is generally recognised that only expert reports which are of sufficient quality should be taken into consideration. EU asylum legislation does not provide any standards for the quality of expert reports.<sup>239</sup> However the CFI's judgment in *Pfizer* provides for some useful standards which can also be applied in asylum cases. These standards will be assessed in this section.

In sections 8.6.2 and 8.6.3. two specific types of expert reports are addressed: country of origin information reports and medical reports. The status and value of these reports seem to cause discussion in several Member States. It is argued on the basis of the ECtHR's case-law and the views of the Committee against Torture that country of origin information reports and medical reports which are reliable and of sufficient quality should be taken into account in the assessment of the asylum claim. Standards for the quality of these reports can be derived from the *Pfizer* judgment. As will be shown below, the ECtHR and the Committee against Torture use similar standards as those laid down by the CFI in *Pfizer* when examining the quality and/or value of country of origin information and medical reports in asylum cases.

#### *The Court of First Instance's case-law regarding expert evidence*

In *Pfizer* a regulation was contested, by which the authorisation of an additive in feeding stuffs was withdrawn, because of the (potential) risk of this additive for human health. In this context a risk assessment had to be carried out in order to assess the degree of probability of the additive having adverse effects on human health and the seriousness of any such adverse effects. For this purpose the Community Institution had to entrust a scientific risk assessment to experts who would provide it with scientific advice. In *Pfizer* the Commission asked the advice of a committee of experts. However in its decision it disregarded this committee's opinion, while it did use part of this opinion in support of its decision.

In *Pfizer* the CFI gave standards for reviewing the quality of scientific advice. It held that on matters relating to consumer health expert advice must be based on the principles of excellence, independence and transparency.<sup>240</sup> Where experts carry out a scientific risk assessment, the competent public authority must be given sufficiently reliable and cogent information to allow it to understand the ramifications of the scientific question raised and decide upon a policy in full knowledge of the facts. The scientific assessment must enable the competent public authority to take its decision on the basis of the best

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239 See also Noll 2006, p 298.

240 Case T-13/99, *Pfizer* [2002], paras 158-159.

available scientific data and the most recent results of international research.<sup>241</sup>

The CFI stated in *Pfizer* that the competent public authority in its turn is required to ensure that any measures that it takes be based on as thorough a scientific risk assessment as possible, account being taken of the particular circumstances of the case at issue. The competent Community institution first has to prepare for the committee of experts the factual questions which need to be answered before it can adopt a decision and, second, assess the probative value of the opinion delivered by the committee. The CFI considered that the Community institution further has to ensure that the reasoning in the opinion is 'full, consistent and relevant'.

The CFI considered that the Community Institutions are allowed to disregard the expert the opinion requested by them. However, in such a case the institution needs to provide specific reasons for its findings by comparison with those made in the opinion and its statement of reasons must explain why it is disregarding the latter. The statement of reasons must be of a scientific level at least commensurate with that of the opinion in question. In such a case, the institution may take as its basis either a supplementary opinion from the same committee of experts or other evidence, whose probative value is at least commensurate with that of the opinion concerned. In the event that the Community institution disregards only part of the opinion, it may also avail itself of those parts of the scientific reasoning which it does not dispute. In *Pfizer* the CFI concluded that the Community institutions did not make an error when they decided not to accept the conclusions of the committee of expert's opinion.<sup>242</sup>

Arguably the requirements of excellence, independence and transparency mentioned in *Pfizer* apply to all expert reports, including those used in asylum procedures. Expert reports should be of sufficient quality in order to ensure that the decision is taken on the basis of reliable information and to prevent arbitrariness.<sup>243</sup> In this context it does not matter whether these reports are requested by the examining authority or submitted by the asylum applicant. If the examining authorities request the expert opinion it must pose the right questions to the expert and it has the duty to ascertain that the expert report is of sufficient quality. If the determining authority decides to disregard information in the expert report they have to motivate this decision thoroughly.

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241 Case T-13/99, *Pfizer* [2002], para 162.

242 Case T-13/99, *Pfizer* [2002], paras 193-210.

243 The CFI stated in para 172 of the *Pfizer* judgment that in the relevant case a scientific risk assessment, carried out as thoroughly as possible on the basis of scientific advice founded on the principles of excellence, transparency and independence is an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures adopted and preclude any arbitrary measures.

