'The Law Applicable to the Determination of Claims to International Protection'

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Introduction

The movement of people between States, in search of refuge and protection, takes place in an environment configured by *obligation*, by international obligations. The duty of *non-refoulement* is laid down in Article 33 of the 1951 Convention relating to the Status of Refugees and, in slightly different ways, in Article 3 of the 1950 European Convention on Human Rights, Article 7 of the 1966 International Covenant on Civil and Political Rights, Article 3 of the 1984 Convention against Torture and, now especially relevant, Article 19 of the 2000 EU Charter of Fundamental Rights.

Moreover, within the European Union the measures already taken to promote a Common European Asylum System have a direct impact on both substantive and procedural matters. Article 4 of the EU Qualification Directive, for example, provides guidance on the 'assessment of facts and circumstances', while the Procedures Directive ensures access, procedural guarantees, such as information, interpretation, a personal interview, evidence-based decisions in writing, and review.

This combination of treaty and regional law, considered together with relevant rules of customary international law, make the treatment of refugees, asylum seekers and migrants very much a matter of obligation. This has further implications for States, for as a matter of international law, every State is obliged to ensure that its municipal law and practice are consistent with its international obligations.

Where the determination of refugee status is concerned, the principle of good faith and the companion principle of *effectiveness of obligations* – read together with constitutional principles and fundamental human rights – point clearly in the direction of *procedure* and *review*. How else could a State know with confidence that it is fulfilling its duty not to *refoule* a refugee, unless, in the words of the UN General Assembly, 'fair and efficient procedures' are in place, which allow for the 'full and effective application of the 1951 Convention/1967 Protocol'?

Now while the 1951 Convention defines refugees and provides for certain standards of treatment to be accorded to refugees, it says nothing specifically about procedures or about the *process* of decision-making. As is often the case with treaties which establish an international legal framework for protection, it leaves to States the choice of means as to implementation at

the national level. The required result remains *protection*, however, and that necessarily opens up the question of how decisions are reached.

Back in 1977, the UNHCR Executive Committee set out the minimum procedural standards for determination of refugee status. Important as they were then, the law has now moved on, and the concept of due process has developed significantly, in no small way because of the jurisprudence of the European Court of Human Rights.

In *M.S.S. v. Belgium and Greece*, for example, the Court expressly recognized the right of States to manage migration, including irregular migration, provided that this takes place within the framework of international law and obligation. The Court also recognized the 'particular vulnerability' of asylum seekers, an underprivileged group in need of special protection.[1]

Today, the basic elements of a fair procedure can be divided into those which, as it were, go to form, and those which go to process. As a matter of *form*, those who seek protection should be guaranteed,

1. Access
2. The opportunity to claim protection
3. Interpretation
4. Legal advice and assistance
5. Confidentiality

As a matter of *process*, those who seek protection should be guaranteed,

6. A full hearing before a decision-maker familiar with the applicable law and generally aware of the background
7. Assessment on the basis of appropriate evidential standards
8. An evidence-based decision in writing, in which the reasons are clearly set out[2]
9. Judicial review or appeal

Today, I want to deal with some aspects of the evidential standards question and the requirement of judicial review or appeal; incidentally, I will touch on the nature of the hearing and the uses and abuses of evidence.

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[1] *M.S.S. v. Belgium and Greece* (Appl. no 30696/09), 21 January 2011, §§216, 232-3, 251.

[2] In *M.S.S. v. Belgium and Greece*, above note, the European Court of Human Rights expressed its concern that almost all first instance decisions in Greece were negative and 'stereotyped', and the reasons lacked detail (§302).

Appropriate evidential standards

Whether someone is a refugee turns on whether he or she has a well-founded fear of persecution, that is, faces a risk of persecution (or other prohibited treatment) if removed to another country.