### 8.5.2 Country of origin information reports

It was concluded in section 8.3.2 that Article 8 (2) (b) PD requires the determining authority of the Member States to gather and assess of their own motion country of origin information reports. Determining authorities often use country or origin information reports produced by their own Ministries. The quality and status of those reports has been under discussion in several Member States.<sup>244</sup> Asylum applicants often submit reports of (inter)national human rights organisations and UN bodies concerning the general situation in their country of origin in support of their asylum claim. With these reports they sometimes seek to dispute the conclusions made in the report produced by the State. Member States may however disregard country of origin information submitted by the asylum applicant or attach limited weight to it. In the Netherlands for example the country of origin reports issued by the Ministry of Foreign Affairs are considered to be expert reports. According to the standing case-law the determining authority may rely on information laid down in such a report, if this report provides information in an impartial, objective and transparent manner. This is only different if the applicant has submitted specific reasons which cast doubt on the reliability or the completeness of the information contained in the report. Generally country of origin information reports issued by human rights organisation do, according to the Dutch courts, not provide such specific reasons.<sup>245</sup>

It is argued in this section that EU law requires that the determining authority take into account and attach weight to country of origin information provided by different sources, including reputable human rights organisations. The exclusion of relevant and reliable country of origin information from the assessment of the asylum claim is contrary to EU law. Furthermore the asylum-decision should be based on country of origin information which is of sufficient quality. Quality standards are derived from the *Pfizer* judgment as well as the ECtHR's case-law.

#### *Taking into account country of origin information from different sources*

Article 8 (2)(b) PD explicitly requires the determining authority to take into account country of origin information provided by different sources, among which UNHCR. Furthermore it follows from Article 4 (3) QD that *all relevant facts* as they relate to the country of origin at the time of taking a decision on the application should be taken into account in the assessment of the asylum claim. Asylum decisions should thus not only be based on information

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244 See with regard to the United Kingdom: Thomas 2006, pp 85-86 and Good 2004, pp 360-361. See with regard to the Netherlands: ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, paras 80-84.

245 See for example Administrative Jurisdiction Division of the Council of State 12 October 2001, no 200103977/1. See also Spijkerboer & Vermeulen 2005, pp 275-276.



gathered by the State itself, but also on information or reports issued by other organisations. Furthermore these provisions imply that country of origin information reports submitted by the asylum applicant, which contain relevant and reliable information should not be excluded from the assessment of the asylum claim.

The ECtHR's recent case-law confirms that in asylum cases the determining authority should base its decision on reliable and objective country of origin information and cannot rely only on reports issued by their own Ministry of Foreign Affairs. It needs to include other country of origin information such as reports by human rights organisations in its assessments. The Court considered in *Salah Sheekh v the Netherlands* that

given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources.<sup>246</sup>

The Court itself does not hesitate to compare information included in country of origin reports used by the determining authority of the State with other information provided by the complainant or gathered by the Court itself. In *Salah Sheekh* the Court considered that it will gather material of its own motion, in particular where the applicant – or an intervening party – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government.<sup>247</sup>

#### *The quality of country of origin information reports*

Asylum decisions should be based on country of origin information which is of sufficient quality. This follows from Article 8 (2) (b) PD according to which the country of origin information taken into account by the determining authority should be 'precise and up-to-date'. Furthermore it may be derived from the CFI's judgment in *Pfizer* that country of origin information reports should also meet the requirements of excellence, independency and transparency. The reports must contain sufficiently reliable and cogent information. Determining authorities requesting a country of origin information report must pose the right questions to the expert and they have the duty to ascertain that the expert report is of sufficient quality. Furthermore it may be concluded from *Pfizer* as well as the more general EU duty to state reasons that if the deter-

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246 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136. See also Wouters p 275.

247 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136, see also ECtHR 24 April 2008, *Ismoilov v Russia*, no 2947/06, para 120, ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 96 and ECtHR 21 October 2010, *Gafarov v Russia*, no 25404/09, para 129.

mining authority decides to disregard country of origin information contained in an expert report it has to motivate this decision thoroughly.

The ECtHR has shown in its case-law that it only takes into account country of origin information which meets certain quality criteria. These criteria resemble to a certain extent to the *Pfizer* criteria of excellence, independence and transparency. In *N.A. v the United Kingdom* the Court stated:

[C]onsideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations.<sup>248</sup>

When assessing the reliability of certain country of origin information reports the ECtHR takes into account whether their conclusions are consistent with each other, whether those conclusions are corroborated in substance by other sources<sup>249</sup> and whether the information has been refuted by the Government of the State party.<sup>250</sup> The consistency of a report with information supplied by other sources is particularly important where this report is based on anonymous sources.<sup>251</sup>

Furthermore consideration must be given to the presence and reporting capacities of the author of the material in the country in question. The Court observed in this respect that States 'through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it'. It finds that the same consideration must apply, *a fortiori*, in respect of agencies of the United Nations, particularly given their direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which States and non-governmental organisations may not be able to do. The Court held in *Sufi and Elmi* that it

appreciates the many difficulties faced by governments and NGOs gathering information in dangerous and volatile situations. It accepts that it will not always be possible for investigations to be carried out in the immediate vicinity of a conflict and, in such cases, information provided by sources with first-hand knowledge of the situation may have to be relied on. The Court will not, therefore, disregard

248 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 120.

249 See for example ECtHR 23 October 2008, *Soldatenko v Ukraine*, no 2440/07, para 71 and ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 143. In ECtHR 31 May 2011, *E.G. v the United Kingdom*, no 53688/08, para 70, the ECtHR attached limited weight to an expert report because it differed greatly from the rest of the background evidence.

250 See for example ECtHR 15 June 2010, *S.H. v the United Kingdom*, no 19956/06, para 71.

251 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, paras 233-234.

a report simply on account of the fact that its author did not visit the area in question and instead relied on information provided by sources.<sup>252</sup>

The Court moreover attaches greater importance to reports which consider the human rights situation in the country of destination and directly address the grounds for the alleged real risk of ill-treatment in the case before the Court. The weight to be attached to independent assessments must inevitably depend on the extent to which those assessments are couched in terms similar to Article 3. The Court states that it has therefore given due weight to the UNHCR's own assessment of an applicant's claims when it determined the merits of a complaint under Article 3.<sup>253</sup> Conversely, where the UNHCR's concerns are focussed on general socio-economic and humanitarian considerations, the Court has been inclined to accord less weight to them, since such considerations do not necessarily have a bearing on the question of a real risk to an individual applicant of ill-treatment within the meaning of Article 3.<sup>254</sup>

The ECtHR has in its case-law considered several human rights organisations, most importantly Amnesty International<sup>255</sup> and Human Rights Watch<sup>256</sup> sufficiently independent, reliable and objective.<sup>257</sup> Furthermore it has taken into account information provided by UNHCR<sup>258</sup> and other UN agencies, such as the United Nations Secretary General,<sup>259</sup> United Nations High Commissioner for Human Rights,<sup>260</sup> the United Nations Special Rappor-

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252 ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 232.

253 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 122. The Court referred to ECtHR 11 July 2000, *Jabari v Turkey*, no 40035/98, para 41. See also ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, para 82.

254 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 122. The Court referred to ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 141. See also ECtHR 20 January 2009, *F.H. v Sweden*, no 32621/06, para 92.

255 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 143 and ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, paras 51 and 54.

256 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 143 and ECtHR 17 July 2008, *NA v United Kingdom*, no 25904/07, para 127.

257 The Court has also referred to reports issued by other human rights organisations, such as the Norwegian Organisation for Asylum Seekers, the Norwegian Helsinki Committee, Greek Helsinki Monitor (ECtHR (Adm) 2 December 2008, *K.R.S. v the United Kingdom*, no 32733/08) and Helsinki Federation for Human Rights (ECtHR 19 November 2009, *Kaboulov v Ukraine*, no 41015/04, para 111).

258 In ECtHR (Adm) 2 December 2008, *K.R.S. v the United Kingdom*, no 32733/08 the Court stated that UNHCR's independence, reliability and objectivity are, in its view, beyond doubt. See also for example ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, paras 80-81 and 85-86.

259 ECtHR 24 April 2008, *Ismoilov v Russia*, no 2947/06, para 121.

260 ECtHR 17 July 2008, *NA v United Kingdom*, no 25904/07, para 132 and ECtHR 24 April 2008, *Ismoilov v Russia*, no 2947/06, para 122.

teur on Torture<sup>261</sup> and the United Nations Independent Expert on Minority Issues.<sup>262</sup> Finally it has referred to governmental sources<sup>263</sup> including the US State Department,<sup>264</sup> the Immigration and Refugee Board of Canada<sup>265</sup> and the United Kingdom Border Agency.<sup>266</sup> Sometimes the ECtHR also attaches important weight to individual experts.<sup>267</sup> The ECtHR has reproached responding Governments for not including relevant human rights reports into the assessment of the claim of a risk of *refoulement*.<sup>268</sup>

*Subconclusion: country of origin information reports*

Article 8 (2) (b) PD and Article 4 (3) QD read in the light of the ECtHR's case-law require that Member States do not only rely on the information provided by their own Ministries but also take into account reports issued by reputable human rights organisations, UN agencies and authorities of other States.

It follows from Article 8 (2) (b) PD that country of origin information reports taken into account by the determining authority should meet certain quality standards. This provision explicitly mentions that such reports should be precise and up-to-date. Further useful standards for the examination of the quality and relevance of country of origin information reports may be derived from the Court of Justice's judgment in *Pfizer* as well as the ECtHR's case-law. Such reports should be independent, reliable and objective. The weight which should be attached to a country of origin information report depends on the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources. Reports which specifically address potential violations of Article 3 ECHR should be considered most relevant. On the basis of the ECtHR's case-law Member States are allowed to accord less

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261 See ECtHR 17 July 2008, *NA v United Kingdom*, no 25904/07, paras 124 and 132 and ECtHR 24 April 2008, *Ismoilov v Russia*, no 2947/06, paras 121-122. See also ComAT 7 July 2011, *Harminder Singh Khalsa et al v Switzerland*, no 336/2008, para 11.3.