Burden of proof

As is the case generally where rights or status are claimed, the onus is on the applicant to establish his or her case. However, in a refugee context, practical considerations and the trauma which can face a person in flight, impose a corresponding duty upon the decision-maker who is called upon to ascertain and evaluate the relevant facts and the credibility of the applicant. In *M.S.S. v. Belgium and Greece*, the European Court of Human Rights found that the general situation concerning the treatment of asylum seekers in Greece was known to the Belgian authorities. In light of that knowledge, the applicant should not be expected to bear the entire burden of proof.[3]

More recently, in *Hirsi v. Italy*, the Court has indicated that it is not always necessary to show evidence of an individualised threat of treatment contrary to Article 3. Information in reports from independent sources may suffice to make it 'sufficiently real and probable' that the general situation in a particular country entails risks sufficient to require non-return.[4]

This position was reiterated in the Court's 3 July 2012 decision in the case of *Rustamov v. Russia*, where it specifically noted that,

> '... requesting an applicant to produce "indisputable" evidence of a risk of ill-treatment in the requesting country would be tantamount to asking him to prove the existence of a future event, which is impossible, and would place a clearly disproportionate burden on him.'[5]

But in general the responsibilities are therefore shared between asylum seeker and the State of refuge.[6] But what is it that the asylum seeker must prove? How do you show a well-founded fear of persecution?

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[3] *M.S.S. v. Belgium and Greece*, above note 1, §352.

[4] *Hirsi v. Italy*, (Appl. no. 27765/09), 23 February 2012, §§118, 123, 136.

[5] *Rustamov v. Russia*, (Appl. no. 11299/10), First Section, 3 July 2012.

[6] In fact, there are elements here of a strict liability regime, once facts and risk have been determined or proven to the requisite degree. Cf. *Hirsi v. Italy*, §156 – Italian officials 'knew or ought to have known' that those returned to Libya did not benefit from safeguards against arbitrary return to their country of origin.

Standard of proof

Even the words we use to express the *standard of proof* – how persuaded we must be – are inadequate to the purpose.

The history of the 1951 Convention shows that the status of refugee was intended for a person who has been persecuted or who has 'good reason' to fear persecution. The fear here is essentially an 'appreciation', based on an objective situation, of what might plausibly and reasonably follow. There is a limit to how far the meaning of terms can be pursued in the abstract. What we need are concrete applications, but even then, we find other challenges.

The decision-making process necessarily requires looking at a series of variables, each of which may be characterised by uncertainty. The process is ultimately 'predictive', and will try to focus on what *might* happen, some time in the future, in a variety of necessarily unknown circumstances. Only in very rare cases, if ever, will the persecutor have provided clear evidence that this particular asylum seeker is indeed at risk.

The word 'predict' is in fact potentially misleading, so far as it may suggest confidence in a particular outcome. The job of the decision-maker is to make a judgement of a slightly different order – to decide whether the asylum seeker should receive or be accorded international protection, a process which integrates (ideally) a decent level of knowledge and appreciation of conditions in countries of origin, an understanding (never complete, of course) of the reasons why people leave in search of refuge and/or a chance in life (and the need for one does not necessarily exclude the other); and a certain ability to see the individual in social and political context, so fas as the evidence allows.

The bottom line is *risk*, but reaching a conclusion on risk requires that the preliminary steps be taken efficiently and effectively. Courts in different jurisdictions have recognized the inability of abstract words to capture precisely what is needed. This is not so much a case of, 'You'll know it when you see it', as of the fact that appreciation of the existence of risk commonly emerges within the interstices of the process of 'understanding' the individual in context.

The decision-making process

But if phrases like 'serious...' or 'reasonable risk' seem too abstract – and that is inevitable when they are removed from any set of individual circumstances – a well- constructed *process* properly anchored in the applicable international standards ought to assist in reaching the right conclusions.

Knowing the background

Whether someone is recognized as a refugee increasingly turns on whether we *believe* his or her story, considered against what we *believe* to be the situation in his or her country of origin. While we should certainly be paying more attention to this question, the irony is, however, that these conditions – belief in the individual, belief in the country conditions – while sufficient, are not always necessary. We may *not* believe the asylum seeker, for example, but we may well know objectively that he or she is at risk of persecution because of factors, such as race, religion, or ethnic origin, independent of our view of their personal credibility.

'Objective knowledge' in this context can stem from a range of authoritative sources, but here too judgements must be made: Is the source reliable, can the picture it paints be trusted, are the events it recounts corroborated, has the source proven accurate in the past, has it ever been challenged or qualified? The information and the sources must be weighed, in order to reach a conclusion, whether this or that country is a place in which human rights are violated, torture is practised, or people disappear.

The European Court of Human Rights takes an approach not so very different from that proposed in Article 3 of the 1984 UN Convention against Torture. This underlines the importance of having regard to reports of systematic violation of human rights, of systematic torture, of the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights – for such evidence may well be sufficient to establish the existence of risk.

This is not a purely abstract exercise, but one which has the individual at its centre: Who is this person in their own land and, given the available information about the country of prospective return, would he or she likely face an (unacceptable) risk of persecution or other serious harm?