262 ECtHR (Adm) 13 October 2009, *Haililova and others v Sweden*, no 20283/09.

263 These are sources other than the State party in the case lying before the Court and may be Contracting or non-Contracting States. ECtHR 24 April 2008, *Ismoilov v Russia*, no 2947/06, para 120.

264 ECtHR 19 June 2008, *Ryabikin v Russia*, no 8320/04, para 113 and ECtHR 12 May 2010, *Khodzayev v Russia*, no 52466/08, para 93.

265 ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 135, ECtHR 8 April 2008, *Nnyanzi v the United Kingdom*, no 21878/06, para 64.

266 ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, para 79.

267 In ECtHR 15 June 2010, *S.H. v the United Kingdom*, no 19956/06, paras 69-71, the ECtHR noted that there was a 'general unavailability of information concerning the human rights situation' in the applicant's country of origin (Bhutan). The Court in this case attached important weight to the reports of a Professor of Nepali and Himalayan Studies and the Coordinator of the Bhutanese Refugee Support Group, both residing in the UK, although they were not able to predict precisely what would happen to the applicant on return.

268 ECtHR 21 October 2010, *Gafarov v Russia*, no 25404/09, para 125, ECtHR 1 April 2010, *Klein v Russia*, no 24268/08, para 56.

weight to reports focusing on the general socio-economic and humanitarian situation in the country of origin.

### 8.5.3 Medical evidence

It was already set out in section 8.2 that the fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm should, according to Article 4 (4) QD, be considered a serious indication of the applicant's future risk of persecution or serious harm. Asylum applicants often submit medical reports to support their allegations of past torture. However, some Member States refuse to admit such reports as evidence in asylum procedures. They argue for example that no causal link can be established between scars or medical problems and past torture.<sup>269</sup> It is submitted in this section on the basis of the ECtHR's case-law and the views of the Committee against Torture that medical expert reports, should be considered relevant or even very important in the assessment of the asylum claim.<sup>270</sup> Therefore Article 8 (2) PD and Article 4 (4) QD read in the light of the requirement to ensure the full effectiveness of the EU right to asylum and the prohibition of *refoulement* require that such reports be taken into account in this assessment.

#### *The importance of medical reports according to the ECtHR and the Committee against Torture*

The ECtHR's recent case-law shows that States should attach important weight to medical reports submitted by the applicant which support the applicant's account of past torture or ill-treatment. In *R.C. v Sweden* the Court even held that the State is obliged to direct that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he has made out a *prima facie* case as to their origin. In this case the applicant submitted a medical certificate, which according to the Court 'gave a rather strong indication to the authorities that the applicant's scars and injuries may have been caused by ill-treatment or torture'. It is important to note that this certificate was not written by an expert specialising in the assessment of torture injuries. In the State authorities' view this medical certificate provided insufficient proof of torture injuries, as it could not be ruled out that (part of) the injuries found could be caused by other events than torture or ill-treatment

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269 See for example ComAT Concluding Observations on the Netherlands, 3 August 2007, CAT/C/NET/CO/4, para 8. Some State parties argued before the ECtHR or the ComAT that the applicant's scars could have been caused by other events than torture. See for example ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, ComAT 18 November 1994, *Khan v Canada*, no 15/1994 and ComAT 22 November 2006, *M.N. v Switzerland*, no 259/2004.

270 See with regard to this issue also Bruin & Reneman 2006.

of the applicant. The Swedish Government in this context pointed to the fact that the medical examination had been performed more than seven years after the alleged torture took place and that the applicant had failed to inform the doctor of other possible causes for some of the injuries. The ECtHR in this case requested the applicant to submit a forensic medical report. This report documented numerous scars on the applicant's body. The ECtHR recognised that some injuries may have been caused by means other than by torture. However it accepted the report's general conclusion that the injuries, to a large extent, were consistent with having been inflicted on the applicant by other persons and in the manner in which he described, thereby strongly indicating that he had been a victim of torture. The medical evidence thus corroborated the applicant's story. According to the ECtHR the applicant's account was also consistent with the information available from independent sources concerning Iran. The Court considered therefore that the applicant had substantiated his claim that he was detained and tortured by the Iranian authorities.<sup>271</sup>

In several other cases the ECtHR has attributed important or even decisive weight to medical reports submitted by the applicant.<sup>272</sup> The Committee against Torture has recognised the importance of medical evidence for the assessment of claims of *refoulement* in its General Comment no 1,<sup>273</sup> its Concluding Observations<sup>274</sup> as well as in its views in individual cases.<sup>275</sup> It is of the opinion that State parties should take into account medical reports in their assessment of a claim under Article 3 CAT.<sup>276</sup> Both the ECtHR and the Committee against Torture are inclined to follow the conclusions of a medical report if the State party has failed to contest them.<sup>277</sup>

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271 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, paras 53-54.