In *Baysakov v. Ukraine*, for example, the Court referred to reports on the human rights situation in Kazakhstan obtained from the UN Committee against Torture, Human Rights Watch and Amnesty International, which referred to torture, ill-treatment of detainees, routine beatings and the use of force against criminal suspects to obtain confessions.

> 'The Court does not doubt the credibility and reliability of the... information and the respondent Government failed to adduce any evidence or arguments capable of rebutting the assertions made in the reports.'[7]

And in *Rustamov v. Russia*, the Court found that the domestic authorities, 'did not pay requisite attention to the evidence concerning the human rights situation' in the country requesting

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[7] *Baysakov v. Ukraine*, Appl. No. 54131/08, Fifth Section, 18 February 2010, §§49-50.

extradition, and that in consequence there was a 'lack of thorough and balanced examination of the general human rights situation... [and] failure to give meaningful consideration to the applicant's personal circumstances.'[8] The Court referred also to 'recent reports' citing the continuing persecution by Uzbek authorities of certain groups, and to credible allegations of torture and deaths in custody. In its view, this was evidence 'showing a persistent pattern of persecution', and no 'concrete elements' had been produced to show any improvement in the situation.[9]

Personal credibility

As personal credibility has become so important in the process of refugee status determination, it is essential that the applicant be interviewed in person. It is equally important, however, that procedures are constructed and followed with due regard to what experience has taught us about memory, and about trauma, recall, delay, successive interviews, and deference; and about our *own* preconceptions, expectations, assumptions, and 'common sense'.

Asylum applicants must put their case fully, but counsel and examiners too have a duty and a role to play. This is not so much a rule of law, as an example of good practice flowing from the nature of the proceedings, where the ultimate objective, recognizing and protecting refugees, may otherwise get lost in the process.

Decision-makers, however, all too commonly rely on instinct and a feel for credibility, and the danger here is that too little attention is paid to the problems of assessment, the identification of material facts, the weight of the evidence, the assessment of risk.

It is often enough said that, as decision-makers, we should avoid being over-influenced by our own views on what is or is not plausible, or reasonable, or necessary, or likely. Easy enough to say, but translating the general proposition into action, *that* is the challenge, and one to be met with careful selection, in-depth training and rigorous oversight; as well as with attention to *form*, such as early legal assistance, competent interpretation, an environment

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[8] *Rustamov v. Russia*, (Appl. no. 11299/10), First Section, 3 July 2012, §§119, 121.

[9] Ibid., §127; and see at §128 : '... where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the protection of Article 3 enters into play when the applicant establishes, where necessary on the basis of the information contained in recent reports from independent international human rights protection associations or governmental sources, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned. The Court considers that this reasoning applies in the present case, where the applicant is accused of membership of a group in respect of which reliable sources confirm a continuing pattern of ill-treatment on the part of the authorities, as has been stated above. Although in such circumstances the Court will normally not insist that the applicant show the existence of further special distinguishing features... it considers it nonetheless important to point out that the applicant repeatedly submitted to the competent Russian authorities that he had already been subjected to persecution and ill-treatment at the hands of the Uzbek law-enforcement authorities in connection with his presumed membership of HT.'

conducive to narrative, attention to the limitations of documents as authority, but due and proper weight to personal testimony of the claimant, which ought not to be discounted in the absence of *cogent* contrary or qualifying evidence.

The recent report by the Irish Refugee Council, 'Difficult to Believe', provides credible evidence of a system that is not working, that is not conducive to ensuring compliance with international obligations. This is especially telling in the accounts of some forty-two Tribunal decisions, all of which were dismissed, over 90% on grounds of lack of credibility. Reading these accounts is like reading a ready-made case study of just what not to do, what not to be, how not to reason. For example, medical evidence is resisted, and accorded little or no weight. Do decision-makers see medical evidence as somehow undermining their own supposed 'independence', because often it can and does map out a persuasive path to protection? Inconsistency and apparent contradictions are not contextualised, but wrapped up in personal assumptions and predilections: If she had been raped, would she not have recalled this when completing her questionnaire, and would she not have written it down? 'No' is not an unreasonable answer.