272 ECtHR 7 June 2011, *RU v Greece*, no 2237/08, paras 81-82, ECtHR, 2 September 2010, *Y.P. and L.P. v France*, no 32476/06, para 68, ECtHR 6 March 2001, *Hilal v the United Kingdom*, no 45276/99, para 64 and ECtHR (Adm) 7 March 2000, *T.I. v the United Kingdom*, no 43844/98.

273 ComAT General Comment No 1 (1997), A/53/44, para 8 (c) states that medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past should be taken into account when assessing the claim under Art 3 CAT.

274 ComAT Concluding Observations on the Netherlands, 3 August 2007, CAT/C/NET/CO/4, para 8.

275 ComAT 17 December 2004, *Enrique Falcon Ríos v Canada*, no 133/99, para 8.4, ComAT 21 March 1997, *I.A.O. v Sweden*, no 65/1997, para 14.3, ComAT 16 December 1998, *Halil Haydin v Sweden*, no 101/97, ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, 185/2001, ComAT 12 November 1998, *Ayas v Sweden*, no 97/1997.

276 In its views in individual cases the ComAT sometimes remarks that the authorities failed to take into account medical reports. See for example ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, para 7.5. See also ComAT Concluding Observations on the Netherlands, 3 August 2007, CAT/C/NET/CO/4, para 8.

277 ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, para 7.5, ComAT 17 December 2004, *Enrique Falcon Ríos v Canada*, no 133/99, ECtHR 14 October 2008, *Mehmet Eren v Turkey*, no 32347/02.

*Quality of medical reports*

The ECtHR and the Committee against Torture have not set any standards as to the quality of medical reports. The ECtHR's judgment in *R.C. v Sweden* shows that also medical reports issued by persons who cannot be considered an expert can establish a *prima facie* case as to the origin of scars on the body of the applicant. In such a situation the State party should request an expert to write a medical report. In several cases the ECtHR did refer to the expertise and experience of the physician who drafted the report<sup>278</sup> or the way in which the medical examinations were conducted when assessing the weight which had to be attached to the report.<sup>279</sup> Both the ECtHR (in non-asylum cases under Article 3 ECHR)<sup>280</sup> and the Committee against Torture<sup>281</sup> have indicated that the 'Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (or Istanbul Protocol)' could be used as a tool to examine the quality of a medical report.<sup>282</sup> This protocol provides clear guidelines for the impartial and objective documentation of torture and is applicable to asylum procedures.<sup>283</sup> Several bodies which issue medical certificates that are used in asylum procedures to support allegations of past torture work according to the guidelines of this protocol.<sup>284</sup> The Istanbul Protocol provides useful standards in order to assess the quality of a medical report, which may be used to fill in the *Pfizer* criteria of excellence, independence and transparency. The Istanbul Protocol states that medical evaluation for legal purposes should be conducted with objectivity and impartiality and that the evaluation should be based on the physician's clinical expertise and professional experience. The clinicians who conduct an evaluation must be properly trained. The medical

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278 ECtHR (Plen) 20 March 1991, *Cruz Varas and others v Sweden*, no 15576/89, paras 39 and 77.

279 The Court noted that the report 'was drafted following very detailed medical examinations which were conducted over five days. It included not only physical but psychological findings, and an interpretation as to the probable relationship of these findings to possible torture or ill-treatment.' ECtHR 14 October 2008, *Mehmet Eren v Turkey*, no 32347/02, para 43.

280 See for example ECtHR 1 February 2011, *Desde v Turkey*, no 23909/03, para 98, ECtHR 14 October 2008, *Mehmet Eren v Turkey*, no 32347/02, para 41 and ECtHR 3 June 2004, *Bati v Turkey*, no 33097/96 and 57834/00, para 133.

281 ComAT Concluding Observations on the Netherlands, 3 August 2007, CAT/C/NET/CO/4, para 8, where it stated that it 'encourages the application of the Istanbul Protocol in the asylum procedures and the provision of training regarding this manual to relevant professionals'.

282 The protocol is not binding on States, but it may serve as a means of interpretation of State's obligations under the ECHR, CAT or ICCPR. See Battjes 2006-II, pp 20-21 and 27. It was adopted by the UN General Assembly (UNGA Resolution 55/89 of 4 December 2004) and the UN High Commissioner for Human Rights (Resolution 200/43 of 25 January 2001, E/CN.4/2001/66).

283 The introduction of the protocol states that documentation methods contained in the manual are applicable to amongst others 'political asylum evaluations'.