In a recent United Kingdom case, *R (on the application of AM)*,[10] the Court of Appeal described an applicant who, in earlier proceedings, had been 'adjudged to be lacking (indeed totally lacking) in credibility'; but whose claim ultimately succeeded on the basis of a medical assessment which addressed her rape, torture and violent abuse, and also identified her as a very private person who did not like to express her emotions in company and who lived with feelings of deep and intense shame and self-disgust. The Court dismissed the decision below that the report was not 'independent evidence of torture' because based in large measure on the testimony of the claimant. To the contrary, the Court emphasised that, if an independent expert's findings, expert opinion and honest belief were to be refused the status of independent evidence because, as must inevitably happen, the expert *starts* with an account from her client and patient, then the very notion of independent evidence in this context would be deprived of all meaning.[11]

In other contexts, the Irish Refugee Council's Report shows that claimant narratives are rejected, not on evidential grounds, but because they do not mesh with the decision-maker's own, unproven assumptions, for example, that you can't get through immigration control with a false passport; or that the claimant must know, surely, how asylum procedures work in any or all of

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[10] *R (on the application of AM) v. Secretary of State for the Home Department* [2012] EWCA Civ 521, 26 April 2012.

[11] Cf. *IY (Turkey) v. Secretary of State for the Home Department* [2012] EWCA Civ 1560, 28 November 2012, in which the Court upheld an immigration judge's finding, contrary to expert medical evidence, that the asylum seeker had fabricated his claim. It noted that the job of the doctor was to clinically assess symptoms, whereas the question of credibility was a matter of legal appraisal, taking a holistic approach to the evidence in its entirety. This might involve finding that the account given to the doctor was falsified, and in the present case the judge had given rational and justifiable reasons for rejecting the medical report as corroborating the veracity of the claimant's account.

the other 26 Member States of the European Union; or that a failure to apply for asylum elsewhere is 'more indicative' of the economic migrant than of the refugee in search of protection.[12]

And too often also the decision-maker fails to treat the personal account of the claimant as evidence in its own right. The overall impression is of a keen desire among decision-makers to focus on minutiae, and to avoid at all costs the key question of protection need. 'Implausibility' is culturally configured and may often reflect idealised and factually incorrect assumptions about the world at large, particularly the world out there, for example, about the efficacy of border controls (don't we normally complain about their *inefficiency* in letting all these foreigners in?), or about bribery, or about how smuggling networks actually operate, or about common humanity and the assistance which people render unto others.

It is as if decision-makers feel the need for degrees of certainty detached from the real world. Why is that? It might be policy driven, of course, or perhaps reflect something deeper, a fear in the decision-maker perhaps, that here is someone, a stranger, who is indeed in need of protection. And if that is so, what does it say about us, and our community?

In every jurisdiction dealing with the challenges of protection claims, the temptation to rely on subjective assessments needs to be resisted, and the various steps which lead to particular conclusions and the reasons which justify each stage must be carefully articulated. In the United Kingdom, following on a number of critical appeal judgments, but also on significant work done and published by Jane Herlihy and others, there is something of a change going on, at least at the level of the Home Office's Asylum Instructions. The latest iteration of those dealing with the assessment of credibility overall and, in particular, with sexual orientation, gender and gender identity, emphasize the need for the interviewer and decision-maker to be *aware* of the status and treatment of particular groups in the country of origin; for credibility to be treated by a *sensitive* enquiry; and for interviewing officers to ask *open questions* allowing the applicant to describe their situation.[13]

They note further that neither a *difficulty in providing* relevant information nor *late disclosure* of fundamental elements should automatically count against credibility, that

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[12] Cf. *MS (Sri Lanka) v. Secretary of State for the Home Department* [2012] EWCA Civ 1548, 28 November 2012, in which the Court of Appeal held that the Upper Tribunal had erred in finding that the fact that the asylum seeker has left through normal channels at an airport using his own passport was strongly indicative that he was of no further interest to the authorities; that finding had misstated the case as set out in the asylum seeker's unchallenged evidence that he had managed to leave with the collusion of airport employees who had been corrupted by his agent. The Court added that it was questionable why a man who was or believed himself to be of no further interest to the authorities would resort to such a mode of departure, with its obvious attendant risks.

[13] The Asylum Policy Instructions, including 'Considering Asylum Claims and Assessing Credibility'and those dealing with gender, gender identity and sexual orientation, can be found by following the links at: http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/

demeanour alone is unreliable, that *trauma* may manifest itself in persistent fear, loss of self-confidence and self-esteem, difficulty in concentration, self-blame, shame, or a pervasive loss of control and memory loss. These are important foundational steps in constructing an effective and compliant system of protection; we will need to see whether the path is well-followed, or whether more is required than the formulation and dissemination of policy instructions.