284 Examples are the Medical Foundation for the Care of Victims of Torture in the United Kingdom and the Amnesty International medical examination group in the Netherlands.

report needs to be factual and carefully worded. Jargon should be avoided and all medical terminology should be defined so that it is understandable to lay persons. Furthermore it is the physician's responsibility to discover and report upon any material findings that he or she considers relevant, even if they may be considered irrelevant or adverse to the case of the party requesting the medical examination.<sup>285</sup>

#### *Conclusiveness of medical reports*

It should be derived from the ECtHR's case-law and the views of the Committee against Torture that the medical report should be sufficiently detailed and conclusive as to the origin of the injuries found on the applicant's body.<sup>286</sup> Usually medical reports contain conclusions as to the degree of consistency between a physical or psychological after-effect and the attribution given to it by the patient.<sup>287</sup> In *R.C. v Sweden* the ECtHR attached much weight to the forensic medical report submitted on its request, which concluded that alternative causes for the origins of the scars than torture could not be completely excluded but that experience showed that self-inflicted injuries and injuries resulting from accidents normally had a different distribution to those showed by the applicant. The findings in that case favoured the conclusion that the injuries had been inflicted on the applicant completely or to a large extent by other persons and in the manner claimed by him. According to the report the findings strongly indicated that the applicant had been tortured.<sup>288</sup> In *Elmuratov* the ECtHR considered that the medical expert examination report submitted by the applicant was not conclusive as to the date the injuries were inflicted and could not in itself serve as evidence of ill-treatment.<sup>289</sup> The Com-

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285 Paragraph 162 of the Protocol. See also Rhys Jones 2004, p 385.

286 ECtHR 3 March 2011, *Elmuratov v Russia*, no 66317/09, paras 71 and 86. In ComAT 3 June 2010, *A.M. v France*, no 302/2006, para 13.5, the Committee noted that the two medical certificates produced by the complainant referred to a number of scars and fractures on various parts of the body, but did not contain any evidence confirming or refuting that they were the result of torture inflicted in the past. See also ComAT 4 July 2011, *R.T-N v Switzerland*, no 350/2008, para 8.7.

287 According to para 187 of the Istanbul Protocol the following terms are generally used: (a) Not consistent: the lesion could not have been caused by the trauma described; (b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes; (c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes; (d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes; (e) Diagnostic of: this appearance could not have been caused in any way other than that described.

288 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, paras 25 and 53. See also ComAT 15 November 1996, *Kaveh Yaragh Tala v Sweden*, no 43/1996.

289 The medical report concluded that the applicant had numerous scars which were the result of injuries sustained at least eighteen months before the examination and that it was impossible to establish the date the injuries had been incurred more precisely. ECtHR



mittee against Torture has held that past torture cannot be made plausible on the basis of a medical report which lacks detail or conclusiveness alone. However in several cases the Committee did not exclude such reports as evidence of past torture.<sup>290</sup>

*Subconclusion: medical evidence*

Past experiences of torture or ill-treatment are a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm. The ECtHR's case-law and the views of the Committee against Torture show that medical reports which assess the degree of consistency between a physical or psychological after-effect and the applicant's asylum account should be regarded important evidence in support of such past torture or ill-treatment. It should therefore be concluded that the requirement of an appropriate assessment of the asylum application of Article 8 (2) PD and Article 4 (4) QD require that Member States take such medical reports into account. The refusal to take medical reports supporting an account of past torture into consideration or to attach important weight to them undermines the effectiveness of the EU right to asylum and the principle of *non-refoulement*. The weight which should be accorded to a medical report depends on its quality and conclusiveness. However it may be derived from *R.C. v Sweden* that even medical reports issued by a physician who is not an expert specialising in the assessment of torture injuries can make out such a *prima facie* case as to the origin of scars. In such a *prima facie* case EU law requires State authorities to request an expert report.<sup>291</sup>

## 8.6 SYNTHESIS OF FINDINGS

Any requirement of proof which has the effect of making it virtually impossible or excessively difficult to exercise the EU right to asylum or the prohibition of *refoulement* would be incompatible with EU law.<sup>292</sup> In the absence of EU asylum legislation specifically governing a certain evidentiary issue, national evidentiary rules should be tested against this general rule. In this chapter several evidentiary issues were discussed in the light of this principle of effectiveness as well as Article 4 QD concerning the assessment of facts and

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3 March 2011, *Elmuratov v Russia*, no 66317/09, paras 71 and 86. See differently ComAT 8 July 2011, *Chahin v Sweden*, nr 310/2007, para 9.5.

290 ComAT 16 May 2008, *Z.K. v Sweden*, no 301/2006, ComAT 19 May 2008, *R.K. v Sweden*, no 309/2006. In ComAT 22 November 2006, *M.N. v Switzerland*, no 259/2004 the ComAT was not prepared to accept that the applicant had been tortured (partly) because of a lack of conclusiveness of the medical report.