Appeal and review

The principle of effectiveness of obligations favours a second look at asylum decision-making, but the nature of the review process requires careful consideration. In certain jurisdictions, there is a tradition of 'deference' to specialist tribunals and first-level finders of fact, while in others the review process can be limited to narrow questions of law alone. In practice, neither is necessarily appropriate to determining the relevant international law and whether international obligations, such as the prohibition of *refoulement*, are in danger of being violated. Some sort of appeal, going both to facts and to legality, offers the best chance of correcting error and ensuring consistency.

Where the role of the reviewing authorities is confined to errors of law, it is all the more important to ensure that the initial decision-making levels are as well provided with the facts as can be. It also means that comparatively more importance should be attached to the nature and form of decision-making, in particular, the articulation and provision of reasons for decisions, both by administrative decision-makers and tribunals.

Considered from the perspective of *process*, the determination of refugee status requires decisions at each step, not just in drawing the final conclusion. Reasoned decisions are required to identify the material facts, to separate out the relevant from the irrelevant, to determine what is credible or not, to indicate why one source is preferred to another, and to identify the applicable law and its meaning and scope. 'I do not believe...' and, 'It is just not plausible...', are not reasons; they are conclusory statements awaiting justification.

Refugee claims are not like other cases. We are not dealing with hard facts, let alone with positive proof, and we will rarely have the luxury of corroboration. In the midst of uncertainty, we are very much in the world of inferences, that is, of being driven, not so much by the facts themselves, as by the conclusions which we may reasonably draw or try to draw from the generally inadequate material before us. We have to get used to living with the absence of certainty, and recognize that the task is to assess *future risk*, not to predict or to forecast with certainty what actually will happen.

What we hope to find is a picture of the individual in context. We want a credible account of the personal history and circumstances of the claimant, and we want the best available information regarding the general situation prevailing in his or her country of origin. It is a step by step process. The context, however, is one of internationalised obligations, which engages

fundamental rights; the implications for judicial processes of review have not always been fully grasped.

Unfortunately, as we see, national procedures are commonly characterised by a 'culture of disbelief'. It is a fair criticism of the process across jurisdictions (driven perhaps by the otherwise non-controversial proposition that it is for the claimant to establish his or her case), that greater emphasis is placed on when and how *negative* inferences should be drawn, than on when and how to draw positive inferences. But negative inferences can also be due to ignorance, assumptions, or misplaced experience. This is evident from the common response to late submission of an application for asylum or protection. There are many reasons for this, and certainly no empirical basis for the proposition that late submission equates with a lack of credibility. The European Court of Human Rights has also had occasion to factor this in when applying the 'broader' protection of Article 3 of the European Convention, noting in *Rustamov* that late application cannot displace obligation.[14]

Judicial review in practice

Not surprisingly, the extent to which higher courts review findings of credibility varies between jurisdictions. In Ireland, the record of the High Court was for long generally non-interventionist, but latterly it has stressed that credibility assessment must not only concord with established legal principles, but with 'the principles of constitutional justice.'[15] This suggests a possibly wider view of the traditional error of law doctrine, and a greater readiness to review the materiality of error.

And so in the Supreme Court's 2010 judgment in *Meadows*, we find the old and the new.[16] On one side stand the opponents of what is labelled rather presumptively as judicial activism, an 'inappropriate encroachment on the functions of the Executive', a merit-based review of a ministerial decision by judges lacking the constitutional mandate and probably less qualified; or, in the words of the other dissentient, a substantial transfer of power from the politically responsible organ of government to an unelected judiciary.

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[14] *Rustamov v. Russia*, (Appl. no. 11299/10), First Section, 3 July 2012, §116: '... whilst a person's failure to seek asylum immediately after arrival in another country may be relevant for the assessment of the credibility of his or her allegations, it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion... '. See also, *Yakubov v. Russia*, Appl. Nno. 7265/10, First Section, 8 November 2011, §74.

[15] *A. M. T. v Refugee Appeals Tribunal and Minister for Justice, Equality & Law Reform* [2002 No. 519J.R.]; See *Imafu v Minister for Justice Equality & Law Reform & Ors* [2005] IEHC 416; *Ashu v The Refugee Appeals Tribunal & Anor* [2005] IEHC 469; *R.K.S. v. Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform* [2004] IEHC 436.

[16] *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3.