291 See also section 8.3.2.

292 Case C-199/82, *SpA San Giorgio* [1983], para 14.

circumstances and Article 8 (2) PD which contains a duty to conduct an appropriate examination of the asylum claim.

In asylum cases in principle the normal evidentiary rules, which govern all sorts of (administrative) procedures, may be applied. Article 4 QD allows Member States to require the asylum applicant to make plausible that he is in need of international protection and to produce evidence substantiating his asylum claim. However the special nature of the EU fundamental rights at issue, which require a careful and vigilant assessment<sup>293</sup> as well as the special characteristics of asylum cases (the lack of documentary evidence and the emphasis on the credibility assessment) demand that the determining authority adopts an active, flexible and open-minded approach and focuses on the core of the asylum account. Sometimes this authority may be expected to assist the applicant in gathering relevant evidence or to ignore his shortcomings or mistakes. No unrealistic evidentiary requirements should be imposed on the asylum applicant. Otherwise, the applicant's effective exercise of the EU right to asylum or the prohibition of *refoulement* may be undermined.

In particular the following conclusions were drawn in this chapter:

*The standard of proof*

- It follows from the principle of effectiveness that the standard of proof should not be set too high. It may be expected of the applicant to show that there is a 'reasonable possibility' of future persecution or that there are substantial grounds for believing that he faces a real risk of serious harm.<sup>294</sup> Member States may not require the applicant to *prove* that he will be subjected to persecution or serious harm in the future or that such treatment is more probable than not.<sup>295</sup> This also applies when examining whether an applicant, who poses a risk to the national security of the Member State, is in need of subsidiary protection.<sup>296</sup>
- In the examination of the asylum claim all relevant indicators, with regard to the individual applicant as well as the general situation in the country of origin, should be taken into account.<sup>297</sup> The fact that a person was persecuted or subjected to serious harm in the past is an important indicator for the existence of a future risk of such treatment.<sup>298</sup>

293 Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla* [2010], para 90.

294 See with regard to refugee status UNHCR Handbook, para 42 and Gorlick 2003, pp 369-370 and with regard to subsidiary protection ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 125.

295 ECtHR (Adm) 27 January 2005, *Mawajedi Shikpohkt and Makkamat Shole v the Netherlands*, no 39349/0.

296 ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 140.

297 Case C-465/07, *Elgafaji* [2009], paras 38-40, ECtHR 28 June 2011, *Sufi and Elmi v the United Kingdom*, nos 8319/07 and 11449/07, para 218 and ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 130.

298 Art 4 (4) QD, ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, paras 146-147, ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 55, UNHCR Handbook, para 45.

*The burden of proof*

- Member States are allowed to place the burden of proof on the asylum applicant.<sup>299</sup>
- It should be derived from the Court of Justice's case-law in equal treatment cases<sup>300</sup> as well as the ECtHR's case-law that certain circumstances should make the burden of proof shift from the applicant to the determining authority. This is particularly so if:
  - 1 The applicant made plausible that he was persecuted or subjected to serious harm in the past.<sup>301</sup>
  - 2 The applicant substantiated that there is a risk of *refoulement* by submitting credible statements and/or documents.<sup>302</sup>
  - 3 Country of origin information reports show that serious human rights violations occur in the applicant's country of origin.<sup>303</sup>
  - 4 The applicant made plausible that he belongs to a group which is at risk.<sup>304</sup>
- The duty to produce evidence is shared between the applicant and the determining authority.
- The determining authority has a positive obligation to gather precise and up-to-date country of origin information.<sup>305</sup>
- The determining authority must direct that a medical expert report be written if the applicant makes out a *prima facie* case as to the origin of the scars on his body.<sup>306</sup>
- The determining authority may also be required to gather evidence which is accessible to it, but not to the applicant.<sup>307</sup>

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299 Under EU law the claimant normally bears the burden of proof. See for example Case C-381/99, *Brunhofer* [2001], para 52. See with regard to asylum cases ECtHR (GC) 28 February 2008, *Saadi v Italy*, no 37201/06, para 129, ComAT General Comment No 1 (1997), A/53/44, para 5 and UNHCR Handbook, para 196.

300 Case C-109/88, *Danfoss* [1989], para 14, Case C-127/92, *Enderby* [1993], para 18 and Case C-381/99, *Brunhofer* [2001], para 58.

301 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 55.

302 ECtHR 15 June 2010, *S.H. v the United Kingdom*, no 19956/06, paras 69-71 and ComAT 25 May 2002, *Chedli Ben Ahmed Karoui v Sweden*, no 185/2001, para 10.

303 ECtHR 10 June 2010, *Garayev v Azerbaijan*, no 53688/08, para 73.

304 ECtHR 28 June 2011, *Sufi and Elmi v United Kingdom*, nos 8319/07 and 11449/07, paras 249-250.

305 Art 8 (2) (b) PD, ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 358-359.

306 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 53.

307 This may be derived from Case C-310/09, *Accor* [2011], para 100 and Case C-526/04, *Laboratoires Boiron SA* [2006], paras 55-57.

*Individual assessment and the use of presumptions*

- The use of presumptions is permissible even though an individual assessment of the case is required according to Articles 4 (3) QD and 8 (2) (a) PD.
- However it follows in particular from the Court of Justice's judgment in *N.S. and M.E. and others, B. and D.* and *San Giorgio* that presumptions, which are excessively difficult to rebut are capable of undermining the effectiveness the EU right to asylum and the prohibition of *refoulement*.<sup>308</sup>

*Assessing the credibility of the applicant's statements*

- When assessing the credibility of the applicant's asylum account, the determining authority should focus on the core of the asylum account and should not put decisive weight on marginal issues such as non-compliance with procedural rules or inconsistencies in parts of the applicant's account which do not relate to the essence of the asylum claim.<sup>309</sup>
- Asylum applicants should be granted the opportunity to explain the alleged deficiencies in the asylum account.<sup>310</sup>
- Inconsistencies in an asylum account or late statements by the applicant, which are caused by psychological trauma or by the minor age of the applicant should not be held against the applicant.<sup>311</sup>
- As soon as the general credibility of the asylum applicant is established, his statements should according to Article 4 (5) QD be accepted as facts, without requiring further evidence. Refusing the benefit of the doubt in such a situation should be considered to undermine the effectiveness of the EU right to asylum and the prohibition of *refoulement*.

*Evidentiary assessment*

- When examining the (documentary) evidence submitted by the asylum applicant, the determining authority should not take a formalistic approach, requiring or excluding specific forms of evidence. All relevant and reliable evidence should be taken into account in the assessment of the asylum claim. This may be derived from the Court of Justice's case-law in tax law

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308 Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and others* [2011], paras 99-105, Joined Cases C-57/09 and C-101/09, *B and D* [2010], paras 94 and 98 and Case C-199/82, *SpA San Giorgio* [1983], para 14.

309 See for example ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, paras 44 and 52, ECtHR 26 July 2005, *N v Finland*, no 38885/02, paras 152-157 and ECtHR 5 July 2005, *Said v the Netherlands*, no 2345/02, paras 50-53.

310 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 50.

311 See with regard to trauma notably the views of ComAt such as ComAT 22 January 2007, *C.T. and K.M. v Sweden*, no 279/2005, para 7.6, ComAT 22 January 2007, *V.L. v Switzerland*, no 262/2005, para 8.8. See with regard to children ComRC General Comment No 12 (2009), CRC/C/GC/12, paras 28 and 30 and UNHCR, Guidelines on international protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Geneva 22 December 2009, para 72.

cases<sup>312</sup> as well as the ECtHR's case-law and the views of the Committee against Torture and the Human Rights Committee, which show that a wide variety of evidence is capable of substantiating an applicant's claim of a risk of *refoulement*.

- It should be derived from the CFI's judgment in *Pfizer* that expert reports must fulfil the requirements of excellence, independence and transparency.<sup>313</sup> Country of origin information reports and medical reports are expert reports which should, according to Articles 4 QD and 8 (2) PD and the ECtHR's case-law, be accorded important weight in asylum cases.
- Member States may not only rely on country of origin information provided by their own Ministries but should also take into account reports issued by reputable human rights organisations, UN agencies and authorities of other States. It follows from the ECtHR's case-law that the weight which should be attached to a country of origin information report depends on the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources.<sup>314</sup>
- The weight which should be accorded to a medical report depends on its quality and conclusiveness.<sup>315</sup> However it may be derived from the ECtHR's judgment in *R.C. v Sweden* that medical reports issued by a physician who is not an expert specialising in the assessment of torture injuries can make out a *prima facie* case as to the origin of scars.<sup>316</sup>

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312 Case C-199/82, *SpA San Giorgio* [1983], para 14, Case C-262/09, *Meilicke and others* [2011], paras 43-47.

313 Case T-13/99, *Pfizer* [2002], paras 158-159.

314 ECtHR 11 January 2007, *Salah Sheekh v the Netherlands*, no 1948/04, para 136, ECtHR 17 July 2008, *NA v the United Kingdom*, no 25904/07, para 120-122.

315 This follows from the *Pfizer* criteria. See for quality criteria the Istanbul Protocol (section 8.5.3). See with regard to conclusiveness ECtHR 3 March 2011, *Elmuratov v Russia*, no 66317/09, paras 71 and 86 and ComAT 3 June 2010, *A.M. v France*, no 302/2006, para 13.5.

316 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 53.