But in my view, this misses the point. In fact, it misses several points. First, the premises which might justify judicial restraint (or deference) are in doubt. The finders of fact do not act, like jurors, within a legal framework closely overseen by the judiciary. Second, the finders of fact commonly operate in a bureaucratic environment in which judgements are only too readily influenced by policy, such as immigration control, rather than by obligation, such as the duty to protect. Third, experience shows that judicial restraint commonly allows incompetence to flourish. And fourth, judicial restraint can frustrate the effective protection and entrenchment of fundamental rights, including those secured by international obligation.

The majority in *Meadows* seemed to recognize these or similar factors. Murray CJ demanded that decisions be seen truly to flow from the premises, that they provide evidence of their own rationale. Denham J stressed that judicial review should be an effective remedy, particularly when access to the courts was curtailed by legislation. Reasonableness and proportionality were also engaged. And although he was prepared to countenance restraint where decisions calling for specialist knowledge, skill or competence are entrusted to skilled decision-makers, this has no obvious application in the refugee/asylum context, or to the formulation of conclusions regarding credibility.

A critical and inquiring approach is needed, therefore, if compliance with international and EU standards is to be ensured. The EU Procedures Directive helpfully identifies some of the key elements which need to be 'controlled' by a superior court, including whether applications have been 'examined and decisions taken individually, objectively and impartially'; whether 'precise and up-to-date' country of origin information has been obtained; whether decisions are in writing; and whether reasons in fact and law are given for negative decisions, and so forth. If domestic courts do not review effectively, the quality of decision-making gets no better, and the potential for breach of international obligations simply increases. The issue, after all, is that of *risk* – the risk of return to persecution, torture, or death. The prohibition of return – the principle of *non-refoulement* – reflects, as the European Court of Human Rights has repeatedly stressed, one of the most important values in a liberal democratic State.

In *Jabari v. Turkey*, for example, the European Court of Human Rights expressly stated that, given the irreversible nature of article 3 harm, 'an effective remedy under Article 13 requires *independent and rigorous scrutiny* of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and *the possibility of suspending the implementation of the measure impugned*.'

In *M.S.S. v. Belgium and Greece* last year, the Court reiterated that the irreversible nature of the damage potentially resulting from a violation of Article 3 ECHR50 imperatively requires close, independent and rigorous scrutiny, as well as promptness and suspensive effect, if the protection obligation is to be effective. It criticised the practice in certain review procedures of 'increasing the burden of proof to such an extent as to hinder the examination on the merits of

the alleged risk...'[17] This does not mean that the effectiveness of a remedy under article 13 requires a favourable outcome for the claimant, but that the lack of *any* prospect of obtaining adequate redress does raise an issue.

Conclusion

Credibility determinations in applications for international protection raise important questions about traditional conceptions of judicial review and appeal. The error of law approach to review, that is, a concentration on *form* rather than *substance*, may only accentuate dissatisfaction and contribute little to raising the quality of decision-making. Moreover, the case for 'deference' needs to be re-examined. It is, or may be, premised on certain assumptions, for example, that a court should be slow to interfere with the findings of a specialist or skilled tribunal; or that the basic principles of due process are understood and factored into the decision-making process. The record suggests that those assumptions are not justified, if ever they were, and that a more rigorous approach is required in relation to the standards of administrative decision-making, especially where fundamental rights are engaged.

Given the formal outlines of the system within which we are now required to work, there is a danger once again that factual judgments are becoming disengaged from the evidence actually adduced; that a culture of disbelief has been fostered, particularly by legislative intervention in some cases; that the inferences – the permissible range of inferences – are tending to extend beyond control; and that the error of law standard, traditionally considered, offers little or no protection against *refoulement*, while equally contributing little to good decision-making.

In this context, it is worth reiterating that it is the local reviewing court, applying nothing less than the standards laid down in international law and by regional mechanisms such as the European Court of Human Rights, which is primarily charged with ensuring that the country's system of protection is compatible with its international legal obligations. International jurisdictions provide important guidance, but they can only be subsidiary to the central role of the national courts as guarantors of the rule of law, both domestic and international.

In the refugee context, there are many things we will never know for certain; but then, we don't need to. What we are concerned with is protection, and the avoidance of the risk of impermissible harm to the individual, and it is the individual who needs to be brought back into the picture, and therefore also into the realm of effective domestic protection.

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[17] *M.S.S. v. Belgium and Greece*, above note 1, §293, 389.